

I·C·A·C

INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES



**INVESTIGATION INTO
ALLEGATIONS THAT AN
AUSGRID ENGINEER
CORRUPTLY SOLICITED AND
ACCEPTED BENEFITS FROM
AUSGRID CONTRACTORS AND
SUBCONTRACTORS**

**ICAC REPORT
JUNE 2015**



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Mr President
Madam 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 allegations that an Ausgrid engineer corruptly solicited and accepted benefits from Ausgrid contractors and subcontractors.

Assistant Commissioner Theresa Hamilton presided at the public inquiry held in aid of the investigation.

The Commission's findings and recommendations are contained in the report.

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 Megan Latham
Commissioner

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Summary of investigation and results

This investigation by the NSW Independent Commission Against Corruption (“the Commission”) examined allegations that between 2008 and 2014 Phillip Cresnar, an engineer in the Contract Cable Laying (CCL) division of Ausgrid, received goods, cash and other benefits from Ausgrid contractors and subcontractors, in return for which he:

- exercised his public official functions to show favour or not to show disfavour to certain contractors and subcontractors
- disclosed commercially sensitive and confidential Ausgrid information.

The Commission’s investigation centred on five companies: Bastow Civil Constructions Pty Ltd and Murray Civil Works Pty Ltd, which were Ausgrid contractors, and MDM Formwork Pty Ltd, Cloughcor Pty Ltd and Fer-Aim Pty Ltd, which were subcontractors to Ausgrid contractors. Mr Cresnar accepted that he received benefits from all but one of these companies, or their directors and shareholders, while he was responsible for overseeing the work that they did on behalf of Ausgrid.

Results

Five corrupt conduct findings are made against Mr Cresnar, as follows:

- Between 2008 and 2010, Mr Cresnar engaged in corrupt conduct by accepting benefits to the value of at least \$97,756 from Jason Bastow, a director of Bastow Civil Constructions Pty Ltd, as an inducement or reward for Mr Cresnar exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Bastow’s business in relation to its work for Ausgrid (chapter 3).
- Between 2012 and 2014, Mr Cresnar engaged in corrupt conduct by accepting benefits from Dennis Twomey, a director of Murray Civil Works Pty Ltd, to the value of \$50,506, the use of a Murray Civil Bunnings trade card, and the use of a Murray Civil company car. Mr Cresnar accepted these benefits knowing that they were intended to influence him to exercise his public official functions to show favour, or not to show disfavour, to Mr Twomey’s business in relation to its work for Ausgrid (chapter 4).
- Between about April and November 2011, Mr Cresnar engaged in corrupt conduct by accepting four cheques from Eamon Burke, the director of Cloughcor Pty Ltd, which Mr Cresnar used to purchase goods for his personal use to the value of \$99,327. Mr Cresnar accepted these benefits knowing that they were intended to influence him to exercise his public official functions to show favour, or not to show disfavour, to Mr Burke’s business in relation to its work for Ausgrid (chapter 5).
- In 2010, Mr Cresnar engaged in corrupt conduct by accepting two international airline tickets worth a total of \$2,652.41 from Patrick Miskelly, the director of Fer-Aim Pty Ltd. Mr Cresnar accepted these benefits knowing that they were intended to influence him to exercise his public official functions to show favour, or not to show disfavour, to Mr Miskelly’s business in relation to its work for Ausgrid (chapter 5).
- In January 2014, Mr Cresnar engaged in corrupt conduct by accepting \$2,500 from John Madden and Fergal McGann, directors of MDM Formwork Pty Ltd, as an inducement or reward for him exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to the business operated by Mr

Madden and Mr McGann, in relation to its work for Ausgrid (chapter 5).

A finding is made in chapter 3 that, between 2008 and 2010, Mr Bastow engaged in corrupt conduct by providing Mr Cresnar with benefits to the value of at least \$97,756 as an inducement or reward for Mr Cresnar exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Bastow's business in relation to its work for Ausgrid.

A finding is made in chapter 4 that, between 2012 and 2014, Mr Twomey engaged in corrupt conduct by providing Mr Cresnar with benefits to the value of \$50,506, the use of a Murray Civil Bunnings trade card and the use of a Murray Civil company car. Mr Twomey provided these benefits knowing that they would tend to influence Mr Cresnar to exercise his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Twomey's business in relation to its work for Ausgrid.

A finding is made in chapter 5 that, between about April and November 2011, Mr Burke engaged in corrupt conduct by giving Mr Cresnar four cheques to purchase items for his own use. Mr Burke was aware the cheques were used by Mr Cresnar to purchase items to the value of \$99,327. Mr Burke provided these benefits knowing that they would tend to influence Mr Cresnar to exercise his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Burke's business in relation to its work for Ausgrid.

A finding is made in chapter 5 that, in 2010, Mr Miskelly engaged in corrupt conduct by giving Mr Cresnar two international flight tickets worth \$2,652.41. Mr Miskelly provided these tickets knowing that they would tend to influence Mr Cresnar to exercise his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Miskelly's business in relation to

its work for Ausgrid.

A finding is made in chapter 5 that, in January 2014, Mr McGann engaged in corrupt conduct by giving Mr Cresnar \$2,500 as an inducement or reward for Mr Cresnar exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Madden and Mr McGann's business in relation to its work for Ausgrid.

A finding is also made in chapter 5 that, in January 2014, Mr Madden engaged in corrupt conduct by being a party to an agreement whereby Mr McGann gave Mr Cresnar \$2,500 as an inducement or reward for Mr Cresnar exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to the business operated by Mr Madden and Mr McGann in relation to its work for Ausgrid.

Statements are made pursuant to s 74(A) 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 (DPP) with respect to the prosecution of the following persons:

Mr Cresnar for:

1. receiving corrupt commissions or rewards, pursuant to s 249B(1)(a) of the *Crimes Act 1900* ("the Crimes Act"), in relation to the benefits he received from Mr Bastow, Mr Madden and Mr McGann
2. receiving corrupt commissions or rewards, pursuant to s 249B(1)(b) of the *Crimes Act*, in relation to the benefits he received from Mr Twomey, Mr Burke and Mr Miskelly
3. attempting to procure the giving of false testimony at a compulsory examination or public

inquiry before the Commission, contrary to s 89(a) of the ICAC Act in relation to a letter sent to Mr Bastow

4. giving false or misleading evidence at a compulsory examination on 17 April 2014, contrary to s 87(1) of the ICAC Act, in relation to his evidence that he had done nothing in exchange for the benefits that were provided to him by Mr Bastow.

Mr Twomey for:

1. offences under s 249B(2)(b) of the Crimes Act in relation to the benefits he supplied to Mr Cresnar
2. an offence under s 114(1) of the ICAC Act of disclosing information about a Commission summons that was likely to prejudice a Commission investigation.

Mr Burke for:

1. offences under s 249B(2)(b) of the Crimes Act in relation to the four cheques he supplied to Mr Cresnar
2. an offence under s 112 of the ICAC Act for disclosing information about his attendance at a compulsory examination.

Mr Miskelly for offences under s 249B(2)(b) of the Crimes Act in relation to the airline tickets he supplied to Mr Cresnar.

Mr Madden for an offence under s 249B(2)(a) of the Crimes Act in relation to the \$2,500 payment to Mr Cresnar.

Mr McGann for an offence under s 249B(2)(a) of the Crimes Act in relation to the \$2,500 payment to Mr Cresnar.

Chapter 6 of this report sets out the Commission's review of the corruption risks present at the time the conduct occurred. The Commission found that the inadequate arrangements within Ausgrid's CCL for recording the details of contract variations allowed Mr Cresnar to avoid proper scrutiny of his activities. Mr Cresnar was able to exploit the high level of discretion he was afforded, and his close proximity to contractors, to secure corrupt payments from contractors. The contractors were motivated to provide benefits in return for favourable treatment under a system that did not guarantee an allocation of profitable work.

The Commission has made the following recommendations:

Recommendation 1

That, in the short term, Ausgrid tightens processes within the existing system for contract cable laying work orders to reduce existing corruption opportunities. In this regard, Ausgrid should focus on processes for approving variations, tightening the scope and budget for work order contracts, and reducing opportunities for individual officers to control key tasks, including the selection of contractors.

Recommendation 2

That Ausgrid improves its data management and retention systems. Data capture should, as a minimum, be able to provide Ausgrid with the capability to establish unusual expenditure patterns, improve the accuracy of estimates for work orders, capture information on environmental and site conditions to inform project design and budgeting, and help to establish cost benchmarks.

Recommendation 3

That Ausgrid considers and adopts the optimum contracting model to deliver contract cable laying work. Central to this consideration should be the alignment of Ausgrid and contractor motivations, Ausgrid's current operating environment, and the efficiency and effectiveness of any such contracting model.

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 Ausgrid and the responsible minister, being the minister for resources and energy.

As required by s 111E(2) of the ICAC Act, Ausgrid must inform the Commission in writing within three months (or such longer period as the Commission may agree in writing) after receiving the recommendations, whether it proposes to implement any plan of action in response to the recommendations and, if so, of the plan of action.

In the event a plan of action is prepared, Ausgrid is required to provide a written report to the Commission of its 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 response to its recommendations, any plan of action and progress reports on its implementation on the Commission's website, www.icac.nsw.gov.au, for public viewing.

Recommendation that 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 the Houses of Parliament to make the report public, whether or not Parliament is in session.

Chapter 1: Background

This chapter sets out some general information concerning the investigation conducted by the NSW Independent Commission Against Corruption (“the Commission”), Ausgrid and Phillip Cresnar.

How the investigation came about

In March 2013, the Commission commenced an investigation after receiving an anonymous complaint about Mr Cresnar, an engineer with the Contract Cable Laying (CCL) division of Ausgrid. The complainant made a number of specific allegations in relation to Mr Cresnar’s conduct, including that he received cash and other benefits from Ausgrid contractors in return for favouring those contractors and that he disclosed commercially sensitive information.

Why the Commission investigated

One of the Commission’s principal functions, as specified in s 13(1)(a) of the *Independent Commission Against Corruption Act 1988* (“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 allegations involved the acceptance of money and other benefits by a public official, in return for his improperly exercising his public official functions as an Ausgrid employee, and the unauthorised disclosure of confidential information obtained during the course of his employment as a public official.

When considering whether to investigate the allegations, the Commission took into account that Mr Cresnar had an influential position within Ausgrid and that he was entrusted with a considerable amount of discretion in relation to his dealings with Ausgrid contractors.

In the circumstances, the Commission decided that it was in the public interest to conduct an investigation to establish whether corrupt conduct had occurred and whether there were corruption prevention issues that needed to be addressed.

Conduct of the investigation

During the course of the investigation, the Commission:

- interviewed and/or obtained statements from a number of persons, including Ausgrid employees and senior managers, Ausgrid contractors and subcontractors, and a number of persons from whom goods were purchased by, or on behalf of, Mr Cresnar
- obtained documents from various sources by issuing 121 notices under s 22 of the ICAC Act
- conducted 19 compulsory examinations
- executed three search warrants.

The public inquiry

After taking into account each of the matters set out in s 31(2) of the ICAC Act, the Commission determined that it was in the public interest to hold a public inquiry, for the purpose of furthering its investigation. In making that determination, the Commission had regard to the following considerations:

- the granting of contracts by public authorities is a high corruption risk area; a public inquiry would serve to expose the types of corrupt conduct that may occur and would raise public awareness about the issue
- the allegations were serious, involving a public official who exercised a considerable amount of discretion in his dealings with contractors and subcontractors
- the alleged corrupt conduct was said to have taken place over an extended period of time and involved a substantial financial gain
- the conduct was alleged to have occurred notwithstanding the existence of policies, procedures and processes that might have been expected to minimise corrupt conduct of the type alleged; it was in the public interest to establish why existing anti-corruption measures did not detect and deter the alleged corrupt conduct
- while there was a risk to the reputation of Mr Cresnar and other witnesses called before the public inquiry, that prejudice was not undue in light of the seriousness of the allegations, the cogency of the evidence then available to the Commission, and the public interest in exposing conduct of the kind alleged
- public exposure of the matter might serve as a deterrent.

The public inquiry was conducted over six days, from 19 to 27 January 2015. Assistant Commissioner Theresa Hamilton presided over the public inquiry. Tim Gartelmann acted as Counsel Assisting the Commission. Mr Cresnar and 11 other witnesses were called to give evidence.

At the conclusion of the public inquiry, Counsel Assisting prepared submissions setting out the evidence and identifying the findings and recommendations that the Commission could make based on that evidence. These submissions were provided to all relevant persons, including Mr Cresnar, and submissions were received in response. All submissions received were taken into account in preparing this report.

Ausgrid

Ausgrid is a NSW state-owned corporation that operates throughout Sydney, the Hunter and the Central Coast, providing and maintaining electrical distribution networks to 1.6 million homes and businesses. Ausgrid was formerly known as EnergyAustralia, and changed its name in March 2011, following the sale of the company's retail operations.

Pursuant to s 36 of the *State Owned Corporations Act 1989*, Ausgrid is a public authority and its employees are public officials for the purposes of the ICAC Act. Prior to March 2011, a similar situation existed in relation to EnergyAustralia and its employees. All references in this report to Ausgrid include its predecessor.

In order to develop and maintain its electricity supply, Ausgrid required work to be carried out on an ongoing basis on its cable and underground electricity distribution network.

The installation of cables was largely undertaken by private contractors that were selected from a panel of companies maintained by Ausgrid for that purpose. Contractors were invited to tender for inclusion on contractor panels,

covering geographical regions defined by Ausgrid. Having been selected for inclusion on a panel, a contractor would enter into what was known as a standing order deed with Ausgrid. Contractors received no payment for entering into these deeds and they did not guarantee that the contractor would subsequently receive work from Ausgrid.

The standing order deed set out a system by which contractors were allocated work. However, each time a contractor was allocated work, this became the subject of a separate contract with Ausgrid.

The standing order deed set out specific stages of the contracting process and the conditions governing individual contracts. When the standing order deed was entered into, contractors undertook to provide specific services for which they would charge set rates, as set out in a schedule of rates attached to the standing order deed.

Standing order deeds were initially valid for two years but could be extended by two further periods of two years each.

Within Ausgrid, CCL was responsible for initiating and managing contracts on behalf of other Ausgrid business units that were responsible for, among other things, delivering large infrastructure and repair projects.

In 2010, CCL was split into a northern and a southern region, each overseen by a portfolio manager who managed a number of engineering officers and contractor panels.

Phillip Cresnar and his role at Ausgrid

On 10 April 2006, Mr Cresnar was employed by Ausgrid as a graduate engineer. Within 18 months he was appointed to the position of engineering officer within CCL, where he remained until he resigned from Ausgrid in May 2014, after being informed that his employment was to be terminated.


Prior to resigning, Mr Cresnar was one of two project planners in CCL northern region, a position which he had held since at least 2012. As a project planner, Mr Cresnar allocated responsibility for the initiation and management of contracts but he continued to carry out the roles of contract initiator and contract inspector on a number of projects (a role that he undertook throughout the period he was employed in CCL).

As a contract initiator and inspector, Mr Cresnar came into regular contact with contractors and subcontractors.

How much influence did Mr Cresnar have?

An important aspect of Mr Cresnar's role as a contract inspector was the assessment of contract variations submitted by contractors and subcontractors. When they encountered latent conditions that were previously unknown, Ausgrid was contractually obliged to pay additional fees to contractors and subcontractors, over and above the initial contract fee. The discovery of rock or groundwater in an area of excavation, for example, is a common occurrence that requires a contract variation.

As a contract inspector, Mr Cresnar was responsible for receiving, assessing and making recommendations about contract variations. Variations could involve a significant increase to the payments that contractors received but if applied properly they could also lead to a reduction in payments. Although variations were not approved by contract inspectors, Ausgrid managers relied almost exclusively on the information contract inspectors provided and considerable trust was placed in them to assess variations honestly and accurately. Mr Cresnar told the Commission that variations could be for significant sums and that his discretion to recommend the approval of "on the spot" variations had never been challenged by anyone at Ausgrid.



Another area in which contract inspectors were given considerable latitude was the issuing of non-conformance notices, covering defective or substandard work. The issuing of non-conformance notices could have an adverse financial impact on the contractor, who would be required to remedy defects at their own expense.

Portfolio managers within CCL had regular meetings with contract inspectors to discuss the performance of contractors and, on occasion, decisions were made to reduce the amount of work a contractor received until performance issues were addressed. As the primary point of contact between Ausgrid and their contractors, contract inspectors were relied on to report on the performance of contractors, which could have a direct effect on their future commercial relationship with Ausgrid. As a project planner, Mr Cresnar was in a position to advise senior managers which contractor should be used on upcoming projects.

The Commission is satisfied that Mr Cresnar was in a position to affect the granting of variations and the issuing of non-conformance notices and that the information he provided to Ausgrid senior managers was influential in relation to decisions that they made, which could directly affect the commercial interests of contractors and subcontractors.

Chapter 2: Relevant Ausgrid policies

In common with most public authorities, Ausgrid has in place a number of policies and procedures, including a code of conduct, designed to guide the conduct of its staff and reduce opportunities for, and instances of, corrupt conduct.

As an Ausgrid employee, Mr Cresnar was required to abide by these policies, a number of which were published and updated during his employment with Ausgrid.

Early policies

On 17 September 2004, EnergyAustralia, as Ausgrid was then known, issued corporate directive 9/2004, the relevant provisions of which are set out below.

ACCEPTANCE OF GIFTS AND BENEFITS

EnergyAustralia's Code of Conduct specifies that employees "do not give or receive unauthorised gifts or benefits". EnergyAustralia's Fraud and Corruption Prevention Guidelines advise that "the acceptance of bribes or unauthorised gifts with the promise of favouritism being shown to a customer or supplier", is corrupt behaviour.

As an EnergyAustralia employee, you should decline offers of gifts, benefits, invitations to social or sporting functions, travel or hospitality [accommodation, meals or entertainment] if you think the person offering the gift, or a fair observer, might think you would be influenced in the way you do your job as a result of the gift.

...

No gifts or benefits of any value are to be accepted from a prospective contractor, when a tender or expression of interest is being evaluated.

Ausgrid corporate directives, providing similar advice, were issued in December 2010 and November 2011.

Code of conduct

All Ausgrid employees and contractors were subject to a code of conduct that was updated and reissued by Ausgrid during the period covered by these allegations. In March 2011, Ausgrid issued an updated code of conduct, the relevant provisions of which are set out below.

