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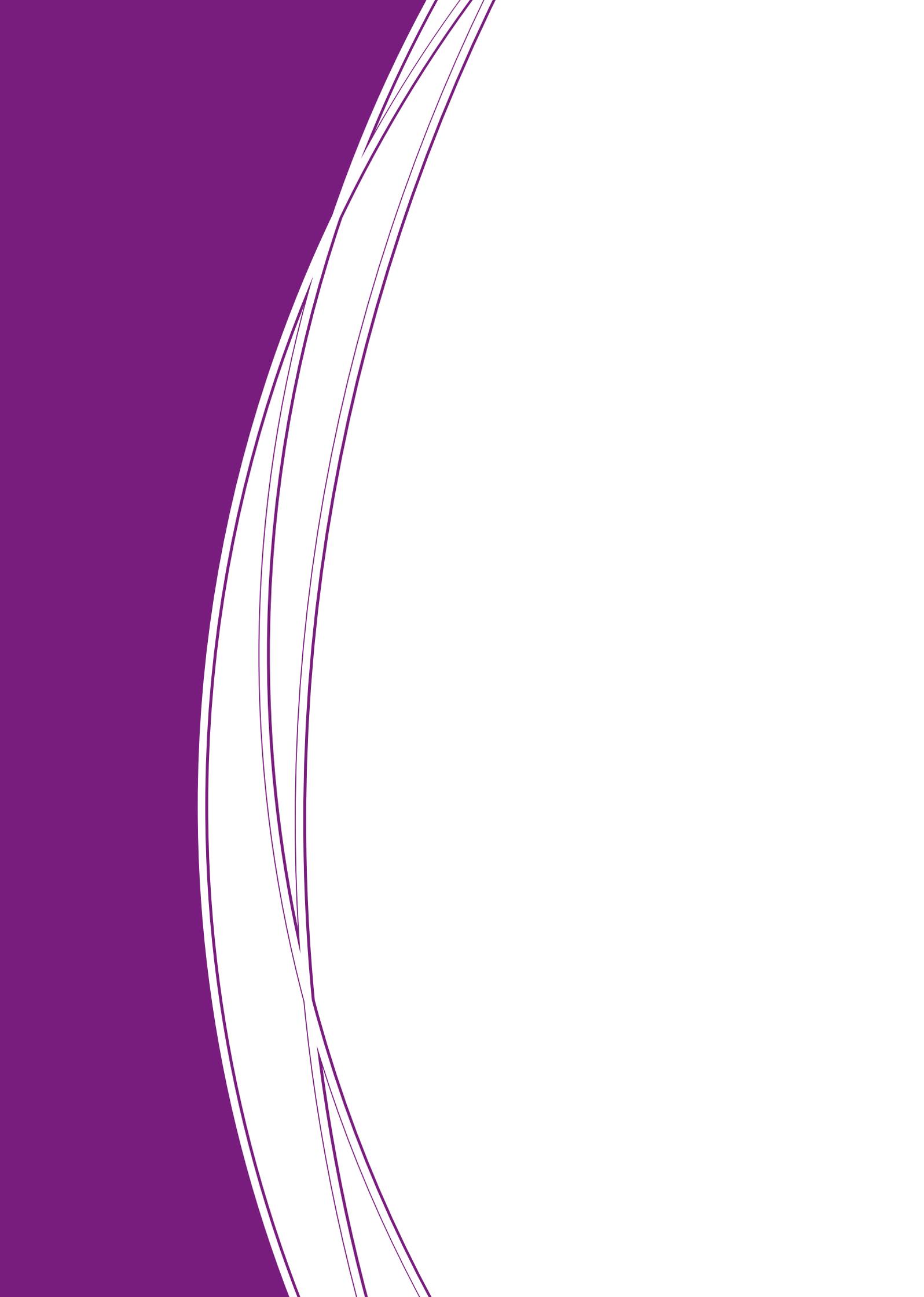
INDEPENDENT COMMISSION  
AGAINST CORRUPTION



**INVESTIGATION INTO THE  
SOLICITATION AND RECEIPT  
OF CORRUPT PAYMENTS  
FROM A RAILCORP  
CONTRACTOR**

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**ICAC REPORT  
SEPTEMBER 2009**





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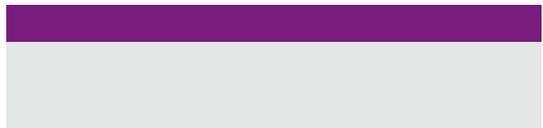
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**I·C·A·C**

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The logo for the Independent Commission Against Corruption (ICAC), featuring the letters 'I·C·A·C' in a stylized, serif font with dots between the letters.

INDEPENDENT COMMISSION  
AGAINST CORRUPTION

The Hon Peter Primrose MLC  
President  
Legislative Council  
Parliament House  
Sydney NSW 2000

The Hon Richard Torbay MP  
Speaker  
Legislative Assembly  
Parliament House  
Sydney NSW 2000

Mr President  
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into the solicitation and receipt of corrupt payments from a RailCorp contractor.

I presided at the public inquiry held in aid of this 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 section 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Jerrold Cripps'.

The Hon Jerrold Cripps QC  
Commissioner

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# Executive summary

This report concerns an investigation conducted by the Independent Commission Against Corruption (“the Commission”) into the conduct of Wasim Khan, a RailCorp employee, and his associates Mohammed Ali and Tabrez Khan. These three men were involved in a plan to solicit \$200,000 over four years in return for the awarding of a RailCorp contract for security guard auditing services to Unisec Security Pty Ltd (“Unisec”). Unisec reported the matter to the Commission. The report also examines a payment of \$15,000 which was paid by Unisec to Tabrez Khan for the benefit of Wasim Khan as the first step in the plan to obtain the \$200,000. The report also examines the extent to which Wasim Khan considered improperly awarding other RailCorp work in return for payment and the acquisition or establishment of a company which he could use to tender for RailCorp work. Finally, it examines the corruption prevention issues identified in the course of this investigation and makes five corruption prevention recommendations to RailCorp.