Integrity

We act with honesty, objectivity, openness and courage of conviction and we:

- deal justly with all issues and consistently manage conflicts of interest in an open and respectful manner.*
- do not use our position to exert inappropriate influence over others.*
- decline gifts or benefits which may be seen to compromise impartiality.*
- do not make decisions for personal gain at the expense of the organisation, or participate in outside employment where there is a conflict of interest.*
- comply with the letter and the spirit of our policies, procedures, guidelines and relevant legislation.*
- ...
- act ethically and avoid actions that bring the organisation into disrepute.*
- do not participate in fraudulent conduct.*

Consult with your supervisor on potential or actual conflicts of interest in order to resolve them.

- ensure all communication is carried out in an open and transparent manner.
- respect the privacy of customer and employee information.
- seek permission before disclosing confidential information or making official comment.
- ...
- do not misuse information obtained at work for personal financial gain or for taking advantage of others.
- ensure only information for which we are authorised is accessed.

An updated and more expansive code of conduct was issued in April 2013, the relevant provisions of which are set out below.

The “once removed” principle

If you are making a decision about an activity or purchase and there is a possibility that people might think you are gaining a personal benefit or that there may be a perception of a conflict of interest, you must inform your manager/supervisor and obtain approval. This must happen before you make the decision.

...

Conflicts of Interest

What is a conflict of interest?

You are at risk of having a conflict of interest if there is even a perception that your personal interests (or the interests of people close to you) will conflict with your ability to impartially perform your work

duties. Conflicts of interest can be actual, perceived or potential.

A conflict of interest is:

- *actual when you are in a position to be influenced by your private interests when doing your job*
- *perceived when you are in a position to appear to be influenced by your private interests when doing your job*
- *potential when you are in a position where you may be influenced in the future.*

Conflicts of interest are also categorised as pecuniary and non-pecuniary. A pecuniary conflict of interest exists when a person has a financial interest or the capacity to make a financial gain or loss. Pecuniary interests include shareholdings, superannuation, spouse/partner financial interests, gifts and hospitality and property ownership.

A non-pecuniary conflict of interest does not have a financial component. It can arise from personal or family relationships, or involvement in sporting, social or cultural activities.

Some conflicts of interest examples include the following situations:

- *knowing that you or your friends or relatives stand to benefit from a matter in which Ausgrid is involved.*
- *having a personal relationship with an Ausgrid business contact that goes beyond a normal professional working relationship*

...

- *having a second job that compromises your integrity or impacts on your ability to perform your employment with Ausgrid*

...

Making a decision that is not impartial can be considered as corrupt conduct.

What should I do to manage conflicts of interest?

...

The six major options for managing conflicts of interest are:

- **register** *all potential conflicts of interest with your manager/supervisor and follow the approach determined with your manager/supervisor to manage the conflict*
- **restrict** *your exposure to potential conflicts*
- **recruit** *a disinterested third party to oversee the process that deals with the matter*
- **remove** *yourself from the conflict issue or situation*
- **relinquish** *the private interest causing the conflict*
- **resign** *from your position.*

Acceptance of Gifts and Benefits

Ausgrid has a 'no gifts' policy. This means that under no circumstances can you receive a gift from any third party as a result of your association with and your role within Ausgrid.

...

*If a gift or benefit is offered to you to influence the way you do your work, you must report this immediately by following the procedure found on *The Wire* for reporting fraud and corruption.*

...

Secondary Employment

We are committed to ensuring that employees undertake their duties with the highest degree of integrity and that no safety risks, conflicts of interest or contractual breaches result from other paid employment.

In some cases, secondary employment will not have any impact on an employee's job with Ausgrid. However, at other times this secondary employment could lead to a real or potential conflict of interest.

Some of the other major risks associated with secondary employment include fatigue, misuse of resources, security of information, and availability for work.

Employees who wish to have a second job must seek approval by submitting the appropriate form.

If you have an approved second job you must, while performing that second job:

- *not use Ausgrid resources (such as tools, equipment, computer systems, telephones)*
- *not use Ausgrid information*
- *not reveal information about Ausgrid business strategies*
- *be alert to any conflicts of interest, real or perceived, and take appropriate steps to deal with them*
- *take personal responsibility for your fitness for duty and be certain that the quality of your Ausgrid work is not affected.*

Ausgrid can require you to cease any secondary employment that adversely affects your employment with Ausgrid and if you fail to do so, disciplinary action may be taken.

Mr Cresnar's knowledge of Ausgrid policies

During the course of his evidence before the Commission, Mr Cresnar initially sought to downplay his knowledge of the Ausgrid policies and procedures dealing with conflicts of interest, secondary employment and the receipt of gifts and benefits. Mr Cresnar accepted that he became aware of the Ausgrid code of conduct in about 2011 or 2012 and that he may have undergone some code of conduct training at that time. Mr Cresnar also accepted that he was aware that certain corporate directives had been issued on these subjects and that he may have undertaken some e-learning sessions on the code of conduct. When later challenged on his knowledge of the code of conduct, Mr Cresnar accepted that he was made aware of it in 2010, during an internal Ausgrid investigation into his conduct, unrelated to the present allegations.

During the public inquiry, Mr Cresnar was asked questions about his knowledge and understanding of Ausgrid's gifts and benefits policy, to which he replied "I understood it perfectly".

Documentary evidence was produced during the public inquiry to show that Mr Cresnar attended a meeting in February 2012 at which the Ausgrid gifts and benefits policy was discussed and another meeting in April 2013

at which the code of conduct and secondary employment policies were on the agenda. Mr Cresnar accepted that he attended these meetings and that these topics were discussed.

During his evidence about his private use of an Ausgrid vehicle, Mr Cresnar accepted that he had used the vehicle in breach of Ausgrid policy, that he was aware of the policy when he did so, and that he acquired a white magnetic blanking plate to cover the Ausgrid corporate logo on the vehicle to facilitate his unauthorised use of the vehicle.

The Commission is satisfied that Mr Cresnar was, either specifically or in general terms, aware of the various codes of conduct and the policies and procedures that were in force during the period of his employment with Ausgrid. The Commission is also satisfied that Mr Cresnar was aware that these policies and procedures placed certain restrictions and obligations on him concerning his relationship with contractors and subcontractors, the acceptance of benefits from contractors, and the undertaking of secondary employment.

Chapter 3: Bastow Civil Constructions Pty Ltd

Bastow Civil Constructions Pty Ltd (“Bastow Civil”) is a civil engineering company that was established in 2001 by Jason Bastow. He remains the company’s director and sole shareholder. Bastow Civil undertook horizontal directional drilling work to facilitate the laying of cables and pipe work.

In 2007, Bastow Civil was admitted to the Ausgrid contractor panel for the northern region. As a result of Bastow Civil’s inclusion on the panel, the company’s turnover increased from approximately \$6 million per annum in 2007 to \$12 million per annum in 2008.

Benefits and cash payments

Between June 2008 and June 2010, a Bastow Civil company credit card was used on at least 44 occasions for the benefit of Mr Cresnar. The cost to Bastow Civil was at least \$67,720. The purchases were made in several ways, namely:

- by Mr Bastow directly
- by Mr Cresnar using the card’s details over the telephone
- by Mr Cresnar transferring funds to the PayPal account of Robert Ujszaszi, a friend of Mr Cresnar’s
- via purchases made with Mr Cresnar’s PayPal account, to which the card was linked.

In 2009, Mr Bastow supplied Mr Cresnar with a Bastow Civil company cheque, which was used to make a payment of \$25,036 to De Jong Motor Engineering and Repairs (“De Jong Motors”), a Canberra-based mechanical engineering company. Mr Cresnar told the Commission that the cheque was used to pay for modification and upgrade work to his private car.

On 12 October 2009, Mr Ujszaszi set up a PayPal account. On the same day, Mr Cresnar transferred \$5,758.15 from the Bastow Civil company credit card account to the PayPal account. On 8 February 2010, a second transaction took place, whereby \$1,236 was transferred from the Bastow Civil credit card account to Mr Ujszaszi’s paypal account. Mr Cresnar claimed that the money was used to pay for car parts that Mr Cresnar had purchased from Mr Ujszaszi and that he had Mr Bastow’s consent to use Bastow Civil funds to pay for the car parts. Mr Ujszaszi told the Commission that he did have some recollection of setting up the PayPal account and of the funds being transferred but could not remember any specific details about why this took place.

Mr Cresnar accepted that the Bastow Civil credit card was used for his benefit on 44 occasions, including the two transfers of cash to Mr Ujszaszi’s PayPal account. He accepted that he had used a Bastow Civil company cheque to pay for modifications to his car but he claimed that this was in exchange for money he had given to Mr Bastow. This issue is further examined below.

The disputed payment

Mr Bastow claimed that, in 2010, after a significant number of purchases had been made, he challenged Mr Cresnar about what Mr Bastow regarded as Mr Cresnar’s excessive use of the Bastow Civil credit card. Despite this, Mr Cresnar continued to use it to make purchases. As a result, Mr Bastow’s wife cancelled the credit card. Mr Bastow claimed that Mr Cresnar became angry when he discovered that the credit card had been cancelled and demanded a cash payment, stating that, if it was not paid, he would blame Bastow Civil for a recent wall collapse at an Ausgrid work site. As a result, Mr Bastow told the Commission that he provided Mr Cresnar with a \$5,000 cash payment; a claim that Mr Cresnar denied.

Following the public inquiry, the Commission received written submissions on behalf of Mr Cresnar in which he accepted receiving “payments or rewards” for assisting Mr Bastow with contract variations. It was submitted that a payment of \$5,000 in cash was inconsistent with the way in which benefits had been supplied in the past and that it was, therefore, unlikely that this payment had been made. It was also submitted that Mr Cresnar would not have threatened Mr Bastow regarding the wall collapse because there was no evidence to suggest that Bastow Civil was at fault.

In deciding whether Mr Cresnar did receive a \$5,000 cash payment, the Commission considered that Mr Cresnar’s acceptance that he received payments or rewards implied that he received benefits that were provided in different ways. Such an inference is supported by the evidence that goods obtained by Mr Cresnar were purchased either directly by Mr Bastow, by Mr Cresnar over the telephone, via Mr Cresnar’s PayPal account or via a transfer to Mr Ujszaszi’s PayPal account.

Mr Cresnar showed no hesitation in accepting benefits purchased using the Bastow Civil credit card and the Commission can see no reason to exclude the possibility of a single cash payment purely on the basis that it differed from the way benefits were normally received. In his own evidence, Mr Cresnar stated that he had initially wanted cash payments for working on contract variations.

Unless Mr Cresnar was in a position to substantiate such an allegation, the Commission also rejects the submission that he could not have made a threat to blame Bastow Civil for the wall collapse. The Commission is satisfied that even an unsubstantiated allegation from an Ausgrid employee could be damaging to the reputation of Bastow Civil.

Mr Bastow gave undisputed evidence that he supplied benefits to Mr Cresnar valued at over \$90,000. The

addition of a \$5,000 cash payment would add little to the overall course of conduct between the parties and the Commission can find no reason why Mr Bastow would fabricate evidence in relation to such a payment. Mr Bastow’s evidence was contrary to his own interest in that it implicated him in a further, potentially corrupt and criminal payment to Mr Cresnar.

By contrast, the Commission found Mr Cresnar’s evidence to be generally implausible and contradictory. In his compulsory examination, when asked what he did in exchange for the benefits he received from Mr Bastow, Mr Cresnar said, “I didn’t do anything really”. Later, during the public inquiry, Mr Cresnar said that he had calculated contract variations over a two-year period on behalf of Mr Bastow, which were then submitted to Ausgrid for payment.

In the circumstances, the Commission is satisfied that Mr Bastow made the \$5,000 cash payment to Mr Cresnar, and that this payment was made in response to a demand by Mr Cresnar.

Why the benefits were provided

The Commission examined whether Mr Bastow provided benefits to Mr Cresnar in order to influence the way in which he carried out his public official functions and whether Mr Cresnar received the benefits knowing that they were intended to influence him to show favour, or not to show disfavour, towards Bastow Civil.

Mr Cresnar was the contract inspector overseeing a number of Ausgrid projects for which Bastow Civil was the contractor. The role of contract inspector includes receiving, assessing and making recommendations about contract variations sought by contractors. As a contract inspector, Mr Cresnar was also responsible for managing the performance of Bastow Civil and for issuing non-conformance notices.

Contractors on the Ausgrid panel were provided with software known as the estimator, which was used to calculate quotes and the value of contract variations that were submitted to Ausgrid. Mr Bastow told the Commission that he had considerable difficulty operating this software. It was accepted that Mr Bastow sought assistance from Mr Cresnar in 2008 and had a meeting at Mr Cresnar's home. Mr Bastow said that, during this meeting, Mr Cresnar prepared a contract variation on his behalf, handed him a document containing the calculations, and told him, "just submit them, they'll be approved". Mr Bastow said that on this and subsequent occasions, when he sought Mr Cresnar's help preparing contract variations, Mr Cresnar did not explain how he calculated the variations but merely provided him with the information that he needed to submit the variations to Ausgrid.

Mr Bastow confirmed that, during the period he worked on Ausgrid contracts, Mr Cresnar completed a large number of variations for Bastow Civil and that Mr Cresnar was responsible for reviewing some of these on behalf of Ausgrid. Mr Bastow confirmed that, on one project, 11 variations valued at over \$1 million were submitted to Ausgrid for payment.

Mr Bastow said that he met Mr Cresnar at an Ausgrid work site in Mosman in 2008 where they discussed the assistance that Mr Cresnar was providing. Mr Bastow claimed that it was during this meeting that Mr Cresnar first sought payment for the services he was providing. Mr Bastow said that Mr Cresnar told him that he was adding value to the variations and therefore "he basically wanted things paid for". It was following this meeting that he started purchasing items for Mr Cresnar using Bastow Civil funds.

Mr Bastow told the Commission that he understood contract inspectors, such as Mr Cresnar, had a discretion in relation to the variations they approved and that Mr Cresnar exercised his discretion in favour of Bastow Civil.

Mr Bastow believed Mr Cresnar was inflating the value of the variations, by overestimating latent conditions such as sub-surface rock. Mr Bastow formed this opinion because Mr Cresnar had justified the payments he was to receive on the basis that Bastow Civil was getting additional money because he was increasing the value of the variations.

Mr Bastow told the Commission that he agreed to provide benefits to Mr Cresnar in exchange for completing contract variations but that he also feared Mr Cresnar would harm his business if he did not continue with the arrangement. Mr Bastow told the Commission that on a number of occasions Mr Cresnar criticised him and his company and made it clear that without his assistance Bastow Civil would be in commercial difficulty and that the company would be treated less favourably if the benefits ceased.

When asked what would have happened if he stopped providing benefits to Mr Cresnar, Mr Bastow said, "We'd pretty much get a lot of crap work".

In his written statement to the Commission, Evan Partridge, a CCL portfolio manager, said that latent conditions uncovered during projects were not recorded in a format that could be easily checked at a later date. In his own evidence, Mr Cresnar accepted that his discretion in relation to variations had never been challenged by anyone at Ausgrid.

The Commission is satisfied that Mr Cresnar was in a position to inflate contract variations and that the system for recording variations would not have disclosed this.

At the public inquiry, Mr Cresnar accepted that he had calculated contract variations on behalf of Bastow Civil over a two-year period and that some of the variations were submitted to him to assess as the responsible Ausgrid contract inspector. Mr Cresnar said that the benefits he received from Mr Bastow were payments for completing contract variations and that he believed the agreement amounted to legitimate secondary employment. Mr Cresnar claimed that he saw no conflict of interest in preparing contract variations on behalf of Bastow Civil and reviewing the same variations on behalf of Ausgrid.

When asked to explain why he had not mentioned that he completed contract variations for Mr Bastow during his earlier compulsory examination with the Commission, Mr Cresnar said that he had forgotten about the work he did for Bastow Civil because of his heavy drinking.

The Commission does not accept that Mr Cresnar could have forgotten that he completed contract variations for an Ausgrid contractor over a two-year period, at a time when he was responsible for overseeing the work of that contractor and receiving benefits from him. The Commission also finds implausible Mr Cresnar's assertion that he saw no conflict of interest in completing contract variations for a contractor when he later went on to review these variations on behalf of Ausgrid.

The Commission is satisfied that, by completing contract variations on behalf of Bastow Civil which he then reviewed on behalf of Ausgrid, Mr Cresnar had an obvious and serious conflict of interest. Whilst it may have been legitimate for an Ausgrid inspector to provide general advice and guidance on the use of the estimator software, Mr Cresnar's activities went far beyond this. Mr Cresnar knew that his role at Ausgrid was to independently oversee and check the contract variations submitted by contractors, to ensure that they were legitimate and that they had been accurately prepared. Mr Cresnar created a situation whereby he was validating his own work.

The next issue for consideration is whether Mr Cresnar's actions involved more than a conflict of interest.

It was clear from Mr Bastow's evidence that he believed that Mr Cresnar exercised his discretion to favour Bastow Civil, including by inflating variations, but would treat Bastow Civil less favourably if Mr Bastow failed to provide Mr Cresnar with benefits. Mr Cresnar denied that he ever made threats to treat Bastow Civil less favourably, claiming that he was receiving the benefits for legitimate secondary employment.

The Commission found Mr Bastow's evidence to be more credible than that of Mr Cresnar. Mr Bastow's evidence was clear and was against his own interest, as it implicated him in possible corrupt and criminal conduct. On the other hand, Mr Cresnar was not an impressive or reliable witness. In assessing Mr Cresnar's evidence, it is significant that, although he claimed he received benefits from Mr Bastow as payment for legitimate secondary employment, he had not sought Ausgrid's approval for such secondary employment. If he had really regarded what he was doing as legitimate secondary employment, it would be expected that he would have sought formal Ausgrid approval so that he was not in breach of relevant Ausgrid policy. The fact that he did not do so indicates an intention on his part to keep secret from Ausgrid the fact that he was receiving benefits from Mr Bastow. His failure at his compulsory examination to fully disclose his dealings with Mr Bastow reinforces the conclusion that he wished to keep these dealings a secret. This desire for secrecy is consistent with an understanding on his part that what he was doing was wrong. The Commission also takes into account that the benefits were not provided in the form that would be expected if Mr Cresnar was merely being paid for legitimate secondary employment. It is also relevant that the method of payment was designed to disguise the beneficiary.

The Commission is satisfied that Mr Cresnar and Mr Bastow entered into an agreement whereby Mr Bastow provided Mr Cresnar with various benefits in return for Mr Cresnar exercising his public official functions to favour Mr Bastow's business by preparing contract variations favourable to Bastow Civil (including by inflating the value of the variations) and favourably reviewing contract variations. The Commission is also satisfied that Mr Cresnar made it clear to Mr Bastow that, if Mr Bastow did not provide him with benefits, then Mr Cresnar could exercise his public official functions in such a way as to prejudice Bastow Civil's commercial relationship with Ausgrid.

The benefits provided to Mr Cresnar under this agreement included the purchase of goods worth at least \$67,720 using the Bastow Civil credit card, the \$6,994.15 transferred from the Bastow Civil credit card account to Mr Ujszaszi's PayPal account and a \$5,000 cash payment.

The only outstanding issue is whether the \$25,036 payment to De Jong Motors was part of this agreement.

The \$25,036 payment to De Jong Motors

When asked about the payment of \$25,036 to De Jong Motors, Mr Cresnar told the Commission that he had given Mr Bastow \$20,000 in cash that he had received from his grandfather, and in return Mr Bastow paid for the modifications to his car. When asked why Mr Bastow would have agreed to this arrangement, Mr Cresnar claimed that Mr Bastow wanted access to cash that he wished to conceal from his wife.

When Mr Bastow gave evidence, it was not put to him, on behalf of Mr Cresnar, that the \$25,036 cheque had been given in exchange for \$20,000 in cash. Mr Cresnar's failure to make this claim, until after Mr Bastow gave evidence, denied Mr Bastow the opportunity to comment on or deny Mr Cresnar's claim.

Following the public inquiry, the Commission received written submissions on behalf of Mr Bastow in which he claimed that he gave the cheque to Mr Cresnar, at Mr Cresnar's request, because he feared that, if he did not, Mr Cresnar would stop assisting with the estimator software and that he would make it more difficult to get variations approved.

It is inherently unlikely that Mr Bastow would make a \$25,036 payment on Mr Cresnar's behalf having received only \$20,000 in cash from Mr Cresnar.

The explanation given by Mr Bastow for the provision of the \$25,036 cheque is consistent with the course of conduct that has been established in relation to purchases made for Mr Cresnar using the Bastow Civil credit card. The Commission also considers that Mr Cresnar's failure to put the allegation to Mr Bastow further undermines the credibility of his claim. The Commission is satisfied that the payment to De Jong Motors was made by Mr Bastow to ensure that Mr Cresnar continued to exercise his public official functions in a way that favoured Bastow Civil.

The anonymous letter

During the course of the investigation, Mr Bastow informed the Commission that he had received an anonymous letter that had been delivered to his home address on 21 August 2014. The letter read:

Pioneer DVD Player, Bosch Fridge & 46" Sony TV traced back to transactions placed with your credit card number. This was done from the serial numbers. That's all, don't be bluffed into saying any more.

These items were gifts for finding resources for you to fill the day labour crew position as you had no one available at the time.

The Commission concluded that the letter was sent to Mr Bastow in an attempt to persuade him to tailor the evidence he gave to the Commission. As a result, the Commission considered it appropriate to investigate the circumstances surrounding the sending of the letter in order to identify the sender.

Mr Cresnar attended compulsory examinations at the Commission on 17 and 18 August 2014, during which he was asked about a number of the credit card purchases that were made for his benefit. Mr Cresnar suggested in the compulsory examination on 18 August 2014 that Mr Bastow may have purchased the items for him because he had helped Mr Bastow to find day labour crews to work on Bastow Civil contracts. When asked about the letter in the public inquiry, Mr Cresnar accepted that no one other than he and Mr Bastow would have known which items had been purchased and that only he would have known about the questions he was asked in his compulsory examination and the explanation he gave about day labour crews.

Mr Cresnar told the Commission that he believed Mr Bastow had written the anonymous letter, although he offered no plausible explanation as to why he would have done so.

The Commission takes note of the fact that only Mr Bastow and Mr Cresnar had knowledge of the items that were bought for Mr Cresnar and only Mr Cresnar knew which items had been mentioned in his compulsory examination and the explanation he gave about these items. There is no obvious motivation for Mr Bastow to have written a letter to himself. Mr Cresnar was in a different position, as he would have benefitted if Mr Bastow corroborated his account and limited the information he provided to the Commission.

The Commission is satisfied that Mr Cresnar was responsible for writing and delivering, or having delivered, the letter to Mr Bastow and that he did so in order to procure the giving of false evidence by Mr Bastow.

Corrupt conduct

The Commission's approach to making findings of corrupt conduct is set out in full in Appendix 2 to this report.

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

In the case of subsection 9(1)(a), the Commission considers whether, 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, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence.

Mr Cresnar

The Commission is satisfied that, between 2008 and 2010, Mr Cresnar accepted benefits to the value of at least \$97,756 from Mr Bastow as an inducement or reward for Mr Cresnar exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Bastow's business in relation to its work for Ausgrid. This conduct on the part of Mr Cresnar is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct of a public official that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of his official functions.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider s 249B(1) of the *Crimes Act 1900* ("the Crimes Act"), which provides:

(1) 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.

The term "agent" includes a public official and in the present case the agent's principal was Ausgrid.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has 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 Cresnar committed offences under

s 249B(1)(a) of the Crimes Act of corruptly receiving a benefit as an inducement or reward for showing favour, or not showing disfavour, in relation to the affairs or business of Ausgrid.

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

Mr Bastow

The Commission is satisfied that, between 2008 and 2010, Mr Bastow provided Mr Cresnar with benefits to the value of at least \$97,756 as an inducement or reward for Mr Cresnar exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Bastow's business in relation to its work for Ausgrid. This conduct on the part of Mr Bastow is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct that could adversely affect, either directly or indirectly, the honest or impartial exercise of Mr Cresnar's official functions.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider s 249B(2) of the Crimes Act, which provides:

(2) 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.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has 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 Bastow committed offences under s 249B(2)(a) of the Crimes Act of corruptly giving a benefit to Mr Cresnar as an inducement or reward for Mr Cresnar showing favour, or not showing disfavour, in relation to the affairs or business of Ausgrid.

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

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:

- a. obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the person for a specified criminal offence
- b. the taking of action against the person for a specified disciplinary offence
- c. the taking of action against the person as a public official on specific 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 Mr Cresnar and Mr Bastow are "affected" persons.

Mr Cresnar

The evidence Mr Cresnar gave was the subject of a direction under s 38 of the ICAC Act. The effect of the declaration is that his evidence cannot be used in evidence against him in any subsequent criminal proceedings, except a prosecution for an offence under the ICAC Act. There are, however, admissible financial records, bank statements and invoices available in relation to benefits received by Mr Cresnar and there is admissible evidence in relation to his position at Ausgrid and the fact that he was in a position to show or not to show disfavour to particular companies. The evidence of Mr Bastow would also potentially be available to the DPP.

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 Cresnar for offences of receiving corrupt commissions or rewards pursuant to s 249B(1)(a) of the Crimes Act in relation to:

- the receipt of goods purchased on 44 occasions between June 2008 and June 2010, using the Bastow Civil company credit card
- the receipt of a \$5,000 cash payment from Mr Bastow in 2010
- the receipt of a benefit in the form of a payment made by Mr Bastow to De Jong Motors of \$25,036.

Consideration should also be given to obtaining the advice of the DPP with respect to the prosecution of Mr Cresnar for offences of:

- attempting to procure the giving of false testimony at a compulsory examination or public inquiry before the Commission, contrary to s 89(a) of the ICAC Act, in relation to the letter sent to Mr Bastow
- giving false or misleading evidence at a compulsory examination on 17 April 2014, contrary to s 87(1) of the ICAC Act, in relation to his evidence that he had done nothing in exchange for the benefits that were provided to him by Mr Bastow.

Mr Cresnar resigned from his position at Ausgrid prior to disciplinary action being instigated. The Commission, therefore, makes no recommendation in relation to the consideration of disciplinary or dismissal action.

Mr Bastow

Mr Bastow gave full and frank evidence at the public inquiry with respect to his dealings with Mr Cresnar, even though it implicated him in potential criminal and corrupt conduct. It is in the public interest to encourage witnesses to tell the truth about matters the Commission investigates. In the circumstances, the Commission is of the opinion that it is not in the public interest to seek the advice of the DPP in relation to the prosecution of Mr Bastow.

Chapter 4: Murray Civil Works Pty Ltd

Dennis Twomey became a director of Murray Civil Works Pty Ltd (“Murray Civil”) in 2011, joining the company’s existing director, Valentine Murray. Shortly after Mr Twomey joined, the company was admitted to the contractor panel for Ausgrid’s northern region. Prior to joining Murray Civil, Mr Twomey owned and ran a civil engineering company called TGB Civil Pty Ltd (“TGB”).

Mr Twomey continued to operate TGB after joining Murray Civil; however, the company’s turnover was modest compared to that of Murray Civil. Between 2011 and 2013, Murray Civil received approximately \$26 million for work it did for Ausgrid. Prior to acceptance onto the Ausgrid contractor panel, Murray Civil had a turnover of approximately \$2 million per annum.

Murray Civil employed a number of staff, including an in-house accountant, Jennifer Wang. Ms Wang was responsible for, among other things, reconciling the company’s accounts, including the company’s credit card account, for which both directors had a company credit card. Personal expenses paid for using the company credit cards were identified by Ms Wang and recorded as company loans to the director concerned. On occasion, if she was unsure, Ms Wang would ask Mr Murray to clarify if expenses related to personal or business purchases. At the end of each financial year, the directors were required to repay the cost of their personal purchases to the company.

In January 2011, Adisty Said began working for Murray Civil as a systems manager. Ms Said was a former girlfriend of Mr Cresnar’s and secured her position with Murray Civil after an introduction and recommendation from him.

Mr Cresnar’s relationship with Mr Twomey

It was not disputed that Mr Cresnar had a close personal friendship with Mr Twomey, which pre-dated Mr Twomey’s directorship at Murray Civil. Mr Cresnar had no personal relationship with Mr Murray. At the time that Murray Civil was admitted to the Ausgrid contractor panel, Mr Cresnar was employed in CCL’s northern region as a contract inspector and went on to oversee projects undertaken by Murray Civil. As a contract inspector, Mr Cresnar had the capacity to make recommendations for approval of contract variations to Murray Civil contracts that could increase the income Murray Civil received from Ausgrid. Mr Cresnar admitted that he had never disclosed his relationship with Mr Twomey or Ms Said to his managers at Ausgrid.

Benefits supplied by Mr Twomey and Murray Civil

Mr Cresnar and Mr Twomey both accepted that Mr Twomey purchased a large number of items for Mr Cresnar and supplied him with other benefits, including the use of a Murray Civil Bunnings trade card, on which Mr Cresnar made purchases of approximately \$19,000, and the use of a Murray Civil company car during the 2012–13 and 2013–14 summer holiday periods. The majority of items purchased for Mr Cresnar were bought with a Murray Civil company credit card, including the items below.

Date	Item	Value
September 2012	Imported marble bath and two imported marble toilets	\$7,819.47
December 2012	Imported marble tiles	USD\$3,640 (approximately \$3,534)
February 2013	Bathroom fittings	\$1,122.68
March 2013	Bathroom fittings	\$8,135.60
November 2013	Bernina sewing machine	\$1,799
November 2013	Fitted wall unit	\$22,396
December 2013	Rinnai fireplace	\$5,699.25
Total		\$50,506

The issue for determination by the Commission was whether these benefits were provided by Mr Twomey and accepted by Mr Cresnar as a reward or inducement for Mr Cresnar exercising his public official functions to show favour or not to show disfavour to Mr Twomey and/or Murray Civil.

Mr Twomey's and Mr Cresnar's explanations

Mr Cresnar and Mr Twomey claimed that benefits obtained by Mr Cresnar were unrelated to his role with Ausgrid and were provided either because of their personal friendship or because Mr Cresnar had assisted Mr Twomey with TGB business in his private capacity.

Imported marble bath and two imported marble toilets

Mr Twomey gave evidence that he purchased the imported marble bath and toilets for Mr Cresnar because Mr Cresnar had assisted with tender applications and found saw-cutting work for TGB. Mr Twomey accepted the items were paid for with a Murray Civil company credit card, notwithstanding that he had a TGB credit card. He also accepted that the invoice for the goods was addressed to Murray Civil not TGB, as would be expected if they related to TGB work. Mr Twomey stated that he used his Murray Civil credit card because TGB had insufficient funds to make the purchase, as it was doing very little work at the time. Mr Twomey was unable to provide any details in relation to the work he claimed had been undertaken by Mr Cresnar on behalf of TGB.

Mr Cresnar gave evidence that differed significantly from Mr Twomey's. He said Mr Twomey had paid for the items because he had previously given Mr Twomey some valuable ornamental porcelain jugs.

Imported marble tiles

Both Mr Cresnar and Mr Twomey claimed that Mr Cresnar had arranged for the importation from Turkey of a quantity of building materials for Mr Twomey. There was a significant reduction in the cost of the materials to Mr Twomey as a result of Mr Cresnar's work. Mr Cresnar received the marble tiles as a reward for his assistance.

The Commission found no direct evidence to contradict the account given by Mr Twomey and Mr Cresnar. There was evidence that an importation of tiles did occur. Tiles received by Mr Cresnar were valued at USD\$3,640 (approximately \$3,534). The Commission considers this to be a significant benefit received from an Ausgrid contractor for whose supervision he was responsible. He was, therefore, under a duty to disclose the benefit to Ausgrid. The Commission considers Mr Cresnar's failure to disclose this benefit, even if it were a gift as claimed, amounted to a breach of the Ausgrid code of conduct in relation to the receipt of gifts from contractors.

Bathroom fittings

Mr Cresnar told the Commission that he had purchased a quantity of bathroom fittings using credit card details supplied by Mr Twomey. In relation to this and other purchases, Mr Cresnar claimed that he did not know at the time that the funds came from Murray Civil but thought that Mr Twomey had given him his personal credit card details. When asked why Mr Twomey funded these purchases Mr Cresnar said "Ah, I was helping him with some saw-cutting work and [it] could have been [the] balance left over for some jobs, I helped him tile around his pool, I don't know".

The Commission found it implausible that Mr Cresnar would have been unable to remember why he received bathroom fittings – worth over \$9,000 – from an Ausgrid contractor. The Commission also notes that in a previous compulsory examination Mr Cresnar had failed to mention any of the reasons now given for receipt of the bathroom fittings.

Bernina sewing machine

Mr Cresnar claimed that he was unaware that the sewing machine had been purchased using Murray Civil funds and that he believed it had been paid for by Mr Twomey because of the work that he was doing for TGB. Mr Cresnar did not provide any details about the work he claimed to be undertaking on behalf of TGB.

Mr Twomey gave no specific explanation for the purchase of the sewing machine.

Fitted wall unit

Mr Twomey could provide little detail about the purchase of the wall unit. Mr Twomey said that Mr Cresnar had reimbursed him for the purchase with cash so that Mr Twomey could use the cash to bet on horses. It was put to Mr Twomey that, during an earlier compulsory examination in April 2014, he had told the Commission that he purchased the wall unit because Mr Cresnar had helped him to secure work with Roads and Maritime Services. Mr Twomey then said that he could not remember why he purchased the wall unit for Mr Cresnar.

Mr Cresnar denied that he knew the wall unit was purchased using a business credit card, saying that he thought Mr Twomey's personal credit card had been used. Mr Cresnar was confronted with evidence showing that he had organised the purchase himself, using Mr Twomey's Murray Civil credit card details and that he told the retailer he was using a business credit card. On hearing this evidence, Mr Cresnar changed his position, stating that he was mistaken when he gave his previous evidence. Mr Cresnar then told the Commission that Mr Twomey had purchased the wall unit in an attempt to persuade him to leave Ausgrid and work for TGB on a full-time basis.

Rinnai fireplace

Mr Twomey accepted that he had purchased the Rinnai fireplace for Mr Cresnar with Murray Civil funds but was unable to offer any explanation as to why he had done so.

Mr Cresnar's only explanation for the purchase was that he had done work on behalf of TGB for which he was paid in goods rather than money. Mr Cresnar was unable to provide specific details of the work he carried out on behalf of TGB.

Bunnings trade card

Mr Cresnar accepted that he was given access to a Murray Civil Bunnings trade card, which he used to make purchases for the restoration of his house. Mr Cresnar claimed that he later reimbursed Murray Civil for the purchases, which included paint and power tools, although no evidence to support this was produced by Mr Cresnar or anyone employed by Murray Civil.

When asked if Mr Cresnar reimbursed Murray Civil for the purchases, Mr Twomey said, "Sometimes, yes" and "Most of the times, yes".

There was insufficient evidence to conclude that Mr Cresnar did not refund Murray Civil for some or all of the

purchases made using the Murray Civil Bunnings trade card.

However, the Commission finds that, even if Mr Cresnar did repay Murray Civil for the purchases, the provision of the card would still have amounted to a benefit provided to Mr Cresnar. Possession of the Bunnings trade card gave Mr Cresnar access to a trade discount and would also have allowed him to delay payment, as the initial payment was charged to Murray Civil.

Company car and fuel card

The Commission heard evidence that Mr Cresnar had been given access to a Murray Civil company car on at least two occasions, over Christmas holiday periods in 2012 and 2013. There was also evidence that arrangements had been made for Mr Cresnar to receive a fuel charge card from Mr Twomey.

In a lawfully-intercepted telephone conversation on 11 January 2014, Mr Twomey and Mr Cresnar discussed arrangements for providing a Murray Civil fuel card to Mr Cresnar. During the conversation, Mr Cresnar told Mr Twomey that the fuel card should not bear the registration number of Mr Cresnar's private vehicle.

Mr Twomey could provide no explanation as to why he agreed to provide Mr Cresnar with a Murray Civil fuel card.

Mr Cresnar accepted that Mr Twomey had loaned him a Murray Civil company car on two occasions. He said that he had been loaned the vehicle because of his friendship with Mr Twomey and that he had use of a Murray Civil fuel card only when he was using the Murray Civil vehicle.

Although there is no evidence that the fuel card was ever provided, the conversation of 11 January 2014 indicates that Mr Twomey and Mr Cresnar discussed providing Mr Cresnar with a Murray Civil fuel card on occasions when he was not using a Murray Civil vehicle. The fact that Mr Cresnar did not want the fuel card linked to his private vehicle and that the benefit was not disclosed to Ausgrid, leads the Commission to conclude that Mr Cresnar was attempting to conceal the fact that he was going to receive a significant benefit from a person he knew to be an Ausgrid contractor.

In his evidence, Mr Murray stated that, if he had known about the arrangement to loan a Murray Civil company car to a person not employed by the company, he would not have agreed to it.