## The Commission’s investigation

As part of its investigation the Commission made extensive use of lawful covert physical and electronic surveillance, including lawful telecommunication intercepts. It also executed three search warrants and conducted a controlled operation. The Commission took evidence from three witnesses during compulsory examinations held between 25 and 28 May 2009 and conducted a public inquiry over three days between 15 and 17 June 2009. Evidence was taken from six witnesses including Wasim Khan, Mr Ali and Tabrez Khan. The Hon Jerrold Cripps QC, Commissioner, presided. Carolyn Davenport SC acted as Counsel Assisting the Commission.

## The Commission’s findings and section 74A(2) statements

The Commission’s findings are set out in Chapter 3. The Commission found that Wasim Khan, Mohammed Ali and Tabrez Khan knowingly entered into an agreement they

knew to be improper to obtain money from Unisec in return for Wasim Khan arranging a RailCorp contract for security guard auditing services to be awarded to Unisec.

The Commission found that Wasim Khan arranged for the Unisec tender to be increased from about \$115,000 per annum over four years to about \$180,000 per annum, so that Unisec would be able to afford to make \$200,000 in corrupt payments over four years to Wasim Khan. Corrupt conduct findings are made against Wasim Khan, Mohammed Ali and Tabrez Khan.

Statements are made pursuant to section 74A(2) of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to:

- the prosecution of Wasim Khan for offences of soliciting a corrupt benefit of \$200,000 and receiving a corrupt benefit of \$15,000 contrary to section 249B(1) of the *Crimes Act 1900* (NSW) (“the Crimes Act”)
- the prosecution of Mr Ali for an offence of aiding and abetting the soliciting of a corrupt benefit contrary to section 249F of the Crimes Act, and
- the prosecution of Tabrez Khan for an offence of aiding and abetting the soliciting of a corrupt benefit and an offence of aiding and abetting the receiving of a corrupt benefit, contrary to section 249F of the Crimes Act.

## Corruption prevention

The investigation identified inadequately trained staff as the major risk area that made it possible for the corrupt conduct to occur and the Commission makes the following five recommendations to improve RailCorp procurement systems and procedures in order to prevent future opportunities for corruption:

### **Recommendation 1**

That RailCorp revises its procurement training for staff and contractors to explicitly address the risks for corruption and non-compliance in direct negotiations, including negotiations over scope of works.

### **Recommendation 2**

That RailCorp establishes and publicises a way for tender evaluation committee members to obtain advice should they have a query about whether proper procedure is being followed for a tender.

### **Recommendation 3**

That RailCorp makes it a requirement that staff and contractors receive training in both ARIBA (RailCorp's new electronic procurement system) and its new Procurement Procedures before they obtain user rights in ARIBA.

### **Recommendation 4**

That RailCorp implements a system of random auditing to be done by senior managers of their middle managers' procurement approvals. Internal Audit should then audit the senior managers' audit. When approving officers approve orders that vary from standard procedures, penalties should be enforced.

### **Recommendation 5**

That within two years of ARIBA becoming fully operational, a performance/operations review is undertaken to ascertain whether ARIBA assists RailCorp and individual managers to detect fraud and corruption.

Copies of the final report should be sent to the Commission and the relevant Minister.

As part of the performance of its statutory functions the Commission will monitor the implementation of the corruption prevention recommendations made as a result of this investigation.

The recommendations will be communicated to RailCorp with a request that an implementation plan for the recommendations be provided to the Commission within three months of the publication of this report. The Commission will also request progress reports on the implementation of recommendations at intervals of 12 and 24 months after the publication of this report.

These reports will be posted on the Commission's website, [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au), for public viewing.

# Chapter 1: Introduction

This report concerns an attempt by Wasim Khan, a RailCorp employee, and his associates to obtain up to \$200,000 over four years in return for him arranging the awarding of a RailCorp contract for security guard auditing services to Unisec Security Pty Ltd (“Unisec”), a business owned and managed by Anes Harambasic. The report also examines a payment of \$15,000, which was made by Unisec to Tabrez Khan for the benefit of Wasim Khan as the first step in the plan to obtain the \$200,000.

The report also examines whether Wasim Khan intended to corruptly award other RailCorp contracts to Unisec and his plan to acquire a company which he could use to tender for other RailCorp contracts.

The Commission’s investigation arose as a result of a telephone call received by Mr Harambasic on 3 April 2009 from a person calling himself “Yusuf”. Yusuf told Mr Harambasic that he and his associates could help Unisec win a RailCorp contract for security guard auditing services and could provide help with the documentation once the company was shortlisted. Yusuf was aware of the tender price that had been submitted by Unisec and suggested that it could be increased. He also told Mr Harambasic that he wanted “a cut”. Mr Harambasic then reported the matter to the Commission.

## Why the Commission investigated

One of the Commission’s principal functions, as specified in section 13(1)(a) of the ICAC Act, is to investigate any allegation or complaint that, or any circumstances which in the Commission’s opinion imply that:

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

The role of the Commission is explained in more detail in Appendix 1, while Appendix 2 sets out the definition of corrupt conduct under the ICAC Act.

Although Yusuf did not identify himself as a public official when he contacted Mr Harambasic it was clear from the information provided that either he was a RailCorp employee or was acting on behalf of a RailCorp employee. The matter reported to the Commission was serious and would, if established, constitute corrupt conduct within the meaning of the ICAC Act. The Commission determined that it was in the public interest to conduct an investigation for the purpose of establishing whether corrupt conduct had in fact occurred, whether there were any corruption prevention issues which needed to be addressed, and, in the event corrupt conduct was established, to send a clear message to the public that soliciting gifts and benefits, including money, by public officials is unlawful and will not be tolerated.

## Conduct of the investigation

The Commission’s investigation involved examining documents obtained from various sources by issuing notices under section 22 of the ICAC Act as well as interviewing and obtaining statements from several witnesses.