Examining the explanations given by Mr Cresnar and Mr Twomey

The Commission examined the evidence given by Mr Cresnar and Mr Twomey to establish whether it provided a credible explanation for the benefits provided to Mr Cresnar. The Commission also examined the way in which Mr Cresnar exercised his public official functions at Ausgrid to establish if there was evidence that the benefits were provided as a reward or inducement to Mr Cresnar to act favourably towards Mr Twomey or Murray Civil.

Mr Cresnar and Mr Twomey explained the provision of some of the benefits as being payments for work Mr Cresnar had performed or obtained for TGB. The Commission does not accept this explanation.

Neither Mr Cresnar nor Mr Twomey were able to provide credible details as to what work had been done or how it was costed. No evidence, whether documentary or otherwise, was provided corroborating the fact that Mr Cresnar had undertaken or found any significant work for TGB. Mr Twomey's evidence, that he knew Mr Cresnar completed tender applications for TGB only because Mr Cresnar told him so, was particularly implausible. The fact that payments were made using Murray Civil funds, not TGB funds, further undermines the claim that the benefits provided to Mr Cresnar were recompense for work he performed or found for TGB.

In relation to other benefits, Mr Cresnar could not recall why Mr Twomey had provided them or gave evidence that contradicted Mr Twomey's explanation. Mr Twomey was unable to explain in any convincing way why a Murray Civil credit card was used to benefit Mr Cresnar for work Mr Twomey claimed was carried out but which had nothing to do with Murray Civil.

Taking these matters into account, as well as the fact that neither Mr Cresnar nor Mr Twomey presented as credible witnesses, the Commission does not accept their explanations for the provision of benefits to Mr Cresnar.

In assessing why these benefits were provided, it is relevant to take into account other evidence which indicated that Mr Cresnar had exercised his public official functions to favour Murray Civil.

Change to scope of works in October 2013

On 30 October 2013, the Commission lawfully intercepted a telephone call between Mr Cresnar and an unknown male Ausgrid employee. The unknown male suggested to Mr Cresnar that the scope of a project, to be completed by Murray Civil, should be reduced. Mr Cresnar then

attempted to persuade the male not to reduce the scope of the project.

Immediately after this call, the Commission intercepted a call from Mr Cresnar to David Naughton, a project manager employed by Murray Civil. During the call, Mr Cresnar told Mr Naughton about the conversation that he had just had and went on to say:

It means the design has changed to virtually nothing. So if you can get there and fucking do a couple of trial holes and saw up the whole footpath all the way up then that'll stop that...

In his evidence to the Commission, Mr Cresnar accepted that, during the first telephone call, he had tried to persuade another Ausgrid employee not to reduce the scope of a project being undertaken by Murray Civil. Mr Cresnar also accepted that his call to Mr Naughton related to the same project. Mr Cresnar claimed that his motivation for seeking to have the original scope of work retained was because it would mean more work for Ausgrid employees at a time when job losses were anticipated. Mr Cresnar also claimed that there were good technical reasons to retain the original project design. Mr Cresnar denied that his telephone call to Mr Naughton was clear evidence of his favourable treatment of Murray Civil.

The Commission is satisfied, however, that Mr Cresnar acted to favour Murray Civil. He did this in a number of ways. First, by seeking to persuade another Ausgrid officer not to reduce the scope of work on a project for which Murray Civil was engaged. Secondly, he then warned a Murray Civil employee that there was a danger that the scope of the work would be reduced and encouraged that employee to arrange for Murray Civil to undertake certain work to prevent the scope from being reduced.

MSA Civil and Communications

On 17 December 2013, Murray Civil submitted a contractor offer to Ausgrid for a project known as the Mosman ZD East Restoration. As part of the offer, Murray Civil included a quote from MSA Civil and Communications Pty Ltd ("MSA"), which it intended to use as a subcontractor on the project. The contractor offer was received by Mr Cresnar on behalf of Ausgrid. The quote from MSA was for \$344,300 (plus GST) and Murray Civil would receive a 10% management fee as the main contractor. The quote was accepted by Ausgrid, having been forwarded for approval by Mr Cresnar.

Prior to recommending the contractor offer for approval, Mr Cresnar had been informed, in a text message from a director of MSA, that MSA was willing to complete the project for \$263,872. Mr Cresnar accepted in his evidence

that, in a return text message, he had undertaken to provide the subcontractor with confidential information about an alternative quote from the local council. He denied, however, that he ever actually supplied this information.

Mr Cresnar was then played a recording of a lawfully-intercepted telephone call during which he discussed the quote with Mr Twomey. During the conversation, he told Mr Twomey that the MSA quote was lower than a local council quote for the same project. During the public inquiry, Mr Cresnar accepted that he had used his position as an Ausgrid employee to provide Mr Twomey with information on a rival bid that would assist him to submit a quote that would be acceptable to Ausgrid.

Mr Cresnar was then asked why he recommended that the Murray Civil tender bid be accepted by Ausgrid, when he knew that the subcontractor was willing to complete the project for a lower price. Mr Cresnar told the Commission that he thought that the initial price had been based on inaccurate technical specifications, as a result of which MSA had prepared a bid that did not accurately reflect the work that needed to be done. Mr Cresnar was unable to explain why he had made that assumption.

Mr Cresnar denied that he encouraged the subcontractor to increase the quote so that Murray Civil would receive a larger management fee.

Mr Cresnar's admission, that he supplied confidential information on a rival bid to Mr Twomey, is undisputed evidence of an occasion where he performed his official functions in a way that favoured Murray Civil. The Commission finds that this disclosure was contrary to the Ausgrid code of conduct. The disclosure was of information that Mr Cresnar obtained through his position at Ausgrid, to a person with whom he had a close personal friendship and who would clearly commercially benefit as an Ausgrid contractor.

Disclosure of confidential tender information

On 16 January 2014, the Commission lawfully intercepted a telephone call between Mr Cresnar and Mr Twomey. During their conversation Mr Cresnar said, "Geez I'll tell you what mate, fucking the pricing between yourself and Dunmain – you're always just, just under. Just".

It was not disputed that "Dunmain" was a reference to Dunmain Pty Ltd, another company on the Ausgrid contractor panel, which competed for work with Murray Civil. Mr Cresnar denied that there was any impropriety in providing this information to Mr Twomey. When asked why he had done so, Mr Cresnar said, "Dunno. To cheer him up a bit. I don't know".

The Commission is satisfied that the provision of information to Mr Twomey regarding bids submitted by a rival contractor would have given him a commercial advantage and was contrary to the Ausgrid code of conduct. The provision of commercially-sensitive information by Mr Cresnar amounted to favourable treatment of Mr Twomey and Murray Civil.

Manipulation of tenders

On 7 February 2014, the Commission lawfully intercepted a telephone call to Mr Twomey from Mr Cresnar. During their conversation, Mr Cresnar said, "Yeah. Do you know, I'll tell you one thing – that cable pull you did this morning; Dunmain were actually slightly cheaper than you but I fudged the figures".

Mr Cresnar was initially unable to clarify what he meant by "fudged the figures" and indicated that he may have lied to Mr Twomey. Later in his evidence, Mr Cresnar claimed that this was a very small project for which it would have been uneconomical to employ Dunmain Pty Ltd. Mr Cresnar was, however, still unable to explain exactly what he meant by "fudged the figures".

The Commission is satisfied that the words "I fudged the figures" is a clear reference to Mr Cresnar manipulating the quoted figures provided to Ausgrid to falsely represent that the Murray Civil quote was more competitive than the Dunmain Pty Ltd quote.

Selection of subcontractors

On 1 February 2014, the Commission lawfully intercepted a telephone conversation between Mr Twomey and Mr Cresnar in which they discussed which subcontractors were to be engaged by Mr Twomey. During the conversation, Mr Cresnar said "I think you should leave these decisions to the boss, not yourself". When Mr Twomey stated that he intended to use a particular subcontractor Mr Cresnar went on to make two further comments:

I invented this, all this, so just leave it to me

...

Well don't be making promises to people without, I started all this so fucking, it's you know – it's not it's not your business.

In his evidence to the Commission, Mr Cresnar accepted that he had referred to himself as "the boss" and that his actions were inappropriate. Mr Cresnar denied, however, that the conversation was evidence of a corrupt arrangement between himself and Mr Twomey, insisting

that his only concern was to ensure that Murray Civil used the best subcontractors on Ausgrid contracts.

It was not disputed that Mr Cresnar's role as a contract inspector at Ausgrid put him in a position to positively or negatively impact the commercial success of contractors and would, therefore, potentially put him in a position to influence Mr Twomey's choice of subcontractors.

The Commission is satisfied that the conversation between Mr Cresnar and Mr Twomey is evidence that Mr Cresnar attempted to influence Mr Twomey's choice of subcontractors. This finding is supported by Mr Cresnar's admission that his actions were inappropriate. This indicates that Mr Cresnar was much more involved in the making of business decisions by Murray Civil than was consistent with his role and duties as an Ausgrid employee that was tasked with the responsibility for overseeing Murray Civil's work for Ausgrid.

There is clear evidence that Mr Cresnar favoured Murray Civil by warning of an impending reduction in the scope of work for one of its Ausgrid contracts and encouraged a Murray Civil employee to undertake certain work to prevent such a reduction. He favoured Murray Civil by recommending Ausgrid accept its bid for the Mosman ZD East Restoration project even though he knew that the relevant subcontractor was prepared to charge less than the amount quoted by Murray Civil. Mr Cresnar disclosed confidential information to Mr Twomey about rival bids and manipulated a tender process to falsely represent that Murray Civil was more competitively priced than its competitor. He involved himself in the affairs of Murray Civil to the extent of giving himself the task of determining which subcontractor Murray Civil should engage for a particular Ausgrid contract.

Mr Twomey knew that Mr Cresnar was a project planner for the northern region and believed that Mr Cresnar had the power to make recommendations as to which contractors should receive Ausgrid work. He knew Mr Cresnar was a contract inspector for Murray Civil contracts. Mr Cresnar was the Ausgrid officer with whom Mr Twomey had the most contact. When it was put to Mr Twomey that Mr Cresnar could influence what Ausgrid work was awarded to contractors and that Mr Cresnar did his job at Ausgrid in a way that favoured Murray Civil, Mr Twomey accepted these propositions were correct.

Both Mr Cresnar and Mr Twomey knew Mr Cresnar could exercise his official functions to benefit Mr Twomey's business. Examples of how Mr Cresnar exercised some of these functions to favour Mr Twomey's business are set out above. There is no doubt that Mr Cresnar obtained a number of valuable benefits from Mr Twomey. The logical inference, which the Commission draws in the absence of any other plausible explanation, is that these benefits were

provided and accepted in return for Mr Cresnar exercising his public official functions to favour Mr Twomey's business.

Mr Murray's knowledge of purchases made with Murray Civil funds

Mr Murray confirmed that both he and Mr Twomey had credit cards linked to a single Murray Civil credit card account and that private purchases were classified, for accounting purposes, as company loans to be repaid at the end of the financial year. Mr Murray accepted that Ms Wang had asked him about some purchases that were later identified as having been made for the benefit of Mr Cresnar, although he was unaware of this at the time. Mr Murray's recollection was that, if he did not recognise the purchase and it did not relate to Murray Civil, he would have told Ms Wang to assign it to Mr Twomey. Ms Wang's evidence contradicted Mr Murray's to some extent, in that she told the Commission that Mr Murray had instructed her to allocate some of the relevant expenses between the two directors. Nevertheless, the Commission is not satisfied there is sufficient evidence to support the proposition that Mr Murray was aware that company funds were being used for the benefit of Mr Cresnar.

Disclosure of information about the investigation

During the course of the investigation, an issue arose regarding the disclosure by Mr Twomey of his attendance at a compulsory examination.

On 14 April 2014, Mr Twomey was summonsed to appear before the Commission for a compulsory examination. The summons served on Mr Twomey noted that it was an offence under s 114 of the ICAC Act to disclose information about the summons, including the existence of the summons, which would be likely to prejudice the Commission's investigation.

During the compulsory examination, Mr Twomey was asked when he had last met Mr Cresnar. He told the Commission that he had met Mr Cresnar the week before the compulsory examination. Mr Twomey admitted that he had disclosed to Mr Cresnar that he had been summonsed to appear before the Commission and that he asked Mr Cresnar what the investigation was about. Mr Twomey accepted that they had discussed the wall unit that he purchased for Mr Cresnar.

During the public inquiry, Mr Twomey was asked about the disclosure of information regarding his attendance at a compulsory examination. He gave the following evidence:

[Counsel Assisting]: *It follow[s] doesn't it that you knew you were committing an offence in talking to him about that. You would agree with that?*

[Mr Twomey]: *I suppose, yes, I would.*

Mr Twomey's actions, in discussing the fact that he was required to give evidence at a compulsory examination and aspects of the investigation, provided Mr Cresnar with information about the investigation that he would not otherwise have had. The meeting also gave Mr Cresnar the opportunity to discuss Mr Twomey's evidence and potentially to tailor the evidence that he would later give.

Mr Twomey's admission, that he knew he was committing an offence when he discussed the matter with Mr Cresnar, indicates that he knew that the disclosure of information was in breach of the requirement not to disclose information that would be likely to prejudice the Commission's investigation.

Corrupt conduct

Mr Cresnar

The Commission is satisfied that, between 2012 and 2014, Mr Cresnar accepted benefits from Mr Twomey to the value of \$50,506, the use of a Murray Civil Bunnings trade card and the use of a Murray Civil company car. Mr Cresnar accepted these benefits knowing that they were intended to influence him to exercise his public official functions to show favour, or not to show disfavour, to Mr Twomey's business in relation to its work for Ausgrid. This conduct on the part of Mr Cresnar is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct of a public official that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of his official functions.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Cresnar committed criminal offences under s 249B(1)(b) of the Crimes Act of receiving a benefit the receipt of which would tend to influence him to show favour, or not to show disfavour, to Mr Twomey's business in relation to the affairs or business of Ausgrid.

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

Mr Twomey

The Commission is satisfied that, between 2012 and 2014, Mr Twomey provided Mr Cresnar with benefits to the value of \$50,506, the use of a Murray Civil Bunnings trade card and the use of a Murray Civil company car. Mr Twomey provided these benefits knowing that they would tend to influence Mr Cresnar to exercise his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Twomey's business in relation to its work for Ausgrid. This conduct on the part of Mr Twomey is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by Mr Cresnar.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Twomey committed criminal offences under s 249B(2)(b) of the Crimes Act by giving a benefit, at the request of Mr Cresnar, the receipt of which would tend to influence Mr Cresnar to show favour, or not to show disfavour, to Mr Twomey's business in relation to the affairs or business of Ausgrid.

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

Section 74A(2) statements

The Commission is satisfied that Mr Cresnar and Mr Twomey are affected persons as defined in s 74A(3) of the ICAC Act.

Mr Cresnar

The evidence Mr Cresnar gave was the subject of a direction under s 38 of the ICAC Act and, therefore, cannot be used against him in criminal proceedings, except for offences under the ICAC Act. However, there are admissible financial records, bank statements and invoices to show that Mr Cresnar received benefits from Mr Twomey. There are recordings of lawfully-intercepted telephone calls to show that Mr Cresnar exercised his public official functions in a way that favoured Murray Civil.

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 Cresnar for offences of receiving

corrupt payments or rewards pursuant to s 249B(1)(b) of the Crimes Act in relation to the:

- receipt of a marble bath and two marble toilets in September 2012, valued at \$7,819.47
- receipt of imported marble tiles in December 2012, valued at USD \$3,640 (approximately \$3,534)
- receipt of bathroom fittings in February 2013, valued at \$1,122.68
- receipt of bathroom fittings in March 2013, valued at \$8,135.60
- receipt of a Bernina sewing machine in November 2013, valued at \$1,799
- receipt of a custom made wall unit in November 2013, valued at \$22,396
- receipt of a Rinnai fireplace in December 2013, valued at \$5,699.25
- use of a Murray Civil company vehicle for the 2012–13 and 2013–14 summer holiday periods
- use of a Murray Civil Bunnings charge card.

Mr Twomey

The evidence Mr Twomey gave was the subject of a direction under s 38 of the ICAC Act and therefore cannot be used against him in criminal proceedings, except for an offence under the ICAC Act. However, there are admissible financial records, bank statements and invoices to show that Mr Cresnar received benefits from Mr Twomey. There are recordings of lawfully-intercepted telephone calls to show that Mr Cresnar exercised his public official functions in a way that favoured Murray Civil.

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 Twomey for offences of giving corrupt rewards pursuant to s 249B(2)(b) of the Crimes Act in relation to the goods and benefits received by Mr Cresnar.

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to prosecuting Mr Twomey for the offence of disclosing information about a Commission summons that was likely to prejudice a Commission investigation, pursuant to s 114(1) of the ICAC Act.

Chapter 5: Ausgrid subcontractors

This chapter contains details of the Commission’s investigation and findings in relation to Mr Cresnar’s dealings with three companies engaged as subcontractors on Ausgrid projects. Two of the companies, Cloughcor Pty Ltd (“Cloughcor”) and Fer-Aim Pty Ltd (“Fer-Aim”), were engaged by Diona Pty Ltd (“Diona”), a company that was on the Ausgrid contractor panel. The third company, MDM Formwork Pty Ltd (“MDM”), was engaged as a subcontractor by Murray Civil.

Cloughcor Pty Ltd

Eamon Burke established Cloughcor in around 2006. He remains the company’s sole director and shareholder. Between 2011 and 2012, Cloughcor was a subcontractor to Diona, which was on the Ausgrid contractor panel. During this period, Cloughcor received the majority of its work from Diona; all of which related to Ausgrid contracts. Cloughcor received approximately \$9 million for this work.

Mr Burke regularly dealt with Mr Cresnar when he visited Ausgrid sites at which Cloughcor was undertaking work. He was aware that Mr Cresnar was an Ausgrid contract inspector and that he was responsible for overseeing work undertaken by Cloughcor, making recommendations in relation to contract variation claims submitted by Cloughcor through Diona, and issuing non-compliance notices. Mr Burke told the Commission that he had no personal relationship with Mr Cresnar outside of work.

Cloughcor company cheques used by Mr Cresnar

Mr Cresnar accepted that he used four Cloughcor company cheques to purchase goods, as outlined below.