To identify those who were engaged in this activity and to establish the full extent of their involvement, it was necessary to make extensive use of covert physical and electronic surveillance. This included a number of telecommunications interceptions pursuant to warrants under the *Telecommunications (Interception and Access) Act 1979* (Cwlth) and the use of surveillance devices authorised by warrants obtained under the *Surveillance Devices Act 2007* (NSW).

A controlled operation was also authorised under the *Law Enforcement (Controlled Operations) Act 1997* (NSW). A controlled operation permits those authorised under the operation to engage in specified activity which would otherwise be unlawful. By this stage Yusuf, who the

Commission had now identified as Mohammed Ali, had asked for money in return for assistance being provided to Unisec to win the RailCorp contract.

The controlled operation was conducted with the assistance of Mr Harambasic. It involved Mr Harambasic attending a meeting requested by Wasim Khan's cousin, Tabrez Khan, who was also operating under an alias, and making a payment of \$15,000 to Tabrez Khan. In addition, the Commission lawfully executed three search warrants as a result of which further documents and the \$15,000 cash paid to Tabrez Khan were seized. The Commission also conducted three compulsory examinations of witnesses in order to further clarify matters.

## Assistance by Mr Harambasic

This investigation was assisted by the honesty and co-operation of Mr Harambasic. Mr Harambasic acted with utmost propriety at all times.

The Commission is indebted to Mr Harambasic, who agreed to take part in the controlled operation and assisted the investigation by obtaining relevant evidence substantiating the allegations which gave rise to the investigation.

## The public inquiry

The ICAC Act provides that for the purposes of an investigation the Commission may conduct a public inquiry if it considers it is in the public interest to do so.

Section 31(2) of the ICAC Act provides that:

*Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:*

(a) *the benefit of exposing to the public, and making it aware, of corrupt conduct,*

(b) *the seriousness of the allegation or complaint being investigated,*

(c) *any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),*

(d) *whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

The Commission assessed the material gathered during the investigation. Taking into account this information and each of the matters set out in section 31(2) of the ICAC Act, the Commission determined that it was in the public interest to hold a public inquiry having regard to the following considerations:

- The serious nature of the matter being investigated, which involved allegations of bribery by a public official.
- Public exposure of the matter was considered desirable for the purpose of educating and deterring others who might be minded to engage in similar conduct.
- There was a substantial public interest in exposing the relevant matters that was not outweighed by any public interest in preserving the privacy of the persons concerned.

The Hon Jerrold Cripps QC, Commissioner, presided at the inquiry and Carolyn Davenport SC acted as Counsel Assisting the Commission. Six witnesses gave evidence.

Following the public inquiry, Counsel Assisting made written submissions regarding possible findings and recommendations. These were provided to RailCorp and all persons potentially the subject of adverse findings and recommendations. Submissions in response were considered in preparing this report.

## Investigation findings and section 74A(2) statements

Chapter 3 examines the conduct of Wasim Khan, Mohammed Ali and Tabrez Khan in soliciting \$200,000 from Unisec in return for Unisec being awarded a RailCorp contract and the obtaining of a \$15,000 payment. Findings of corrupt conduct are made against Wasim Khan, Mohammed Ali and Tabrez Khan.

Chapter 4 examines Wasim Khan's plans to improperly influence the awarding of other RailCorp contracts and to acquire or establish a company through which he could receive RailCorp contracts.

The report contains a statement pursuant to section 74A(2) of the ICAC Act that the Commission is of the opinion that the advice of the Director of Public Prosecutions ("the DPP") should be obtained with respect to the prosecution of Wasim Khan for the following offences contrary to section 249B(1) of the Crimes Act:

- soliciting a corrupt benefit of \$200,000 from Mr Harambasic.
- receiving a corrupt benefit of \$15,000 from Mr Harambasic

A section 74A(2) statement is made that the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mohammed Ali for an offence under section 249F of the Crimes Act of aiding and abetting the soliciting of a corrupt benefit.

In addition, the Commission recommends that consideration be given by the Attorney-General's Department to the removal of Mr Ali as a justice of the peace.

The Commission also recommends that the Registrar of Marriage Celebrants review the appointment of Mr Ali as a marriage celebrant.

A section 74A(2) statement is made that the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the

prosecution of Tabrez Khan for the following offences under section 249F of the Crimes Act:

- aiding and abetting the soliciting of a corrupt benefit from Mr Harambasic
- aiding and abetting the receiving of a corrupt benefit of \$15,000 from Mr Harambasic.

## Corruption prevention

Chapter 5 examines a number of corruption prevention issues relating to RailCorp's systems and procedures which may have facilitated, or failed to deter, corrupt conduct. The Commission makes five recommendations to help RailCorp reform the system and procedures and mitigate or prevent similar misconduct in the future. As part of the performance of its statutory functions, the Commission will monitor the implementation of the corruption prevention recommendations made as a result of this investigation.

## Recommendation that this report be made public

Pursuant to section 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 2: Background

### The people

Anes Harambasic is the Managing Director as well as the General Manager of Unisec Pty Ltd. He oversees all operations of the company. Unisec has been operating for more than seven years. It is engaged in providing security services to a number of organisations.

Wasim Khan commenced employment with RailCorp in September 2008 as a Procurement Manager for an initial period of 17 weeks. His contract was extended until 30 May 2009 and plans were afoot to further extend his contract at the time of this investigation. As a Procurement Manager, he was required to ensure the integrity of the tender process. His contract was terminated as a result of the Commission's investigation.

Mohammed Ali is a business man. He is also a justice of the peace and a marriage celebrant. Mr Ali has been a friend of Wasim Khan's father, Mohammed Shamsher Azaad Khan ("Mohammed Khan"), for more than 55 years and had known Wasim Khan since his childhood. He initially contacted Mr Harambasic on behalf of Wasim Khan, using the alias of "Yusuf".

Tabrez Khan is a citizen and resident of Canada and a cousin of Wasim Khan. He came to Australia in May 2009 to attend the funeral of one of his relatives. While in Australia he stayed with Wasim Khan. He contacted Mr Harambasic on behalf of Wasim Khan using the alias of "Tafzil" and attended a meeting with Mr Harambasic where he collected a payment of \$15,000.

### The tender process

RailCorp employs a number of contract security guards to conduct continuous foot patrols in RailCorp train stabling areas and maintenance centres. On 9 March 2009 an invitation to tender for the "security guard auditing services" contract was advertised on the RailCorp website. Wasim Khan was responsible for the management of the tender process relating to the contract.

The role of the "security guard services auditors" is to monitor the performance of RailCorp security guards and in particular to check whether the guards are wearing appropriate uniforms, have the correct equipment and are at their specified locations. The contract was for two years with options to extend the contract for two periods, each of 12 months. The tender specification required 56 hours of work to be performed each week.

Wasim Khan, Helen Ye, the Logistics Officer responsible for the security auditing contract, and Douglas Brennan, who was the Team Leader of Law Enforcement, RailCorp Security Division, comprised the tender evaluation committee ("TEC"). Wasim Khan was the chairman of the TEC.

Eight companies tendered for the contract, including Unisec. All tenders were evaluated on 31 March 2009. All except the tenders from Unisec and Davis Langdon Pty Ltd ("Davis Langdon") were eliminated by the TEC on the grounds that they did not meet the mandatory requirements set out in the tender specifications. Davis Langdon had been the incumbent security guard auditor for over 12 months prior to the advertisement of the tender.

The Unisec and Davis Langdon tenders were then assessed on the technical criteria. The technical criteria assessment examined issues such as financial stability of the companies, experience in similar work, organisational structure, quality management system and the ability to achieve key performance indicators. Companies required a score of greater than 60 per cent to satisfy the criteria. Davis Langdon scored 40 marks out of a possible 40 (100 per cent) whereas Unisec scored 37.60 out of 40 (94 per cent) on the technical criteria.

As both companies attained the set minimum technical cut-off score, the tender evaluation methodology required that the companies then be assessed on the total anticipated costs to RailCorp. David Langdon quoted a price of \$248,472 per year based on 72 hours work per week. Unisec quoted a price of \$114,939



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per year based on 56 hours work per week, being the number of hours specified in the tender specification.

Wasim Khan saw the significant difference between the price quoted by Unisec and Davis Langdon as an opportunity to engage in corrupt conduct. He was able to convince the TEC to enter into direct negotiations with the two companies to clarify issues relating to the hours of work and to ensure both quoted on 72 hours work per week.

It is not clear why other members of the TEC agreed to negotiate with the two companies. RailCorp Procurement Technical Policy requires that the lowest commercially evaluated tender in terms of cost that satisfies all requirements including the technical criteria must be accepted. Based on this policy Unisec's tender should have been accepted without any further negotiation as it was the lowest tender cost that met the technical criteria. Given that the Davis Langdon tender exceeded the hours specified in the invitation to tender, it should have been eliminated.

Ms Ye told the Commission that she had not received any training in procurement. She relied on Wasim Khan for advice on procurement policy and procedures. Her understanding was that she was responsible for the issues relating to the technical criteria.

She asked Wasim Khan why Davis Langdon had based its tender on 72 hours of work including supervisory work. According to her, he explained that Davis Langdon's tender was based on 56 hours normal operation work and an extra 16 hours for supervision work. She accepted this explanation. Ms Ye knew from past experience that Davis Langdon did have a supervisor to monitor the security guard auditors although it did not charge RailCorp for the services of the supervisor. It appears that this knowledge may have led to confusion in her mind relating to the hours required for the tender.

Wasim Khan provided a similar explanation to Mr Brennan as to why David Langdon based its tender on 72 hours of work.

## Chapter 3: The security guard auditing contract

This chapter sets out the circumstances in which payments of \$200,000 over four years were solicited from Mr Harambasic on behalf of Wasim Khan in return for awarding the RailCorp contract for security guard auditing to Mr Harambasic's company. It also examines the payment of \$15,000 which was made by Mr Harambasic to Tabrez Khan, who was acting on behalf of Wasim Khan. The evidence of Wasim Khan, Mohammed Ali, Tabrez Khan and others is dealt with in this chapter.

### Seeking payments

On 3 April 2009 Todd Armstrong, an employee of Unisec, received a telephone call from Wasim Khan, informing him that Unisec had been short-listed for the security guard auditing contract. Wasim Khan requested that Unisec attend a meeting at RailCorp on Wednesday 8 April 2009 to discuss the tender. Mr Armstrong telephoned Mr Harambasic and advised him of this conversation.

Approximately two hours before Wasim Khan's telephone conversation with Mr Armstrong, Mr Harambasic had received a telephone call from a male who identified himself as "Yusuf". He asked Mr Harambasic if he was the owner or manager of Unisec and if Unisec had applied for a RailCorp contract. He told Mr Harambasic that he could help him win the contract.

Mr Harambasic told the Commission that "Yusuf" went on to tell him that he could help Unisec get shortlisted and made a number of general statements to the effect that he could help win the security guard auditing contract and future RailCorp contracts, including contracts for cleaning. "Yusuf" also discussed the current tender and suggested Unisec could increase its price from \$115,000 to between \$185,000 and \$190,000. He then asked for a payment for his assistance. He informed Mr Harambasic, that as a sign of "their" genuine commitment to this arrangement, someone from RailCorp would call Mr Harambasic to confirm Unisec had been shortlisted.

At a later stage of the investigation the Commission identified "Yusuf" as Mohammed Ali.

On 6 April 2009 Mr Harambasic met with Commission officers. During that meeting he received a telephone call from "Yusuf". In the course of the conversation, Mr Ali indicated that he was part of a group that included people from Melbourne and said that they were seeking a payment of \$50,000 annually to ensure Unisec was awarded the RailCorp contract. He said he would call Mr Harambasic the following day and tell him the questions Mr Harambasic would be asked at his meeting with the tender evaluation committee ("TEC") on 8 April.

On the same day both Ms Ye and Mr Brennan, members of the RailCorp TEC, received emails from Wasim Khan containing seven questions to be asked of the representatives of the two companies at the TEC meeting on 8 April and model answers that were expected of the company representatives.