Date	Item	Value
19 April 2011	Cheque number 000111 made payable to Gosford Quarries	\$5,810
26 May 2011	Cheque number 000119 made payable to Dan Kitchens	\$60,024
17 June 2011	Cheque number 000123 made payable to Miele Australia	\$21,093
5 November 2011	Cheque number 001013 made payable to Architectural Decor	\$12,400
Total		\$99,327

Why were cheques provided to Mr Cresnar?

Mr Burke accepted that all four Cloughcor company cheques were signed by him. Mr Cresnar admitted that the other writing on the cheques was his or that of retailers from whom he purchased goods. Mr Burke agreed that none of the items purchased was for Cloughcor.

Mr Burke told the Commission that, on occasion, he signed company cheques without filling in any other details. Mr Burke said that signed cheques were given to Cloughcor drivers who were instructed to fill out the remaining details when they paid for the disposal of construction waste or other goods. Mr Burke was the only authorised signatory for company cheques. He told the Commission that the company cheque book was under his control and was normally left in his work vehicle.

Mr Burke accepted that the cheques had been drawn against the company account, but he provided no explanation as to how Mr Cresnar came into possession of them.

Mr Burke told the Commission that, prior to 2013, Cloughcor's office administration was dealt with by his wife, Mary Burke. Mrs Burke told the Commission that, as part of her role, she checked the company bank statements and, for tax purposes, made handwritten annotations next to entries to identify what they related to. She said that, if she was unsure what a particular entry was for, she asked her husband.

Mrs Burke was shown copies of the company bank statements relating to three of the cheques used by Mr Cresnar. She confirmed that she had made handwritten notes next to each entry, describing the Gosford Quarry purchase as haulage hire, the Dan Kitchens purchase as materials, and the Miele Australia purchase as materials. Mrs Burke told the Commission that she would have asked her husband about the purchases and he would have given her the information she wrote on the bank statements.

Mrs Burke said that, as a result of the cheque for \$60,024 being presented, the company account became overdrawn by more than \$40,000. As a result of this overdraft, Mrs Burke transferred money from the company's online saver account to restore a positive balance in the main company account. Mrs Burke told the Commission that, despite the fact that one of the cheques had overdrawn the company account by over \$40,000 and there were no receipts accompanying the transactions, she was content to leave any further enquiries to her husband or the company's accountant.

Mr Burke accepted that he probably did speak to his wife about the four cheques. He also accepted that the descriptions on the company bank statements were untrue as none of the cheques had been used to purchase materials or haulage hire for Cloughcor.

Mr Burke told the Commission that he was aware that the cheques had been cashed but claimed he had no knowledge of what the cheques were used for until he was asked about them in a compulsory examination.

Mr Burke's inability to explain why he gave his wife incorrect information about the use of the cheques was not credible and unconvincing. The Commission does not accept Mr Burke's claim that he was unaware of how the cheques came into Mr Cresnar's possession.

During a compulsory examination in April 2014, prior to the public inquiry, Mr Cresnar said that he had found a signed, but otherwise blank, Cloughcor cheque in the letter box at his home and that he had used the cheque to pay Dan Kitchens. Mr Cresnar said that he remembered this because it was a difficult thing to forget.

During the public inquiry, Mr Cresnar told the Commission that, in 2011, as part of his duties with Ausgrid, he visited Mr Burke at an Ausgrid work site, where he was told

to sign a site safety register, known as the HAC book. Mr Cresnar claimed that, when he opened the HAC book, which was in Mr Burke's vehicle, he found a signed Cloughcor company cheque that he presumed had been left there for him. Mr Cresnar said that he took the cheque and used it to purchase goods from Gosford Quarries.

Mr Cresnar told the Commission that on three further occasions he found cheques in the HAC book, which he presumed were left there for him, and that he removed the cheques and used them to purchase goods.

Mr Cresnar was asked to explain the inconsistency between the evidence he gave at the compulsory examination and the evidence he gave at the public inquiry. He said that during the compulsory examination he had confused the Cloughcor cheques with pay cheques, made out to cash, which had been left in his letter box for a flat mate.

Mr Cresnar told the Commission that he had no specific conversation with Mr Burke about the cheques he claimed to have found in the HAC book. He gave varying reasons for his assumption that the cheques had been left for him; at one point he said that it was because he had suggested that Mr Burke purchase a road saw, and on another occasion said that he believed the cheques were left because Mr Burke was happy with the way his business was going.

Later in the public inquiry, Mr Cresnar gave the following evidence:

[Counsel Assisting]: All right. So, Mr Cresnar, you were taking Mr Burke's cheques because you thought he believed you could influence the work that he got for his company. Correct?

[Mr Cresnar]: Seems like it yep.

The Commission accepts this evidence as an acknowledgment by Mr Cresnar that he used Cloughcor company cheques to purchase items for his personal use and that he understood these cheques were given to him by Mr Burke to influence him to exercise his public official duties in a manner favourable to Mr Burke. This conclusion is reinforced by the following evidence given by Mr Cresnar:

[Counsel Assisting]: Isn't it the case that you were quite worried when Mr Burke said words to the effect of someone's been asking questions?

[Mr Cresnar]: That's right.

[Q]: An [sic] you were worried because you knew that you had

purchased many things with Mr Burke's company funds?

[A]: Correct.

[Q]: *And you knew you had good reason to be worried about it because you knew that those purchases were corrupt?*

[A]: Correct.

The Commission does not accept that Mr Cresnar found the cheques and presumed that they were for him without having any discussion with Mr Burke. Mr Cresnar's evidence regarding how he came into possession of the Cloughcor company cheques was inconsistent with his earlier evidence and implausible.

The Commission does not accept Mr Burke's claim that he did not know that the cheques had been used by Mr Cresnar until it was brought to his attention during a compulsory examination. It is inconceivable that, as Cloughcor's sole director, shareholder and account signatory, Mr Burke had no knowledge of the use of four cheques to a total value of almost \$100,000, which were paid over a relatively short period of eight months. This represented a significant impost for his business. Mr Burke's claim is contradicted by the undisputed evidence of his wife, who told the Commission that she asked her husband about the purchases and that the information recorded on the company bank statements, which was later admitted to be false, was provided by him. The provision of false explanations to his wife is consistent with an appreciation on his part that the cheques were being used for an improper purpose.

Mr Burke knew that, as a contract inspector, Mr Cresnar oversaw Cloughcor's work for Ausgrid, made recommendations that could result in approval for variations submitted by Cloughcor and could issue non-compliance notices with respect to Cloughcor's work. He understood that Mr Cresnar's actions could impact on Cloughcor's business either by Mr Cresnar favouring Cloughcor or by showing disfavour.

The Commission is satisfied that Mr Burke provided the cheques to Mr Cresnar knowing that Mr Cresnar would use them for his personal benefit. He provided the cheques as an inducement or reward to influence Mr Cresnar to show favour, or not to show disfavour, to Mr Burke's business. The Commission is satisfied that Mr Cresnar accepted and used the cheques on this basis.

Disclosure of information relating to the investigation

During the investigation, the Commission became aware that Mr Burke may have told Mr Cresnar that he had been summonsed to appear before a compulsory examination at a time when Mr Cresnar was not aware that his activities were being investigated.

When Mr Burke appeared before the Commission for a compulsory examination on 31 January 2014, he was asked about the cheques that he provided to Mr Cresnar. At the start of the compulsory examination, Mr Burke was warned that he should not disclose any information about the examination, including the fact that he had been called to give evidence. At the end of the compulsory examination, Mr Burke was told "You are not allowed to discuss the fact that you've been here or any of the evidence with anyone and it is an offence for you to do so. Do you understand?". Mr Burke confirmed that he did understand.

During the public inquiry, Mr Burke accepted that, following his attendance at the compulsory examination, he telephoned Mr Cresnar and arranged to, and subsequently did, meet him. He said that he did this because he wanted to find out what was going on and what he was involved in, and also because his wife had been summonsed to attend a compulsory examination on 19 February 2014. Mr Burke was then played a recording of a lawfully-intercepted telephone call on 17 February 2014 between himself and Mr Cresnar.

Mr Burke accepted that he told Mr Cresnar during the call that their relationship was being investigated and that they needed to meet. Mr Burke also accepted that he told Mr Cresnar that they should meet somewhere out of public view because he did not want anyone to see them together. Mr Burke said that he knew when he telephoned Mr Cresnar that it was in breach of a Commission order.

An hour after Mr Burke's call, Mr Cresnar made a telephone call to Mr Twomey that was lawfully intercepted by the Commission. Mr Cresnar told Mr Twomey that he had been contacted by someone and that questions had been asked about their relationship. Mr Cresnar went on to say, "Could be a big problem, lad, big problem".

Mr Cresnar accepted that it was Mr Burke's telephone call that first alerted him to the Commission's investigation and that prior to the telephone call he was unaware that his activities were under investigation.

Corrupt conduct

Mr Cresnar

The Commission is satisfied that, between about April and November 2011, Mr Cresnar accepted four cheques from Mr Burke that Mr Cresnar used to purchase goods for personal use to the value of \$99,327. Mr Cresnar accepted these benefits knowing that they were intended to influence him to exercise his public official functions to show favour, or not to show disfavour, to Mr Burke's business in relation to its work for Ausgrid. This conduct on the part of Mr Cresnar is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct of a public official that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of his official functions.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Cresnar committed offences under s 249B(1)(b) of the Crimes Act of receiving a corrupt reward that would tend to influence him to show favour, or not to show disfavour, to Mr Burke's business in relation to the affairs or business of Ausgrid.

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

Mr Burke

The Commission is satisfied that, between about April and November 2011, Mr Burke gave Mr Cresnar four cheques to purchase items for his own use. Mr Burke was aware the cheques were used by Mr Cresnar to purchase items to the value of \$99,327. Mr Burke provided the cheques knowing that they would tend to influence Mr Cresnar to exercise his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Burke's business in relation to its work for Ausgrid. This conduct on the part of Mr Burke is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct that could adversely affect, either directly or indirectly, the honest or impartial exercise of Mr Cresnar's official functions.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Burke committed offences under s 249B(2)(b) of the Crimes Act of giving a corrupt reward

that would tend to influence Mr Cresnar to show favour, or not to show disfavour, to Mr Burke's business in relation to the affairs or business of Ausgrid.

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

Section 74A(2) statements

The Commission is satisfied that Mr Cresnar and Mr Burke are affected persons for the purposes of s 74A(2) of the ICAC Act.

Mr Cresnar

The evidence Mr Cresnar gave was the subject of a direction under s 38 of the ICAC Act and, therefore, cannot be used against him in criminal proceedings, except for prosecution of an offence under the ICAC Act. However, there are admissible financial records, bank statements and invoices to show that Mr Cresnar received benefits from Mr Burke. There are also admissible business records to show that Mr Cresnar's employment with Ausgrid afforded him the opportunity to show favour, or not to show disfavour, to Mr Burke.

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 Cresnar for corruptly receiving benefits the receipt of which would tend to influence Mr Cresnar to show favour, or not to show disfavour, to Mr Burke in relation to the affairs of Ausgrid, contrary to s 249B(1)(b) of the Crimes Act, in respect of Cloughcor company cheque numbers 000111, 000119, 000123 and 001013.

Mr Burke

The evidence Mr Burke gave was the subject of a direction under s 38 of the ICAC Act and therefore cannot be used against him in criminal proceedings, except for prosecution of an offence under the ICAC Act. However, there are admissible financial records, bank statements and invoices to show that Mr Burke provided benefits to Mr Cresnar. There are admissible business records to show that Mr Cresnar's employment with Ausgrid afforded him the opportunity to show favour, or not to show disfavour, to Mr Burke.

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 Burke for corruptly giving benefits the receipt of which would tend to influence Mr Cresnar to show favour, or not to show disfavour, to Mr Burke in relation to the affairs of Ausgrid, contrary

to s 249B(2)(b) of the Crimes Act, in respect of the four cheques, listed above, provided to Mr Cresnar.

In relation to the telephone conversations and meeting between Mr Burke and Mr Cresnar, during which Mr Burke disclosed that he had been summonsed to a compulsory examination and that Mr Cresnar was the subject of an investigation, consideration should also be given to obtaining the advice of the DPP with respect to the prosecution of Mr Burke for disclosing information contrary to an order made under s 112(1) of the ICAC Act.

Fer-Aim Pty Ltd

Fer-Aim was established in 2008 by Patrick Miskelly. Fer-Aim was a subcontractor for Diona. All of the work done by Fer-Aim for Diona related to Ausgrid contracts and, at various stages, Fer-Aim was employed exclusively by Diona. In 2010–11, Fer-Aim was paid over \$3 million for working as a subcontractor for Diona on Ausgrid projects.

Mr Miskelly first met Mr Cresnar in 2009, when Mr Cresnar was a contract inspector overseeing Diona contracts. Mr Miskelly also began to socialise with Mr Cresnar, who attended Christmas parties hosted by Fer-Aim. He ceased to have contact with Mr Cresnar in 2011, when Fer-Aim stopped subcontracting for Diona.

Mr Miskelly accepted that, as a contract inspector, Mr Cresnar was in a position to affect Fer-Aim's commercial success as a result of his ability to impose non-compliance notices, validate contract variations submitted by Fer-Aim (via Diona) and provide positive or negative reviews on Fer-Aim's performance to senior Ausgrid managers.

Benefits provided by Mr Miskelly

In June and July 2010, Mr Miskelly used his personal credit card to purchase two international flight tickets for Mr Cresnar for a total of \$2,652.41. At this time, Mr Cresnar was the contract inspector for a number of projects in which Diona was the contractor and Fer-Aim was the subcontractor.

Mr Miskelly told the Commission that he purchased the flight tickets as a "thank you" for help that Mr Cresnar had given him with construction work at his home. He initially claimed the work was done over at least three weekends but later told the Commission it was done over "at least four or five weekends". He initially told the Commission the work involved building a patio but later said that the work involved a driveway. Mr Miskelly said that Mr Cresnar had helped him with the work because of the friendship they had developed since meeting in 2009.

Mr Cresnar told the Commission that he thought the tickets had been purchased by Mr Bastow. It was only after reading transcripts of Mr Miskelly's evidence during the public inquiry that he realised that they had been purchased by Mr Miskelly. Mr Cresnar claimed that the tickets had been given to him because he helped with building work at Mr Miskelly's home and that he had forgotten about the work until he was reminded that Mr Miskelly had purchased the tickets.

Why were benefits provided to Mr Cresnar?

Mr Miskelly told the Commission that he had purchased the tickets because Mr Cresnar had refused to accept cash for the work he did at Mr Miskelly's home. Mr Miskelly was, however, vague about the details surrounding the purchase of the tickets, the travel destination, the amount of work carried out by Mr Cresnar and the period of time over which the work was done.

Mr Cresnar had no detailed recollection of the work he was supposed to have carried out at Mr Miskelly's home, despite the fact that it was said to have taken place over a number of weekends.

As a result of Mr Cresnar and Mr Miskelly's inability to describe, with any degree of specificity, the nature of the work said to have been undertaken, and the time it took to complete, the Commission does not accept that Mr Cresnar undertook any or any significant work at Mr Miskelly's home. The Commission is not satisfied that the tickets were provided for the reasons advanced by Mr Miskelly and Mr Cresnar.

Mr Miskelly said that he knew Mr Cresnar was in a position to affect Fer-Aim's profitability as a result of his position at Ausgrid and that negative reviews of Fer-Aim's performance by Mr Cresnar could also affect its ability to undertake work on behalf of Diona.

The Commission is satisfied that the tickets were provided in order to influence the way in which Mr Cresnar exercised his public official functions.

Mr Cresnar's failure to disclose to Ausgrid that he had received airline tickets from a subcontractor further reinforces the conclusion that they were not legitimate benefits provided on account of work carried out by Mr Cresnar in his private capacity.

Mr Miskelly confirmed he met Mr Cresnar at a pub in Rouse Hill at Christmas 2013, shortly after being contacted by the Commission regarding the investigation. Mr Miskelly said that Mr Cresnar had telephoned him to arrange the meeting and that he had asked Mr Cresnar to telephone him back on a landline as he feared that their call was being

recorded. Mr Miskelly denied that he had discussed the investigation with Mr Cresnar and claimed that the fact the meeting coincided with him becoming aware of the Commission's investigation was a coincidence.

The Commission does not accept that Mr Miskelly did not discuss the investigation with Mr Cresnar. This finding is supported by Mr Miskelly's evidence that he took steps to ensure that the contents of his telephone call to Mr Cresnar were not recorded and that he had very little contact with Mr Cresnar after 2011. This evidence, and the fact that the meeting occurred in such close proximity to Mr Miskelly being contacted by the Commission, satisfies the Commission that the purpose of the meeting was to discuss the Commission's investigation and what explanation Mr Miskelly and Mr Cresnar would provide to the Commission for the tickets provided to Mr Cresnar.

The Commission also takes into account Mr Cresnar's admission that he received cheques from Mr Burke because he understood that Mr Burke believed he could influence the amount of Ausgrid work Mr Burke could get for his company. Mr Burke's company was also a subcontractor for Diona. Mr Cresnar's willingness to accept improper benefits from a subcontractor, in a similar commercial position to Fer-Aim, makes it more likely that he was willing to accept improper benefits from Mr Miskelly.

The Commission is satisfied that the tickets were provided and accepted for the purpose of influencing Mr Cresnar to exercise his public official functions to show favour, or not to show disfavour, to Mr Miskelly's business.

Corrupt conduct

Mr Cresnar

The Commission is satisfied that, in 2010, Mr Cresnar accepted from Mr Miskelly two international flight tickets worth a total of \$2,652.41, knowing that they were intended to influence him to exercise his public official functions to show favour, or not to show disfavour, to Mr Miskelly's business in relation to its work for Ausgrid. This conduct on the part of Mr Cresnar is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct of a public official that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of his official functions.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Cresnar committed criminal offences under s 249B(1)(b) of the Crimes Act of receiving a

corrupt reward that would tend to influence him to show favour, or not to show disfavour, to Mr Miskelly's business in relation to the affairs or business of Ausgrid.

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

Mr Miskelly

The Commission is satisfied that, in 2010, Mr Miskelly gave Mr Cresnar two international flight tickets worth \$2,652.41. Mr Miskelly provided these tickets knowing that they would tend to influence Mr Cresnar to exercise his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to Mr Miskelly's business in relation to its work for Ausgrid. This conduct on the part of Mr Miskelly is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct that could adversely affect, either directly or indirectly, the honest or impartial exercise of Mr Cresnar's official functions.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Miskelly committed offences under s 249B(2)(b) of the Crimes Act of providing a corrupt reward that would tend to influence Mr Cresnar to show favour, or not to show disfavour, to Mr Miskelly's business in relation to the affairs or business of Ausgrid.