At 9.00 am on 7 April 2009, Mr Ali telephoned Mr Harambasic to discuss the meeting with RailCorp that was to take place the next day. The conversation was lawfully intercepted and recorded. During the conversation Mr Ali provided the questions which were to be asked by the TEC and the preferred answers to those questions. He also told Mr Harambasic that Unisec would be asked to resubmit its pricing based on 72 hours per week.

On 8 April, just prior to the TEC meeting, both Ms Ye and Mr Brennan received emails from Wasim Khan with an additional question to be raised at the TEC meeting with Unisec. This was whether Unisec could resubmit its pricing for the contract based on 72 hours of work per week.

Mr Harambasic attended the TEC meeting on 8 April. Wasim Khan was present at the meeting. The questions asked by the TEC were identical to those provided to Mr Harambasic the previous day. Unisec was also asked to re-submit its tender on the basis of 72 hours work per week. Unisec subsequently resubmitted its tender for \$179,668 based on 72 hours work per week. This would increase the amount Unisec would receive from RailCorp by about \$64,000 per year, or \$256,000 over the four-year

period of the contract.

The increased price was clearly communicated to Mr Ali, as on 14 April 2009 he rang Mr Harambasic and mentioned the new amount that had been quoted by Unisec. He also told Mr Harambasic that Unisec had been recommended for the contract and stated that if they worked together Unisec would be able to get other RailCorp contracts.

On 5 May 2009 Wasim Khan telephoned Mr Ali. In the early part of the conversation Wasim Khan told Mr Ali that the formal letter accepting the Unisec tender could be held back until full payment was received and mentioned an amount of \$50,000 to be sought from Unisec each year for the life of the contract. The contract was to be for four years.

On 7 May 2009 Mr Ali telephoned Wasim Khan and discussed what he should tell Mr Harambasic about the payment. Wasim Khan instructed Mr Ali to tell Mr Harambasic that “they” wanted an upfront payment. Wasim Khan mentioned \$50,000 as the amount of upfront payment but told Mr Ali to tell Mr Harambasic that if he could not pay it all at once then the “majority of it” should be paid. Wasim Khan also told Mr Ali to let Mr Harambasic know that after the initial payment of \$50,000, a further \$150,000 would have to be paid as the contract was for four years.

Mr Ali then telephoned Mr Harambasic and conveyed Wasim Khan’s instructions. On 14 May 2009 Mr Harambasic telephoned Wasim Khan to tell him that he was travelling overseas between 26 May 2009 and 7 July 2009. The next day, Wasim Khan contacted Mr Armstrong and advised him that the contract had been awarded to Unisec. A formal letter to this effect was received by Mr Harambasic on 18 May 2009.

On 17 May 2009 Mr Ali telephoned Wasim Khan and told him that he intended to go to Fiji that day and would be back by the end of the week. Wasim Khan later contacted Mr Ali and told him to telephone Mr Harambasic and tell him that he would be contacted by an associate whilst Mr Ali was away. Mr Ali complied with this instruction.

As Mr Ali would be absent in Fiji, Wasim Khan organised for his cousin, Tabrez Khan, to contact Mr Harambasic. Tabrez Khan had travelled from Canada to Australia to attend the funeral of a family member and was staying with Wasim Khan.

On 20 May 2009 Tabrez Khan rang Mr Harambasic, identifying himself as “Tafzil”. He told Mr Harambasic that he was ringing on behalf of “Yusuf”, who had gone to Fiji. He told Mr Harambasic he was from Canada and did not have much time in Australia. He arranged to meet Mr Harambasic on Friday 22 May to collect a payment.

## The \$15,000 payment

As arranged, a meeting occurred on 22 May 2009. During the course of the meeting Tabrez Khan told Mr Harambasic that his syndicate was going to give Unisec about 15 RailCorp contracts including forensic cleaning. Tabrez Khan emphasised the importance of being able to trust Mr Harambasic in their dealings with him. When the subject of payment for the security guard auditing contract was raised, Mr Harambasic told Tabrez Khan the cash was in his car. The two men proceeded to the car park where Mr Harambasic removed from his car a bag containing \$15,000, which he gave to Tabrez Khan. The meeting was captured on the Commission’s surveillance cameras and the conversations were lawfully recorded by use of listening devices.

Tabrez Khan refused to touch the money and asked Mr Harambasic to place it in a bag he had with him. He then took the bag containing the money and returned to Wasim Khan’s house.

Later that day a search warrant was executed by Commission officers at Wasim Khan’s house. Both Wasim Khan and Tabrez Khan were present during the execution of the search warrant. During the course of the search, the bag containing the \$15,000 cash given to Tabrez Khan by Mr Harambasic was located in the house.

## Wasim Khan’s evidence

Wasim Khan gave evidence to the Commission in a compulsory examination on 28 May 2009 and again at the public inquiry on 16 June 2009. His evidence on each occasion was substantially the same. He admitted his involvement in seeking payment from Mr Harambasic in return for arranging the awarding of the RailCorp contract to Unisec.

He said he first saw a corruption opening when the tender evaluation for the contract closed and the prices came in for the contract. He spoke to his father, Mohammed Khan, about the matter and they decided to get some advice from their family friend, Mr Ali. After some persuasion by Wasim Khan, Mr Ali agreed to contact Mr Harambasic to solicit a payment for the awarding of the security guard auditing services contract.

On each occasion Mr Ali contacted Mr Harambasic he reported back to Wasim Khan about what was discussed. Wasim Khan said that at all times Mr Ali acted on his instructions.

He agreed that he provided the list of TEC questions and answers to Mr Ali to pass on to Mr Harambasic. He agreed that the real reason why he increased the hours of work required to be performed under the contract from 56 to 72 was to enable Unisec to earn the additional money

from RailCorp so that it could afford to pay him the initial \$50,000. He acknowledged that he had instructed Mr Ali to advise Mr Harambasic that Unisec would not have to actually work the extra 16 hours which Mr Harambasic had been asked to include in his re-submitted tender.