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

Section 74A(2) statements

The Commission is satisfied that Mr Cresnar and Mr Miskelly are affected persons for the purposes of s 74A(2) of the ICAC Act.

Mr Cresnar

The evidence that Mr Cresnar gave was the subject of a direction under s 38 of the ICAC Act and, therefore, cannot be used against him in criminal proceedings, except for prosecution of an offence under the ICAC Act. However, there are admissible financial records, bank statements and invoices to show that Mr Cresnar received international airline tickets from Mr Miskelly. There are also admissible business records to show that Mr Cresnar's employment with Ausgrid afforded him the opportunity to show favour, or not to show disfavour, to Mr Miskelly.

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 Cresnar for the offence of receiving a corrupt reward, contrary to s 249B(1)(b) of the Crimes Act, in relation to the receipt of airline tickets valued at \$2,652.41 from Mr Miskelly.

Mr Miskelly

The evidence that Mr Miskelly gave was the subject of a direction under s 38 of the ICAC Act and, therefore, cannot be used against him in criminal proceedings, except for prosecution of an offence under the ICAC Act. However, there are admissible financial records, bank statements and invoices to show that Mr Cresnar received international airline tickets from Mr Miskelly. There are also admissible business records to show that Mr Cresnar's employment with Ausgrid afforded him the opportunity to show favour, or not to show disfavour, to Mr Miskelly.

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 Miskelly for giving a corrupt reward, contrary to s 249B(2)(b) of the Crimes Act, in relation to the purchase of airline tickets valued at \$2,652.41 for Mr Cresnar.

MDM Formwork Pty Ltd

MDM was established in 2012 by John Madden and Fergal McGann. The company was engaged as a subcontractor by Murray Civil, completing road and pavement reinstatement work on Ausgrid projects.

Although Mr Madden and Mr McGann had previously met Mr Cresnar through a mutual friend, their first contact with him in a professional capacity was in 2013, when they were working on an Ausgrid project in Lindfield, Sydney. Mr Cresnar was the Ausgrid contract inspector on the Lindfield project and was responsible for conducting site inspections, as a result of which he came into regular contact with Mr Madden and Mr McGann.

The value of the Lindfield contract to MDM was in excess of \$100,000. In their written submission to the Commission, Mr Madden and Mr McGann accepted that the work provided by Murray Civil was of considerable value to their company, amounting to approximately \$300,000 in 2013.

Cash payments to Mr Cresnar

When asked if he had had any work-related meetings with Mr Cresnar, away from Ausgrid work sites, Mr McGann told the Commission that he and Mr Madden had met Mr Cresnar on 20 January 2014 at the Greengate Hotel,

Lindfield. Mr McGann said that the meeting was to discuss the Lindfield project. He denied that either he or Mr Madden had given anything to Mr Cresnar during the meeting.

Mr McGann was then played a recording of a lawfully-intercepted telephone call between Mr Cresnar and himself made at 1.35 pm on 20 January 2014. During the telephone call, Mr McGann discussed arrangements for the meeting, which was to be held later the same day, and said to Mr Cresnar, "we want to sort you out".

Mr McGann told the Commission that he could not recall what he meant by "we want to sort you out" but claimed that he was not referring to payment of money to Mr Cresnar.

Mr McGann was then shown surveillance footage taken during the meeting on 20 January 2014, which showed him handing an envelope to Mr Cresnar, who immediately placed it in his pocket. When asked what he had given Mr Cresnar, he said, "That could be drawings for all I remember". Mr McGann then claimed that Mr Cresnar sometimes priced jobs for MDM and that the drawings may have been provided to assist him to price tenders.

On 20 January 2014, shortly after Mr McGann's telephone conversation with Mr Cresnar, but before the three men met, Mr Madden withdrew \$2,500 from the MDM business account. Video security footage from the bank showed that the money was immediately placed in an envelope and sealed by Mr Madden before he left the bank.

When asked about the envelope Mr McGann gave to Mr Cresnar, Mr Madden, who had been present during Mr McGann's evidence claimed, "Well, maybe it was drawings or something. I don't know". Mr Madden then told the Commission that Mr Cresnar had assisted MDM to price jobs but that he could not remember paying him any money in return.

Mr Madden was then played a recording of a lawfully-intercepted telephone call between himself and Mr Cresnar that was made on 20 December 2013, a month before their meeting on 20 January 2014, during which the following conversation took place:

[Mr Madden]: *No you're grand, you're grand, listen just ringin ya, how much was ah was that Lindfield job?*

[Mr Cresnar]: *Ah can't remember. Was it 180 or something?*

[Mr Madden]: *No, but what did you agree with Fergal for that for me?*

[Mr Cresnar]: *Oh same as the job before.*

[Mr Madden]: *How much was that, I can't fucking remember.*

[Mr Cresnar]: *Five*

[Mr Madden]: *5, so 2 and a half each.*

[Mr Cresnar]: *5 each I think it was.*

[Mr Madden]: *5 each?*

[Mr Cresnar]: *Yeah.*

[Mr Madden]: *Jesus it was never 5 each was it?*

[Mr Twomey]: *Yeh because I said to them just 5 each. He says he says a fuck he says. And then I said look —*

...

[Mr Cresnar]: *I reckon you should ring him up and say something mate.*

[Mr Twomey]: *Nah, fuck him. Just get them jobs over and done with and that's it.*

Mr Madden was unable to give any reasonable explanation as to the meaning of this conversation other than to say that it did not refer to any sort of payment.

When asked about the telephone call between himself and Mr McGann on 20 January 2014, Mr Cresnar claimed that Mr Madden and Mr McGann had left the Greengate Hotel with him after their meeting and gone to another location where they gave him a bottle of whiskey. Mr Cresnar said that this was what Mr McGann was referring to when he said he wanted to sort Mr Cresnar out.

Neither Mr McGann nor Mr Madden gave this explanation to the Commission when they gave their evidence and it was not put to them, on behalf of Mr Cresnar, that they had given him a bottle of whiskey.

Mr Cresnar claimed that the sums referred to in the telephone conversation of 20 December 2013, between himself and Mr Madden, did relate to money but that he and Mr Madden were discussing a quote for construction work rather than a payment to Mr Cresnar.

Mr Cresnar, who gave evidence after Mr Madden and Mr McGann, said that the envelope handed over at the meeting on 20 January 2014 contained drawings of a school and that he was going to assist MDM to prepare a tender submission relating to the school. Mr Cresnar was unable to provide any specific details of the contract or the school involved.

On 22 December 2013, the Commission lawfully intercepted a telephone call between Mr Cresnar and Mr Twomey, during which the following conversation took place:

[Mr Cresnar]: *— unlike that fucking John Madden ringing me up.*

[Mr Twomey]: *Yeh.*

[Mr Cresnar]: *That was definitely 5 on that one, cause I remember we wanted 20 and then they*

...

[Mr Twomey]: *Yeh.*

[Mr Cresnar]: *I thought I swear it was I thought, it definitely was man cause I remember saying, I remember saying fucking at the start, fucking 20 you know? And then they were fucking then they we settled for 10 mate.*

[Mr Twomey]: *Yeh.*

[Mr Cresnar]: *Anyway, he's fucking done his dough this time.*

...

He said to me, he said and will there be much work coming up next year, and I said oh yeah there'll be some (indecipherable) do you know what I mean?

[Mr Cresnar]: *Yeah.*

[Mr Twomey]: *Because I want you to get your share.*

[Mr Cresnar]: *Right.*

[Mr Twomey]: *Because what he what he said to me has [sic] says don't say nothing to Phil he says.*

...

What a prick. And I, I knew very well it was 5 because you said it to me and I —

[Mr Cresnar]: *I thought I swear it was I thought, it definitely was man cause I remember saying, I remember saying fucking at the start, fucking 20 you know? And then they were fucking then they we settled for 10 mate.*

[Mr Twomey]: *Yeh.*

[Mr Cresnar]: *Anyway, he's fucking done his dough this time.*

Mr Cresnar was unable to provide the Commission with any explanation as to the meaning of the conversation.

Mr McGann's evidence was evasive and unconvincing. On a number of occasions he altered his evidence after being shown material that contradicted an account he had previously given.

Mr McGann was unable to explain what he meant by “we want to sort you out” in the telephone call of 20 January 2014. The Commission is satisfied that by using the term “we” Mr McGann was referring to himself and at least one other person, and that the other person was Mr Madden. The Commission is also satisfied that, if the comment had related to a bottle of whiskey, Mr McGann would have given this explanation in his evidence.

After initially stating that nothing had been handed over at the meeting on 20 January 2014, Mr McGann changed his evidence when faced with surveillance footage showing him passing something to Mr Cresnar. It was only after being shown this footage that Mr McGann put forward the explanation that Mr Cresnar carried out work on behalf of MDM and that he may have handed over a drawing for a school.

Mr McGann’s inability to provide any details about the work that he claimed Mr Cresnar had carried out on behalf of MDM further undermined his credibility.

Mr McGann and Mr Madden were the only directors of MDM, they worked together on a daily basis and lived at the same address. The Commission is satisfied that both men shared responsibility for the running of the business and that decisions were made jointly between them. This finding is supported by evidence contained in Mr Madden’s telephone call to Mr Cresnar on 20 December 2013 during which he said, “what did you agree with Fergal for that for me?”. The Commission is satisfied that Fergal is a reference to Mr McGann. The Commission is satisfied that, if a payment was made to Mr Cresnar on 20 January 2014, both Mr McGann and Mr Madden would have been parties to the payment.

In the telephone conversation of 20 December 2013, Mr Madden and Mr Cresnar appear to discuss a payment that Mr Madden and Mr McGann were going to make in relation to the Lindfield project. The contents of the conversation indicate that Mr Madden believed that the payment should be \$2,500 to each of the parties involved while Mr Cresnar believed that it should be higher. It is of particular note that the payment appears to be related to the value of the Lindfield project, for which Mr Cresnar was the contract inspector. Mr Madden was unable to provide any explanation for the conversation, other than to say it was not about a payment to Mr Cresnar.

In the telephone call of 22 December 2013, Mr Cresnar and Mr Twomey discussed Mr Cresnar’s conversation with Mr Madden and a payment that he was going to make. This conversation supports the proposition that payments were linked to work that MDM was receiving from Murray Civil.

Mr Madden, who was present during Mr McGann’s evidence, was also unable to provide any details about what was handed over to Mr Cresnar at the meeting on 20 January 2014, other than to repeat the evidence given by Mr McGann.

Mr Madden told the Commission that he withdrew \$2,500 from the MDM business account shortly before the meeting with Mr Cresnar. He said that the money was to be used to purchase materials but was unable to provide any specific details.

The inconsistent and implausible accounts given by Mr Madden, Mr McGann and Mr Cresnar about the meeting of 20 January 2014 undermined their credibility to such an extent that the Commission cannot accept the truthfulness of their evidence.

The Commission is satisfied that the telephone calls of 20 December 2013, 22 December 2013 and 20 January 2014 indicate that there was an agreement to provide a payment to Mr Cresnar, and that Mr Madden believed that the payment should be \$2,500. This finding is supported by the fact that \$2,500 was withdrawn from the MDM business account shortly before the meeting on 20 January 2014.

The Commission is satisfied that Mr McGann gave Mr Cresnar \$2,500 on 20 January 2014 and that both Mr Madden and Mr McGann were a party to the transaction.

Why was Mr Cresnar given \$2,500?

It was not denied that Mr Cresnar’s position at Ausgrid provided him with the opportunity to favour particular contractors. In his evidence, Mr Twomey accepted that Mr Cresnar exercised his public official functions in a way that favoured Murray Civil.

The Commission is satisfied that Mr Cresnar used his position to influence Mr Twomey in relation to his use of subcontractors. This finding is supported by the telephone call previously referred to between Mr Twomey and Mr Cresnar on 1 February 2014, during which Mr Cresnar challenged Mr Twomey regarding his use of subcontractors. It is also supported by the telephone call of 22 December 2013, during which Mr Twomey and Mr Cresnar discussed the payment from MDM and whether they should be used as subcontractors again.

The Commission is satisfied that Mr Madden and Mr McGann made a \$2,500 cash payment to Mr Cresnar knowing that he was in a position to influence Mr Twomey in the awarding of subcontract work for MDM. Mr Madden and Mr McGann also knew that Mr Cresnar was in a position to favour MDM by agreeing to contract variations, reporting favourably on their performance and by not issuing non-compliance notices.

The Commission is satisfied that the payment was made as an inducement to Mr Cresnar to exercise his public official functions in a way that favoured MDM or as a reward for his having done so in the past.

Corrupt conduct

Mr Cresnar

The Commission is satisfied that, in January 2014, Mr Cresnar accepted \$2,500 from Mr Madden and Mr McGann as an inducement or reward for Mr Cresnar exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to the business operated by Mr Madden and Mr McGann in relation to its work for Ausgrid. This conduct on the part of Mr Cresnar is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct that could adversely affect, either directly or indirectly, Mr Cresnar's honest or impartial exercise of his official functions.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Cresnar committed an offence under s 249B(1)(a) of the Crimes Act of receiving a benefit as an inducement or reward for showing or having shown favour, or not showing disfavour, to the business operated by Mr Madden and Mr McGann in relation to the affairs or business of Ausgrid.

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

Mr McGann

The Commission is satisfied that, in January 2014, Mr McGann, on behalf of himself and Mr Madden, gave Mr Cresnar \$2,500 as an inducement or reward for Mr Cresnar exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to the business operated by Mr McGann and Mr Madden in relation to its work for Ausgrid. This conduct on the part of Mr McGann is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct that could adversely affect, either directly or indirectly, Mr Cresnar's honest or impartial exercise of his official functions.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were proved on admissible evidence to the criminal standard and accepted by an appropriate tribunal, they would be grounds

on which such a tribunal would find that Mr McGann committed an offence under s 249B(2)(a) of the Crimes Act of giving a benefit to Mr Cresnar as an inducement or reward to show favour, or not to show disfavour, to Mr McGann's business in relation to the affairs or business of Ausgrid.

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

Mr Madden

The Commission is satisfied that, in January 2014, Mr Madden was a party to an agreement whereby Mr McGann gave Mr Cresnar \$2,500 as an inducement or reward for Mr Cresnar exercising his public official functions as an Ausgrid employee to show favour, or not to show disfavour, to the business operated by them in relation to its work for Ausgrid. This conduct on the part of Mr Madden is corrupt conduct for the purposes of s 8(1)(a) of the ICAC Act. This is because it is conduct that could adversely affect, either directly or indirectly, Mr Cresnar's honest or impartial exercise of his official functions.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Madden committed an offence under s 249B(2)(a) of the Crimes Act of giving a benefit to Mr Cresnar as an inducement or reward to show favour, or not to show disfavour, to Mr Madden's business in relation to the affairs or business of Ausgrid.

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

Section 74A(2) statements

The Commission is satisfied that Mr Cresnar, Mr McGann and Mr Madden are affected persons for the purposes of s 74A(2) of the ICAC Act.

Mr Cresnar

The evidence Mr Cresnar gave was the subject of a direction under s 38 of the ICAC Act and, therefore, cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, there are admissible financial records, bank statements, telephone intercept recordings and surveillance material to show that Mr Cresnar received \$2,500 from Mr Madden and Mr McGann. There are also admissible

business records to show that Mr Cresnar's employment with Ausgrid afforded him the opportunity to show favour, or not to show disfavour, to Mr Madden and Mr McGann. There are recordings of lawfully-intercepted telephone calls to show that Mr Cresnar did influence Mr Twomey's choice of subcontractors.

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 Cresnar for receiving a corrupt commission or reward contrary to s 249B(1)(a) of the Crimes Act in relation to the receipt on 20 January 2014 of a \$2,500 cash payment from Mr Madden and Mr McGann.

Mr McGann

The evidence Mr McGann gave was the subject of a direction under s 38 of the ICAC Act and, therefore, cannot be used against him in criminal proceedings, except in relation to a prosecution for an offence under the ICAC Act. However, there are admissible financial records, bank statements, telephone intercept recordings and surveillance material to show that Mr McGann gave \$2,500 to Mr Cresnar. There are also admissible business records to show that Mr Cresnar's employment with Ausgrid afforded him the opportunity to show favour, or not to show disfavour, to Mr Madden and Mr McGann.

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 McGann for giving a corrupt inducement or reward contrary to s 249B(2)(a) of the Crimes Act in relation to the \$2,500 payment to Mr Cresnar.

Mr Madden

The evidence Mr Madden gave was the subject of a direction under s 38 of the ICAC Act and, therefore, cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, there are admissible financial records, bank statements, telephone intercept recordings and surveillance material to show that Mr Madden was a party to an agreement to give \$2,500 to Mr Cresnar. There are also admissible business records to show that Mr Cresnar's employment with Ausgrid afforded him the opportunity to show favour, or not to show disfavour, to Mr Madden and Mr McGann.

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 Madden for giving a corrupt inducement or reward contrary to s 249B(2)(a) of the Crimes Act in relation to the \$2,500 payment to Mr Cresnar.

Chapter 6: Corruption prevention

Ausgrid's CCL manages contracts to install, replace and improve underground cables of up to a certain voltage. Cable laying may only be part of an overall Ausgrid capital project and, therefore, CCL's involvement in a project may be also limited – even though cable laying may sometimes be a substantial component.

CCL receives work orders from other independent design teams in Ausgrid called Field Services and Zone Development. These teams have an overall project management role and set the entire project budget. CCL considers these teams their clients.

Ausgrid uses a contracting model for CCL work orders that has been operating since the 1980s. The model relies on CCL issuing numerous short-term contracts to multiple contractors and managing these contracts. During peak periods, contractors were operating at many different work sites in many different locations. Although there have been changes over the years with regard to the contracting model, these were largely procedural.

A core feature of this model is the establishment of contractor panels under a standing order deed, whereby contractors are allocated to one of four different panels that pertain to particular geographic parts of the Ausgrid distribution network. CCL chooses a contractor from the panel that corresponds to the geographic location of the work order.

Ausgrid adopted a standing order deed arrangement to allow it to purchase services from pre-established contractor panels to meet the requirements of its business; requirements such as commercial flexibility to meet varying demands and work volume fluctuations. As the installation and restoration of underground cables is dangerous work, pre-qualification exercises were undertaken to identify suitable contractors.

CCL operates in an environment where many uncertainties could impact on the scope of its work and, consequently, the price to complete the work. These include the presence of underground rock, naturally occurring groundwater, contamination and tree roots.