Wasim Khan said he recruited Tabrez Khan to replace Mr Ali in the negotiations with Mr Harambasic while Mr Ali was overseas. He told Tabrez Khan all the background information and told him that when he met Mr Harambasic he would be collecting a bribe. Wasim Khan's understanding was that Mr Harambasic was going to pay \$50,000 to Tabrez Khan but the payment ended up being \$15,000. When Tabrez Khan collected the \$15,000 he telephoned Wasim Khan to let him know by way of a coded message that he had done so.

At the public inquiry Wasim Khan said that he made it clear to Mr Harambasic through Mr Ali that Mr Harambasic would be required to pay \$200,000 over four years. He claimed that he asked for \$50,000 each year to allay any concerns Mr Harambasic might have about the possibility of the contract being terminated prematurely after making the payment of \$50,000. He wanted to show Mr Harambasic that he had a vested interest in the life of the contract and was therefore unlikely to walk away from it before the expiry of the contract. He claimed that he had no specific plan to require payment of the other \$150,000, although he conceded that he "may have" done so in the future. The Commission is satisfied that Wasim Khan always intended to obtain \$200,000 from Mr Harambasic over the term of the contract. The telephone intercept evidence shows that Wasim Khan told Mr Ali to tell Mr Harambasic that he would be required to pay \$50,000 per year over the life of the contract, and this was passed on to Mr Harambasic by Mr Ali. There was no indication in any of the telephone conversations that future payments would not be pursued. It is not likely that having once successfully secured a payment that Wasim Khan would voluntarily have foregone the opportunity to obtain further payments.

## Mohammed Khan's evidence

Mohammed Khan told the Commission that his son, Wasim Khan, had seen an opportunity to make some money and wanted someone to call one of the contractors for him. He knew exactly what his son wanted to do and advised him against it. Eventually he relented and decided to go with Wasim Khan and see his family friend Mr Ali for advice.

Ultimately, as Wasim Khan was unwilling to abandon his corrupt plan, it was decided that Mr Ali would act as go-between. Mr Ali regularly updated Mohammed Khan about the progress of the negotiations between himself and Mr Harambasic. Mohammed Khan admitted that he knew

his son and Mr Ali were corruptly conspiring to get money from Unisec and that such conduct was illegal.

Mohammed Khan said he did not take part in any negotiations with Mr Harambasic nor did he agree to Mr Ali's suggestion that he would take over the negotiations during Mr Ali's absence in Fiji. There is no evidence that Mohammed Khan was involved in any of the negotiations with Mr Harambasic. The Commission is satisfied that Mohammed Khan's involvement in the scheme was limited to knowledge of what was planned.

## Mohammed Ali's evidence

Mr Ali told the Commission that when Wasim Khan first mentioned the scheme to him, he advised him that what he wanted to do was wrong. The scheme was to obtain a payment of \$50,000 for each year of the contract. After some persuasion by Wasim Khan, however, he agreed to become involved. He knew that what he was doing was illegal.

Mr Ali said Wasim Khan used him as a go-between so as to avoid any direct connection between himself and the soliciting of the money from Mr Harambasic. In particular, he wanted someone else to contact Mr Harambasic so that Mr Harambasic did not identify Wasim Khan's voice. Mr Ali used the name "Yusuf" and pretended to be part of a larger group in an attempt to avoid detection. Mr Ali conceded that he was doing more than just being a go-between and shared his thoughts and ideas with Wasim Khan and suggested ways in which they could advance the scheme.

Mr Ali said when he gave Mr Harambasic the questions and answers for the TEC interview he knew doing so might be illegal.

Mr Ali denied that he was either going to be paid or had been promised any money for his role in the scheme. He maintained that he participated in the scheme out of a sense of obligation to Mohammed Khan because he had done some favours for Mr Ali in the past.

The Commission does not accept Mr Ali's claim that he was not expecting any money for his role in the scheme in light of the extent and the duration of his involvement in the scheme.

It was apparent from Mr Ali's evidence to the Commission that he was reluctant to acknowledge matters that were against his interest. When questioned at the public inquiry about his understanding of the reasons for increasing the hours to be worked under the contract he gave contradictory answers. In the early part of his evidence, he said the reason he was asked to inform Mr Harambasic that the contract hours would be increased by 16 hours was to assure Mr Harambasic that the payment would

effectively come from RailCorp. Later he resiled from this position and said that he knew the hours were increased and a payment was to be made but he did not make the connection between the two. After further questioning he said that it did occur to him that the payment to be obtained from Mr Harambasic was coming effectively from RailCorp and was public money.

The Commission is satisfied that Mr Ali participated in the scheme to solicit money from Mr Harambasic for personal gain. The Commission is also satisfied that Mr Ali was aware that the increase in hours under the contract was to be effected so that Unisec would obtain sufficient additional funds from RailCorp to cover the payment to be made to Wasim Khan.

### Tabrez Khan's evidence

Tabrez Khan gave evidence at a compulsory examination on 25 May 2009 and again at the public inquiry on 16 June 2009. His evidence on each occasion was substantially the same. He admitted his involvement in obtaining the payment of \$15,000 from Mr Harambasic.

He said that Wasim Khan gave him snippets of information over the course of a few days. Wasim Khan told him that he had found a company that would save a lot of money for his employer and he wanted to make some money "on the side" out of the savings. Tabrez Khan claimed that when he questioned Wasim Khan as to whether Mr Harambasic was being blackmailed over the contract, Wasim Khan said Mr Harambasic would get the contract even if he did not pay any money. However, he said that Wasim Khan had told him that Wasim Khan had helped Mr Harambasic get the contract and wanted to make sure that he, Wasim Khan, got money from Mr Harambasic for his assistance.

He said that at the request of Wasim Khan, he telephoned Mr Harambasic and arranged a meeting to pick up the payment. He introduced himself as "Tafzil" and informed Mr Harambasic that he was replacing "Yusuf". He attended the meeting and collected the money which was inside a bag. He took the bag without touching the money. After he left the meeting he telephoned Wasim Khan and told him "I've only walked 15 kilometres". He agreed he was using a code to tell Wasim Khan that he had only collected \$15,000.