Ausgrid's contracting model uses a schedule of rates pricing arrangement – which has been in place for many years – as the means to control the price uncertainty in underground cabling. The establishment of a schedule of rates reduces costs by transferring to Ausgrid, rather than the contractor, the risk of underground obstructions and any resulting change to a cable laying route.

If Ausgrid had chosen a contracting model whereby payment was based on achieving outcomes, the uncertainty in the operational environment would have transferred a large amount of risk to contractors rather than Ausgrid, resulting in higher prices to Ausgrid.

The implementation of a schedule of rates pricing arrangement means that tight project management practices are required to control both the risk of cost blowouts and the risk of corrupt conduct. The payment arrangement based on the performance of activities in the schedule of rates means contractors and subcontractors stand to gain by claiming for unforeseen site conditions and by performing additional activities; whether they are needed or not.

While Ausgrid transferred a large amount of risk to itself under the contracting model, it did little to manage this risk. The responsibility for work order contracts is diffused across CCL and the design teams responsible for overall project management. While the design teams are ultimately responsible for a project, including its budget, the processes in place during the time that Mr Cresnar engaged in corrupt conduct did not assist or encourage project design teams to take responsibility for projects.

In the past, there was no mandatory requirement for project managers to attend sites and walk-through the project with CCL officers and contractors – an exercise that helps determine the scope of contracts. Similarly, because design teams were not involved in the daily management of work order contracts, they had limited capacity to oversee variations, despite being responsible for overall project budgets.

The lack of effective contract management processes is a constant theme throughout this investigation by the Commission. The tight contract management processes needed to control CCLs arrangements, which involve individual staff working often unsupervised and closely with contractors, were absent in the period identified in this report.

Instead, CCLs processes for selecting individual contractors for work orders were opaque and highly discretionary, providing opportunities for favouritism. Additionally, the method for determining the scope of works for work orders – a particular feature of CCLs work arrangements – involved the exercise of significant discretion as contractors and individual CCL officers negotiated the scope. To some extent, this discretion has been reduced due to recent changes, which are outlined below.

At the time, CCL also lacked a formal contractor performance management system that could have provided an alternative and objective basis for allocating work. CCLs processes were not only loose but also afforded end-to-end control over operations to individual CCL officers responsible for awarding work orders and monitoring contractors. This provided an opportunity for officers to use the work order and contract performance process to secure corrupt benefits.

This situation is made worse by the loose budgets that were adopted for individual work orders and the lack of

expert analysis regarding contract expenditure, which meant CCL could not compare contract expenditure across its regions. While budget estimates have improved, the only accurate cost benchmarks CCL possesses are the schedule of rates provided by its contractors; unfortunately, this was undermined two years ago when it changed its pricing arrangement for some work orders to require contractors to bid competitively by submitting discount lump sum bids for work.

The profitability of work orders has always varied depending on the nature and size of a job. Fixed set up and running costs made smaller jobs expensive for contractors, resulting in little or no profit. Further, the pricing arrangements adopted by Ausgrid prior to the period identified in this investigation – where some costs were reimbursed but others were not – made some jobs more profitable than others. In addition, contractors were neither guaranteed work nor paid a retainer despite the high costs of investing in personnel and capital. Ultimately, if work volumes are high, there are profitable jobs to go around.

This situation changed when investment in the network shrunk after 2011. Faced with limited work, potentially shrinking profits and a contracting model that did not contain an in-built mechanism for ensuring they were allocated a fair and even mixture of work, contractors became susceptible to corrupt approaches from CCL officers.

Before exploring these issues in more detail, more explanation is needed of the purpose of Ausgrid's contracting model and how contractors receive work orders.

Ausgrid's contracting model

Ausgrid's contracting model meets three purposes.

The first purpose is to allow Ausgrid to select multiple contractors on pre-agreed terms quickly. Having contractors readily available for work on pre-agreed terms reduces the time and cost of procuring contractors for the many work orders that CCL generates.

The second purpose is to reduce the risk to Ausgrid of a contractor becoming insolvent or refusing to accept work. This was a real concern for Ausgrid.

Before the period of corrupt conduct identified in this investigation, a contractor regularly refused work and told Ausgrid it did not want to be issued with further work orders. This created difficulties for Ausgrid because, at the time, there was only one other contractor available and they were unable to accept more work orders. The availability of multiple contractors helps ensure this situation does not arise again. Ausgrid also continues to avoid the risk of becoming trapped in an unproductive relationship through reliance on a sole supplier.

The third purpose is to provide assurance to Ausgrid that selected contractors are capable of satisfactorily completing a range of work orders at the best price. For Ausgrid, this means being confident that contractors have the capability, capacity, systems and experience to work in a high-risk electrical underground environment through a pre-qualification process.

Selecting contractors is a lengthy process for Ausgrid. The Commission's investigation concerned the process used to establish contractor panels for standing order deeds and the selection of contractors for individual work orders. Prior to 2010, CCL had responsibility for both managing the establishment of contractor panels and selecting contractors for work orders. In 2010, the establishment of the standing order deed panels was transferred to Ausgrid's Contract Management Unit.

An initial pre-qualification exercise was used both before and after 2010 to identify suitable contractors to work on Ausgrid's underground cable network. This involved Ausgrid choosing companies, accredited to work on NSW's electrical distribution network, to register their interest. After evaluating the pre-qualification response, Ausgrid identified the successful companies that would be invited to submit a final bid in the second round.

The second round sought to verify the capability, work experience and price of a company, based on weighted criteria. These criteria were price-based against a proposed schedule of rates. Technical considerations were also made based on quality, safety and environmental factors. In calculating price, Ausgrid used hundreds of historic

small and large works to calculate and compare competing contractor proposed rates.

Selected contractors were then retained under a standing order deed, which had pre-conditioned terms of agreement for works, for an initial two-year period. Ausgrid retained the sole option to cancel the standing order deed or to extend it for a further two years. The option to extend could occur twice. The awarding of work orders to contractors followed distinct stages in a standing order deed. Most of the corrupt conduct identified during the investigation took place under this standing order deed. In November 2013, Ausgrid introduced a new standing order deed.

CCL project planners, who are responsible for scoping and planning the CCL program of works in a region, initially identify suitable contractors for work orders. Contract initiators are then responsible for finalising the selection of contractors; this includes issuing contractual documentation, negotiating the scope of contracts and communicating with potential contractors. A contract inspector is then responsible for managing CCL work orders.

Up until two years ago, CCL did not have formal processes for allocating work orders to contractors. This meant a CCL officer could choose any contractor on the panel. In fact, there were no rules preventing a CCL officer from repeatedly choosing the same contractor and no focus on the number of work orders that had been allocated to a specific contractor.

In the last two years, new rules have been introduced for CCL to determine which contractor would be chosen for a work order. The decision on which contractor is awarded work depends on the cost estimate of the contract value. A threshold of \$200,000 was chosen and determines whether CCL directly negotiates with a single contractor or conducts a competitive bid among the available contractors. This is an arbitrary value and one which can easily change as the scope of a work order is adjusted following a site walk-through with a potential contractor.

The estimated contract value of a work order is based on the design submitted by a design team. Ausgrid's estimator program, which is based on each contractor's schedule of rates, is used to calculate whether the work order is estimated to cost less than \$200,000 and which contractor is the least expensive for the proposed work order.

For work orders estimated to cost less than \$200,000, the project planner can select the least expensive contractor unless the selection of a more expensive contractor can be justified (for example, their suitability for the job and the availability of their crew resources).

There is some confusion, however, amongst CCL officers over the extent to which non-price factors should be considered and it appears that price remains the dominant factor. If a work order is estimated to cost more than \$200,000, then the project planner must provide all contractors on the panel working within the region the opportunity to participate in the selection process. Contractors bid competitively against each other.

Importantly, these new rules require contractors to submit a lump sum bid for work orders based on the activities outlined in the schedule of rates – effectively undercutting their schedule of rates prices in the standing order deed. Any subsequent claims for variations to the work order, including rock trenching, are paid based on the existing prices in the schedule of rates. While price is a main factor influencing the awarding of work, it appears CCL officers may also consider other non-price factors, such as contractor capability, experience, availability and prior performance.

Regardless of whether the work order is estimated to be above or below \$200,000, the full set of criteria for selecting contractors is not documented in a specific Ausgrid policy. Indeed, the contractor selection rules are not formalised in any Ausgrid document (a flowchart was, however, prepared in April 2014 to show the selection process for choosing a contractor).

As is the case in both the former and current arrangements, potential contractors are required to attend a site inspection with CCL officers. The site inspection involves an assessment of any physical constraints that are likely to impact on the price for a proposed work order, including the level of urbanisation, gradient of the land, and the actual area requiring excavation (for example, a road or footpath). The need for changes in a route may also be identified at this stage. Underground conditions remain unknown unless geotechnical investigations are undertaken or contractors dig trial holes, which may occur for large jobs.

At the time of the subject of this investigation, even though it was a key exercise that determined the scope of works, attending a site inspection was not a mandatory requirement for project managers from the design teams. This meant that it was possible for a contractor to attend a site inspection with a single CCL officer as contractor initiator, as contractor inspection roles were sometimes combined within CCL.

Contractors can propose amendments to work orders based on any observations made during the site visit, which are then either accepted, rejected or further negotiated by contract initiators who independently verify a contractor's offer using CCL's cost estimator program. Consequently,

the route, as designed, may be changed due to constraints identified during a site walk-through – ultimately impacting on the scope of a project. Indeed, where a work order originally estimated to be less than \$200,000 increases above that amount following a site walk-through, CCL's practice is to continue negotiating with the sole contractor.

While delegations are in place for approving the selection of contractors, senior officers continue to be reliant on the integrity of individual CCL officers making selection choices. Although the panel system was adopted, in part, to avoid the highly discretionary and resource-intensive nature of multiple short-term procurement activities, this remains a key characteristic of the existing system.

Once a work order commences, a CCL contract inspector is given responsibility for daily inspections of work sites. A component of this involves issuing non-conformance notices. Should a contractor or subcontractor fail to comply with their contractual obligations, these notices provide Ausgrid with the option of recovering its costs. CCL contract inspectors have sole discretion to issue non-conformance notices.

Currently, as was the case in the past, there are no formal guidelines regarding the issuing of notices, although the standing order deed outlines the events for which a non-conformance order can be issued.

Ausgrid's contracting model recognises that circumstances may arise where there is a need to change the work order after a contractor commences work. The contracting model defines these changes as contract variations and outlines procedures for them. Variations may be "negative" or "positive". During the public inquiry, Mr Cresnar described these as follows:

Positive is where the variation amount is positive, i.e. the contractor gets more money, negative is where the variation amount is negative, i.e. money is taken off the contractor.

There are two types of contract variations in the contracting model:

- scope of work contract variations, initiated either by Ausgrid or the contractor, and being either negative or positive
- latent condition contract variations, which arise when site conditions, such as rock, are unknown before work commences but have the potential to adversely affect the work order.

Mr Cresnar explained that latent conditions also include site conditions that were "foreseeable" – that is, likely – but where the extent, in terms of quantity, remains unknown.

Typically, latent condition variations are initiated by a contractor and, perhaps unsurprisingly, tend to be positive in effect. As noted above, Ausgrid bears the budget risk for variations, as its pricing arrangements are based on payments for specific activities.

Given that there are fixed start up costs for cable laying work, such as insurance and staff training, an equal allocation of differently-sized work orders to contractors is needed for them to access, on balance, an industry standard profit margin. Contractors can also find themselves in a situation where environmental conditions reduce the profitability of work orders.

Ausgrid's inconsistent approach to costing site conditions results in contractors being reimbursed for some unforeseen conditions (such as underground rock) but not others. For example, when contractors experience long delays because of certain site circumstances, such as steeply-sloping work sites, unit prices for trenching remain unchanged. This inconsistency creates a variability that impacts on the profitability of work orders.

The control of multiple contractors who are issued numerous short-term contracts is, by its nature, resource-intensive, especially when work is spread across many sites. In order to avoid corruption risks and maintain control over this situation, Ausgrid requires tight contractor selection and management processes as well as the segregation of duties. Accurate cost information is also needed to ensure budgets are tight and costs can be compared across contracts.

Instead, during the period identified in this investigation, Ausgrid relied on individual CCL officers to manage contractors, placing a large amount of discretion in their hands.

When operational staff are in the field almost every day with contractors, a real risk arises that the interests of the operational staff will become more aligned with a contractor's than that of their employer. The heavy reliance on the honesty of individual CCL officers in this environment represents an inadequate approach to preventing corruption. The risk of collusion between contractors and CCL officers is further exacerbated by contractor motivations to seek profitable work and the system's inability to guarantee profitable work.

Weak budgets

When planning a project, the design teams must develop a project budget. A component of this budget is the work order contracts. The design teams rely on CCL for information for a proposed cable laying work order. CCL provides the design teams with an estimate to complete

the work and identify other cost components as possible budget contingencies.

There are problems with calculating the cost estimates for work orders, which involves CCL officers using the estimator program to calculate the cost of proposed work. According to Ausgrid officers, the estimator software is cumbersome and difficult to use; a view that is shared by the contractors. A version of this program is provided to each contractor on the standing order deed, albeit without their competitors' schedule of rates, so that they can also calculate the cost of a job. Mr Bastow, Mr Murray and Ms Said described this software as difficult to use or "buggy". These problems undermine the integrity of budget estimates and encourage manipulation of costs. The accepted need to adjust figures disguises any unjustified manipulation of project costs.

During the time of the Commission's investigation, there was also a problem with budget management practices. Evidence tendered at the public inquiry from a former Ausgrid design team manager was that design teams did not align the project's construction budget with the cost estimate generated by CCL.

Instead, Ausgrid's design teams would allow a work order to commence and would change the construction budget, as necessary, to reflect a contractor's increasing work costs. This would occur even though the general observation of the design teams was that CCL tended to exceed its budget more than the other areas of Ausgrid involved in construction activity. Indeed, this observation encouraged design teams to withhold details about the construction budget to discourage CCL from spending it all. This practice continued until recently.

By failing to align a project's construction budget with the cost estimate for the work, Ausgrid did not have a potential cost comparison yardstick available for use to detect inflated costs, such as those arising from unnecessary variations. The value of such a yardstick, even if the cost estimates are accurate and available, is further diminished by the fact that the design teams and CCL would include different cost components in their budgets.

For example, while the design teams would include underground rock as a major cost component, CCL would not include this cost in their original estimates of a given work order. In the end, inaccurate budget estimates, budget management practices lacking in rigor, and the absence of meaningful comparisons, resulted in loose contract budgets that were ineffective in detecting potentially inflated costs.

Another factor impacting on Ausgrid's ability to control project costs was the frequency of contract variations. The latent condition contract variation process provided

opportunities for CCL to effectively wrest control of the project budget from the design teams, undermining the role of the design team in overseeing the budget.

Currently, there are differences between the two groups with regard to which generates variations and conducts the associated approval processes. For scope of work contract variations, approval lies with the project managers within the design teams who have overall project budget responsibility for a work order.

The latent condition contract variations are different. These variations are generated by contractors, or subcontractors submitting claims through contractors, as they undertake a work order and seek to recoup money lost to deal with an unforeseen eventuality. The estimator software is also used to calculate the value of variations that are submitted by contractors to Ausgrid. The difficulty with using this software encourages contractors, such as Mr Bastow, to rely on contract inspectors for assistance with submitting claims. These problems continue.

At the time of the Commission's investigation, the contract inspectors believed that they were obliged to accept a claim for a latent condition contract variation and adopted a position of automatically sending a request for a variation approval to the relevant project manager in the design teams.

CCL's position put pressure on project managers in the design teams to approve latent condition contract variations without scrutiny. In fact, project managers in the design team had no formal powers or functional role that allowed the accuracy of claims to be verified. Indeed, even if they could have had those powers, they were aware of the risk that the project may incur additional costs from contractors who could charge for lost time if Ausgrid caused delays in order to check variations. This did little to encourage design teams to take responsibility for project costs involving variations.

Mr Cresnar's evidence at the public inquiry about latent conditions involving underground rock confirmed the lack of scrutiny regarding site conditions:

[Mr Cresnar's counsel]: And you said that the contractors will mark the road with paint?

[Mr Cresnar]: That's right.

[Q]: What does that mean, how does that assist anybody?

[A]: Just to record the depths of the rock in the trench.

[Q]: But if they dug a trench there's a hole in the ground?

[A]: Yep.

[Q]: And the Ausgrid officer – are you saying then an Ausgrid officer would turn up some point later and look at the marks on the road?

[A]: Well, you can't just leave a trench open because ah, there's no one available to come and have a look so they'll mark up the, the rock on the road before backfilling the trench.

In later evidence, Mr Cresnar suggested CCL did dispute latent condition contract variations but these were on the quantities extracted and not whether they existed or not.

In these circumstances, design teams were left to rely on trust in ensuring that contract inspectors were scrutinising contractor claims for latent condition variations and that the figures declared were accurate. For contractors and subcontractors who were motivated to do so, it was clearly an opportunity to enter into corrupt arrangements with contract inspectors to improve the chance of submitting and successfully securing inflated payments from questionable latent condition contract variations.

Limited benchmarks

Apart from the schedule of rates, which it subsequently undermined two years ago, CCL did not have access to accurate cost benchmarks that could be used as a point of reference to ensure that its costs were not inflated and its contractors could remain viable.

The establishment of accurate cost benchmarks helps ensure that excess money is not available in the system for corrupt purposes; for example, through inflated variation claims. Alternatively, accurate cost benchmarks also help ensure a contractor can remain viable and is not motivated to engage in corrupt conduct; for example, by securing unnecessary changes to project scopes.

Ausgrid used cost benchmarks as part of the initial pre-qualification exercise to test which companies should be engaged as contractors under a standing order deed. The benchmarks, which became available after 2010, when the Contract Management Unit became responsible for the establishing of the panels, included traffic control and non-rock trenching. All of these benchmarks represented 80% of contractor costs. They were, however, unavailable for use by CCL.

Similarly, Ausgrid had limited knowledge about its spending patterns in relation to work orders. Until last year, for

example, CCL reporting did not include analytics on contract variations. Had Ausgrid retained expenditure data in a useable format and conducted an analysis of CCL contract expenditure, it is possible that unusual expenditure in CCL could have been highlighted.