Although Tabrez Khan was promised money by Wasim Khan for his services, he said that what amount, if any, would be paid to him was left to Wasim Khan to determine.

He said he knew his involvement in the scheme was wrong and that Wasim Khan's employer had some sort of

rule that would not allow him to do what he was doing. However, he claimed that he did not believe at the time what was being done was "illegal", although he conceded that after hearing what transpired at the public inquiry he had come to realise it was illegal.

He understood the payment was related to a contract connected with Wasim Khan's work. He knew Wasim Khan was working for a company named RailCorp although he claimed that he was unaware that RailCorp was a public authority or connected with the government.

The Commission does not accept his claim at the public inquiry that at the time he did not believe what he was asked to do by Wasim Khan was illegal. In his compulsory examination he agreed that he thought Mr Harambasic was asked to pay a bribe and that he thought such solicitation was illegal. At the public inquiry he conceded that what was being done could involve a "minor" criminal activity and agreed that he was a party to obtaining a "secret commission" for Wasim Khan. In addition, his clandestine behaviour in his dealings with Mr Harambasic is a clear indication that he knew he was behaving illegally in collecting the payment on behalf of Wasim Khan. This conclusion is further supported by Wasim Khan's evidence at the public inquiry that he gave Tabrez Khan all of the background information relating to the transaction and Tabrez Khan knew that his meeting with Mr Harambasic was to collect a bribe. The Commission is satisfied that he was fully aware of the illegality and the seriousness of his conduct.

### Findings of fact

Based on the evidence set out above, the Commission is satisfied to the requisite degree that the following facts have been established:

1. Between 9 March 2009 and 18 May 2009 Wasim Khan was the project manager responsible for managing the tender process relating to a RailCorp contract for security guard auditing services.
2. Wasim Khan, Mohammed Ali and later Tabrez Khan knowingly entered into an agreement they knew to be improper to obtain money from Anes Harambasic in return for Wasim Khan arranging the awarding of the RailCorp contract for security guard auditing services to Mr Harambasic's company, Unisec Security Pty Ltd.
3. In furtherance of the scheme Wasim Khan manipulated the RailCorp contract selection process to ensure that the security guard auditing services contract was awarded to Unisec. This manipulation included arranging for Mohammed Ali to provide

Mr Harambasic with the questions and answers to be asked by the tender evaluation committee at the meeting on 8 April 2009.

4. Wasim Khan also manipulated the RailCorp contract selection process by arranging for the tender evaluation committee, of which he was chairman, to agree to ask Unisec to re-submit its tender to quote for 72 hours work per week, despite the request for tender specifying 56 hours work per week, in order to ensure that once the contract was awarded to Unisec it would receive additional payments from RailCorp of approximately \$64,000 per year over four years and therefore be able to afford to meet his demand for payments of \$50,000 per year.
5. Acting under the instructions of Wasim Khan, Mohammed Ali sought payments from Mr Harambasic of \$50,000 per year for the four-year term of the contract in return for Unisec Security Pty Ltd being awarded the RailCorp security guard auditing contract.
6. Acting under the instructions of Wasim Khan, Tabrez Khan accepted a payment of \$15,000 from Mr Harambasic on 22 May 2009 knowing that such payment was improper and was made for the purpose of Mr Harambasic's company securing a contract with Wasim Khan's employer.

## Corrupt conduct

In determining findings of corrupt conduct, the Commission has applied the approach set out in Appendix 2 to this report.

### Wasim Khan

In light of the factual findings set out above, the Commission finds that Wasim Khan, by soliciting payment of \$200,000 to be paid over four years from Mr Harambasic, accepting a payment of \$15,000 from Mr Harambasic and providing favourable treatment to Unisec by manipulating the RailCorp contract selection process for the security guard auditing services to ensure Unisec was awarded that contract, engaged in corrupt conduct, as defined in sections 7, 8 and 9 of the ICAC Act on the basis that his conduct:

- adversely affected, either directly or indirectly, the honest or impartial exercise of his official functions and therefore comes within section 8(1)(a) of the ICAC Act;
- constituted or involved the dishonest or partial exercise of his official functions and therefore comes within 8(1)(b) of the ICAC Act;

- constituted or involved a breach of public trust on the part of Wasim Khan and therefore comes within section 8(1)(c) of the ICAC Act; and
- adversely affected the exercise of his official functions and could involve official misconduct, bribery and obtaining secret commissions on his part and therefore comes within section 8(2) of the ICAC Act.

For the purpose of section 9 of the ICAC Act such conduct could also constitute the following criminal offences contrary to section 249B(1) of the Crimes Act:

- soliciting a corrupt benefit of \$200,000 from Mr Harambasic;
- receiving a corrupt benefit of \$15,000 from Mr Harambasic.

### Mohammed Ali

The Commission finds that by entering into a scheme he knew to be improper to seek payments of \$200,000 over four years from Mr Harambasic in return for Wasim Khan arranging the awarding of the RailCorp contract for security guard auditing services to Unisec, Mohammed Ali engaged in corrupt conduct, as defined in sections 7, 8 and 9 of the ICAC Act on the basis that his conduct comprised a conspiracy or attempt to commit or engage in conduct that:

- adversely affected, either directly or indirectly, the honest or impartial exercise of official functions by Wasim Khan and therefore comes within section 8(1)(a) of the ICAC Act;
- constituted or involved the dishonest or partial exercise by Wasim Khan of his official functions and therefore comes within 8(1)(b) of the ICAC Act;
- constituted or involved a breach of public trust on the part of Wasim Khan and therefore comes within section 8(1)(c) of the ICAC Act; and
- adversely affected the exercise of official functions by Wasim Khan and could involve official misconduct, bribery and obtaining secret commissions on the part of Wasim Khan and therefore comes within section 8(2) of the ICAC Act.

For the purposes of section 9 of the ICAC Act, it could also constitute a criminal offence under section 249F of the Crimes Act of aiding and abetting the soliciting of a corrupt benefit.