On one occasion, CCL did compare prices provided by contractors with prices provided by other public authorities. Permanent reinstatement work is negotiated by CCL as a separate work order under the contracting model rather than as part of the original work order for cable laying. The payment arrangement for reinstatement works is done on a cost-plus-10% basis, rather than a schedule of rates arrangement. CCL seeks quotes for reinstatement works from a contractor on the panel, who may then use a subcontractor, or the relevant road authority – that is, either the local council or Roads and Maritime Services. After receiving quotes, CCL recommends a contractor depending on whoever is the least expensive. The recommendation is then forwarded to the Ausgrid officer with the appropriate financial authority.

This process is problematic. In awarding permanent reinstatement work, Ausgrid is potentially considering an inaccurate benchmark that bears little reference to the true cost of completing the work. Each road authority calculates their road reinstatement costs in different ways; however, they tend to have high prices providing little value for money.

Imperfect knowledge within Ausgrid about the true cost of permanent reinstatement works provides contractors and subcontractors with an opportunity to make inflated claims. In order to succeed, a contractor's bid must appear reasonable and be less than that of the road authority. Inside information about bids provided by a road authority is also needed, and corrupt relationships provide a means of securing this information. This was the case with Mr Cresnar providing information about a local council quote relating to road reinstatement works to Murray Civil.

Ausgrid is now reconsidering its arrangements for permanent reinstatement road work.

Loose contractor selection and negotiation processes

Prior to the changes introduced two years ago, CCL officers had unfettered discretion in choosing contractors. Although changes were introduced in an attempt to formalise arrangements, they have done little to reduce the discretionary nature of selection processes.

Evidence tendered at the public inquiry by CCL officers suggests that there is still some confusion over the extent to which non-price factors can influence the selection of contractors. This confusion is unsurprising, given that the

full set of selection criteria is not documented in a stand-alone policy. The establishment of clear selection criteria is fundamental to minimising opportunities for favouritism during the selection of contractors. In the absence of clear criteria, it is difficult to scrutinise the basis for selection decisions, which masks favouritism on the part of CCL officers.

The selection of a sole contractor, where work orders are initially estimated to cost below \$200,000, also locks CCL into a direct negotiation early on in the process. Currently, CCL continues to negotiate directly with a single contractor, even though the initial cost estimate may change after above-ground conditions are identified during the site inspection. As a result, it is possible for a sole contractor to be selected on the basis of an initial loose cost estimate. Not only is this estimate potentially inaccurate, there is every possibility it could increase significantly after the site inspection is conducted.

The cable laying environment is inherently uncertain due to unknown geotechnical conditions. This uncertainty is exacerbated by CCL's poor practices regarding the retention of data concerning above-ground and below-ground site conditions from previous jobs. In particular, CCL does not retain data about site conditions relating to previous work orders in a central location that is easily accessible to its officers. Retaining this information would help reduce the uncertainty surrounding site conditions and, consequently, improve the accuracy of project scopes. The level of uncertainty regarding the underground environment has also resulted in CCL adopting a common practice of dealing with underground rock as a variation.

The CCL practice of undertaking a site inspection with potential contractors is an attempt to improve the accuracy of project scopes. In fact, the site inspection is a critical part of the process that is used to refine the scope of a work order, as it enables site constraints to be identified and can result in route changes.

Until the Commission's investigation, however, it was possible for a sole CCL officer to conduct this exercise. Given that differences can arise between potential contractors and CCL officers over the impact of site conditions, a degree of negotiation is involved in settling the final scope. Design teams hold the view that CCL officers have greater local knowledge about conditions and, consequently, are better placed to foresee cost issues. As such, design teams are not always in a position to verify changes to work orders that occur after a site inspection.

The flexibility around project scopes, in part due to poor data retention practices, further diminishes the already weak budget estimate process. The lack of data regarding previous site conditions also makes variations common across all work orders and, consequently, less likely to

attract attention. In this climate of uncertainty, sole CCL officers can negotiate with contractors over the basis of an offer to perform works.

The existing uncertainty regarding project scopes, combined with the high level of discretion afforded to CCL officers in finalising the scope of a project, created an opportunity for collusion between contractors and CCL officers.

Limited formal contractor monitoring and performance evaluation

Until recently, CCL issued a high volume of short-term contracts to numerous contractors. At its peak, CCL had 30 officers supervising 87 contractor crews; each crew had between three and four members. In 2013, the number of contractor crews fell to 17 and remains low.

Supervising many contractors spread across multiple sites that, in turn, are spread over a large physical area, is a resource-intensive exercise, particularly in terms of coordination and oversight. Indeed, to maintain control over this situation, Ausgrid needs tight and transparent processes for monitoring contractors and to evaluate their overall performance. Importantly, such processes mitigate the risk of CCL officers over-identifying with the interests of contractors, failing to effectively monitor contractor performance or, alternatively, unfairly issuing non-conformance notices to contractors.

CCL does not have a formal system for managing and assessing contractor performance. For example, key performance indicators are not established as a measure of performance nor is there any policy setting out how contractor performance should be assessed. There is also no formal mechanism to integrate the day-to-day supervision of contractors with an overall assessment of their performance.

When it comes to the performance of contractors, CCL managers continue to be largely dependent on information provided by contractor inspectors. Ausgrid is considering steps to address this issue; one way is by developing and implementing key performance indicators to measure contractor performance.

As referenced above, Ausgrid has the ability to issue non-conformance notices and impose financial penalties either directly – such as reimbursement of costs incurred by Ausgrid for issuing the notice – or indirectly – such as stopping work. The only formal means of supervising contractors is through the issuing of notices, which can also be issued to subcontractors.

In evidence tendered at the public inquiry, a CCL senior officer suggested that there were shortcomings with the issuing of non-conformance notices as a means of dealing with poor performance. In his opinion, the issuing of notices only shows how strictly a contract inspector chooses to exercise their discretion in monitoring performance. He also argued that the issuing of a notice only provides a view on one aspect of performance.

The loose nature of the overall contractor monitoring arrangements, with a focus on non-conformance notices as a means of ensuring compliance, creates a blunt but discretionary system for managing contractors. It also provides an opportunity for contract inspectors to obtain benefits from contractors and subcontractors. In essence, it could be used by contract inspectors to secure corrupt benefits by threatening the use of these formal powers under the standing order deed.

End-to-end control of processes

Where processes cannot be tightly designed, independently monitored or constrained by delegations, segregations are often the only way to ensure the processes are not corrupted for personal gain. Corruption can be controlled by ensuring there is in-built separation between responsibilities for key activities.

In the case of Ausgrid, the processes for selecting contractors, determining prices and monitoring contractor performance should contain in-built segregation of responsibilities. The ultimate aim of segregation is to allow the exercise of discretion but to make it difficult for any individual to obtain end-to-end control over a system. This means a public official could never have sufficient control across all key activities and processes within a system to use them inappropriately for their own benefit.

If the segregation of responsibilities at critical points in a system is effective, it reduces the power of gifts, benefits, hospitality and relationships to corruptly influence public officials or for public officials to corruptly use the system to extract private benefits. In short, effective segregation of duties can disrupt the ability to manipulate processes for corrupt purposes.

The awarding of work orders and the monitoring of contractors were functional roles. This meant that, during the time of the Commission's investigation, a single officer could perform both the project planner and the contract inspector roles. Consequently, one officer could choose the contractor for a proposed work order and act as the contract inspector to monitor the contractor, process contract variations, and issue non-conformance notices. It was also not unknown for the contractor inspector to have been the contract initiator who issued works to a contractor.

On various occasions, Mr Cresnar exercised end-to-end control over work orders with minimal supervision by being both the person selecting the contractor for work orders and managing the contractor's work performance. Ausgrid now requires that the functions of project planner and contract inspector be performed by separate CCL officers.

While a common presumption might be that corrupt approaches would come from the contractor to a corrupt public official, evidence at the public inquiry demonstrated that public officials are just as capable of taking advantage of end-to-end control as a means of coercing contractors into engaging in corrupt conduct.

[Counsel Assisting]: *When Mr Cresnar suggested that to you, what did you say to him?*

[Mr Bastow]: *I didn't know what to do. I was, I was sort of – at that time when it was suggested it was like I was sort of I guess held at ransom in some respect because I need those variations that we had legitimately paid because we had to pay subcontractors and our own staff and because I struggled with that estimate we had a lot of money that was held up that we couldn't get approved to get paid so it happened.*

[Q]: *So what did you say?*

[A]: *I didn't. I sort of – when the variation – when he submitted the variation to me I produced an invoice back to him and then some time after that he said to me, "You know I've put extra money in that project. When are you going to fix me up?"*

[Q]: *All right. And what did you do when he said that?*

[A]: *I hesitated and hesitated and hesitated.*

[Q]: *But ultimately did you do something?*

[A]: *Yes.*

[Q]: *And what did you do?*

[A]: *I went and purchased some equipment from different stores.*

Non-alignment of contractor and Ausgrid interests

One of the most powerful ways of motivating a contractor to improve performance is to align their interests with those of their client agency. Achieving this involves designing arrangements that integrate a contractor's risks and rewards in such a way as to remove motivations that are contrary to their client's interest. The misalignment of contractor risks and rewards with the client agency's interests is often an underlying factor in the Commission's investigations.

As the client agency, the interest of Ausgrid was to have suitable and capable contractors deliver cable laying work at the best price. Until the time of the Commission's investigation, the contracting model for Ausgrid appeared to deliver its aims by:

- having contractors price their work according to a schedule of rates
- not guaranteeing works or paying a retainer to contractors
- imposing standards that contractors were to maintain in order to work on its network.

A contractor's key motivation is to secure profitable work over the life of a standing order deed. There are a number of impediments to achieving this aim created by Ausgrid's system. The contracting model imposes significant costs on contractors.

Ausgrid's standards in relation to working on its network, in particular, impose high and recurring compliance costs on contractors. These costs involve carrying insurances and certificates, investing in and maintaining the correct equipment, and investing time and money to train and maintain crews for deployment on work orders. So, while there is no guarantee of profitable work, the cost of investing in personnel and capital items is high. This means that small jobs involve little or no profit for contractors.

Ausgrid's contracting model assumes that, when developing their prices in the schedule of rates during the pre-qualification phase, contractors will factor in these and other costs so that they may obtain a reasonable industry standard profit. The profit, however, depends on contractors having an allocation of profitable work orders. As referenced above, work orders vary in profitability depending on size and pricing arrangements and there is no available mechanism for providing an equal allocation of jobs among contractors.

Further, the lack of guaranteed work or a paid retainer makes a contractor's viability over the life of the standing order deed even more uncertain. These factors provide

contractors with an incentive to take perverse actions that change the balance of work order allocation in favour of more profitable jobs or increase the profit on individual work orders; for example, by claiming unnecessary or inflated contract variations.

CCL's practice of undercutting the pre-established schedules of rates by requiring contractors to offer discount lump sum prices further exacerbates the situation. This bidding arrangement was not part of the original system designed by the procurement team; rather, it was introduced by CCL two years ago. Contractors who find themselves priced so low that they cannot make a profit as a result of this practice have a strong motivation to use variations to remain viable. Further, the ability of the contracting system to balance profitable work with less profitable work is diminished the more prices fall.

It should be remembered that when companies are bidding to become contractors under the standing order deed, they spend a large amount of time preparing the prices for the schedule of rates. When they do this, contractors are developing their schedules with a view to balancing the need to make a profit with the need to remain competitive. This fine-tuning exercise is undermined by the practice of requiring contractors to resubmit their prices.

Most CCL contractors are medium-sized operators. Due to their size and market exposure, these contractors are less able to absorb the risk of unprofitable jobs compared to national or international operators. While not every contractor engages in corrupt conduct as a result of a desire to secure profitable work, it is perhaps unsurprising that, for those who did in the Commission's investigation, Ausgrid contracts represented a significant proportion of company turnover. This was the case with Murray Civil, whose turnover between 2011 and 2013 was almost completely as a result of Ausgrid work orders, and Mr Bastow's construction company, which sharply reduced in size following the cancellation of its standing order deed arrangements with Ausgrid.

Decisions made from 2011, when investment in the underground cable network dropped, exacerbated uncertainties for contractors by reducing the number of work orders. In 2011, a restructure of the NSW electricity distribution network was undertaken. These decisions led to a reduction in the number of cable laying work orders. The competitive bidding CCL now requires for work orders above \$200,000 only acts to further undermine a contractor's profitability by reducing the availability of work that is needed to balance less profitable jobs.

The lack of guaranteed profitable contracts, combined with an increasing reliance on Ausgrid for work, provides the motivation for contractors to act corruptly. It also

makes contractors susceptible to CCL officers soliciting benefits in exchange for making corrupt decisions, particularly guaranteeing allocation of lucrative work orders in their favour. At all times, due to a lack of tight contractor selection and project management controls, officers within CCL could use their authority to influence decisions concerning the allocation and scope of work along with the issuing of penalty notices.

Conclusion

The contracting model adopted by Ausgrid, with its reliance on a schedule of rates to establish prices based on activities, appeared to represent a sound option until Mr Cresnar's corrupt conduct was exposed given that uncertainties regarding underground conditions could impact on the scope of work order contracts. The adoption of alternative arrangements, such as paying for the achievements of outcomes, would have increased Ausgrid's costs by transferring a large amount of risk to contractors.

The contracting model requires tight operational arrangements for selecting contractors and managing work orders in order to control the pricing risks accepted by Ausgrid and the ensuing corruption risks that arise from potential cost blowouts and managing multiple contractors across numerous sites.

During the period investigated by the Commission, loose arrangements existed for the awarding and managing of work orders (these have since been addressed in part). Working in close proximity to contractors and exercising a high level of discretion, Mr Cresnar was able to exploit this situation to secure corrupt payments from contractors who were motivated to provide benefits in return for favourable treatment under a system that does not guarantee an allocation of profitable work.

Ausgrid has a number of available options for reducing the current corruption opportunities in cable laying. These include improving processes and practices within its existing contracting model.

Since 2014, Ausgrid has taken steps to improve its processes. It has, for example, recently taken steps to facilitate the sharing of budget information between units and begun to analyse contract variation amounts. It also now requires the project managers in the design teams to attend initial site walk-throughs prior to the commencement of a contract. Individual contract inspectors are also not assigned to one particular contractor on an ongoing basis.

These changes, however, do not go far enough in addressing the significant corruption risks that are present in the current arrangements. There is scope to make

further improvements across most of the existing activities involved in procuring and managing contractors. There is also a need for caution in adopting a possible piecemeal approach that would simply target the kind of corruption that arose in the context of this investigation. This is because it is possible that other, currently unforeseen weaknesses in the current contracting model may provide opportunities for corrupt conduct.

Over the longer term, Ausgrid has committed to a more holistic approach that involves examining its contracting model and considering alternative arrangements. This could include options such as removing the panel arrangement, engaging one or more larger contractors (although this may no longer be a viable option given that the available work has reduced), providing guaranteed work (subject to satisfactory performance) and changing pricing arrangements. The suitability of one or all of these options will depend on a number of factors, including the level of work available to contractors and Ausgrid's data collection and analysis capabilities.

Recommendation 1

That, in the short term, Ausgrid tightens processes within the existing system for contract cable laying work orders to reduce existing corruption opportunities. In this regard, Ausgrid should focus on processes for approving variations, tightening the scope and budget for work order contracts, and reducing opportunities for individual officers to control key tasks, including the selection of contractors.

Recommendation 2

That Ausgrid improves its data management and retention systems. Data capture should, as a minimum, be able to provide Ausgrid with the capability to establish unusual expenditure patterns, improve the accuracy of estimates for

work orders, capture information on environmental and site conditions to inform project design and budgeting, and help to establish cost benchmarks.

Recommendation 3

That Ausgrid considers and adopts the optimum contracting model to deliver contract cable laying work. Central to this consideration should be the alignment of Ausgrid and contractor motivations, Ausgrid's current operating environment, and the efficiency and effectiveness of any such contracting model.

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 Ausgrid and the responsible minister, being the minister for resources and energy.

As required by s 111E(2) of the ICAC Act, Ausgrid must inform the Commission in writing within three months (or such longer period as the Commission may agree in writing) after receiving the recommendations, whether it proposes to implement any plan of action in response to the recommendations and, if so, of the plan of action.

In the event a plan of action is prepared, Ausgrid is required to provide a written report to the Commission of its 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 response to its recommendations, any plan of action and progress reports on its implementation on the Commission's website, www.icac.nsw.gov.au, for public viewing.

Appendix 1: The role of the Commission

The ICAC Act is concerned with the honest and impartial exercise of official powers and functions in, and in connection with, the public sector of NSW, and the protection of information or material acquired in the course of performing official functions. It provides mechanisms which are designed to expose and prevent the dishonest or partial exercise of such official powers and functions and the misuse of information or material. In furtherance of the objectives of the ICAC Act, the Commission may investigate allegations or complaints of corrupt conduct, or conduct liable to encourage or cause the occurrence of corrupt conduct. It may then report on the investigation and, when appropriate, make recommendations as to any action which the Commission believes should be taken or considered.

The Commission can also investigate the conduct of persons who are not public officials but whose conduct adversely affects or 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. The Commission may make findings of fact and form opinions based on those facts as to whether any particular person, even though not a public official, has engaged in corrupt conduct.

The ICAC Act applies to public authorities and public officials as defined in s 3 of the ICAC Act.

The Commission was created in response to community and Parliamentary concerns about corruption which had been revealed in, inter alia, various parts of the public service, causing a consequent downturn in community confidence in the integrity of that service. It is recognised that corruption in the public service 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 role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, 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 principal functions of the Commission, as specified in s 13 of the ICAC Act, include investigating any circumstances which in the Commission's opinion imply that corrupt conduct, or conduct liable to allow or encourage corrupt conduct, or conduct connected with corrupt conduct, may have occurred, and cooperating with public authorities and public officials in reviewing practices and procedures to reduce the likelihood of the occurrence of corrupt conduct.

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 either or both s 8(1) or s 8(2) and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Section 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*
 - c. *any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
 - d. *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.*
- c. *reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*
 - d. *in the case of conduct of a Minister of the Crown or a Member of a House of Parliament – a substantial breach of an applicable code of conduct.*

Section 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 offences which are set out in that subsection.

Section 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*

Section 13(3A) of the ICAC Act 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.

Section 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in s 8 is not excluded by s 9 from being corrupt 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.

Section 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in s 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

The Commission adopts the following approach in determining whether corrupt conduct has occurred.

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

jurisdictional requirements of s 9(5). In the case of s 9(1)(a) and s 9(5) the Commission considers whether, 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, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of s 9(1)(b), s 9(1)(c) and s 9(1)(d) the Commission considers whether, 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, they 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.

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 only 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 in 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 *Rejtek 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 of fact and corrupt conduct set out in this report have been made applying the principles detailed in this Appendix.



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