## Tabrez Khan

There is no evidence that Tabrez Khan knew that Wasim Khan was a public official or that RailCorp was a public authority. However, such knowledge on the part of Tabrez Khan is not a pre-requisite to a finding of corrupt conduct. It is sufficient that Wasim Khan was a public official.

A corrupt conduct finding may be made relating to 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 a public official or any public authority. As such, what is required for a finding of corrupt conduct is the effect of Tabrez Khan's conduct on Wasim Khan and not Tabrez Khan's knowledge of Wasim Khan's status as a public official.

The Commission finds that by entering into a scheme he knew to be improper to obtain payment from Mr Harambasic in return for Wasim Khan arranging the awarding of a RailCorp contract to Mr Harambasic's company and accepting a payment of \$15,000 from Mr Harambasic for Wasim Khan, Tabrez Khan engaged in corrupt conduct, as defined in sections 7, 8 and 9 of the ICAC Act on the basis that his conduct comprised a conspiracy or attempt to commit or engage in conduct that:

- adversely affected, either directly or indirectly, the honest or impartial exercise of official functions by Wasim Khan and therefore comes within section 8(1)(a) of the ICAC Act;
- constituted or involved the dishonest or partial exercise by Wasim Khan of his official functions and therefore comes within 8(1)(b) of the ICAC Act;
- constituted or involved a breach of public trust on the part of Wasim Khan and therefore comes within section 8(1)(c) of the ICAC Act; and
- adversely affected the exercise of official functions by Wasim Khan and could involve official misconduct, bribery and obtaining secret commissions on the part of Wasim Khan and therefore comes within section 8(2) of the ICAC Act.

For the purposes of section 9 of the ICAC Act, it could also constitute the following criminal offences under section 249F of the Crimes Act:

- aiding and abetting the soliciting of a corrupt benefit;
- aiding and abetting the receiving of a corrupt benefit of \$15,000.

## Section 74A(2) statement

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

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

An "affected" person is defined in section 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 concerned.

For the purposes of this report Wasim Khan, Mohammed Ali and Tabrez Khan are "affected" persons.

## Wasim Khan

Wasim Khan made a number of admissions when giving evidence to the Commission. These admissions were made subject to a declaration pursuant to section 38 of the ICAC Act. The effect of this declaration is that his evidence cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. However, other evidence would be available to the prosecuting authority, most notably extensive telephone intercept material and potential evidence from Mr Harambasic, Mr Ali, Ms Ye and Mr Brennan.

The Commission states that pursuant to section 74A(2)(a) of the ICAC Act, it is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Wasim Khan for offences of soliciting a corrupt benefit of \$200,000 and receiving a corrupt benefit of \$15,000 contrary to section 249B(1) of the Crimes Act.

As a result of this investigation, RailCorp dismissed Wasim Khan as an employee. It is therefore not necessary to make any statement in relation to any of the matters referred to in section 74A(2)(b) or (c) of the ICAC Act.

## Mohammed Ali

Mohammed Ali made a number of admissions when giving evidence to the Commission. These admissions were made subject to a declaration pursuant to section 38 of the ICAC Act. The effect of this declaration is that his evidence cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. However other evidence would be available to the prosecuting authority, most notably extensive telephone intercept material and potential evidence from Mr Harambasic and Wasim Khan.

The Commission states that pursuant to section 74A(2)(a) of the ICAC Act, it is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mohammed Ali for aiding and abetting a criminal offence of soliciting a corrupt benefit contrary to section 249F of the Crimes Act.

Mohammed Ali is a business man. He is also a justice of the peace and a marriage celebrant. It is a requirement for appointment as a justice of the peace under the *Justices of the Peace Act 2002* that a person must be of good character. Similarly, under the *Marriage Act 1961* (Cwlth) for appointment as a marriage celebrant, the person should demonstrate he has met the fit and proper person criteria including that he is a person of good standing in the community. These requirements exist because persons filling these positions play an important role in the community. Mr Ali's conduct is such that he is unfit to hold these appointments.

Based on the findings outlined in this report, the Commission makes the following recommendations:

1. That the Attorney-General consider removing Mohammed Ali from the position of justice of the peace.
2. That the Registrar of Marriage Celebrants review the appointment of Mohammed Ali as a marriage celebrant.

## Tabrez Khan

Tabrez Khan made a number of admissions when giving evidence to the Commission. These admissions were made subject to a declaration pursuant to section 38 of the ICAC Act. The effect of this declaration is that his evidence cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. However other evidence is available to the prosecuting authority including telephone intercept material and potential evidence from Mr Harambasic and Wasim Khan. Video footage recorded by Commission

officers of the meeting between Mr Harambasic and Tabrez Khan on 22 June 2009, when the money was paid to Mr Tabrez Khan, and the listening device recordings of the conversation between them on that occasion, would also be available as evidence.

The Commission states that pursuant to section 74A(2)(a) of the ICAC Act, it is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Tabrez Khan for an offence of aiding and abetting the soliciting of a corrupt benefit and an offence of aiding and abetting the receiving of a corrupt benefit of \$15,000, contrary to section 249F of the Crimes Act.

## Chapter 4: Other contracts

In addition to the RailCorp security guard audit contract, Wasim Khan also gave some consideration to the possibility of improperly influencing the awarding to Unisec of three other future RailCorp contracts relating to plumbing and carpark cleaning.

Wasim Khan also discussed with Mr Ali the possibility of acquiring a company which could be used to tender for RailCorp contracts. He agreed that if he remained working at RailCorp he would be in a position to ensure that RailCorp work was awarded to the company. This was a method used by some RailCorp employees to obtain money from RailCorp which was exposed in the Commission's recent previous investigation into bribery and fraud at RailCorp.<sup>1</sup>

### A promise of other contracts for Mr Harambasic

On 25 April 2009 during a telephone conversation with Mr Harambasic, Mr Ali raised the possibility of future plumbing and carpark cleaning contracts being awarded to Mr Harambasic. The following excerpts of his conversation are relevant:

*I think there are a couple more contracts coming up. One I think is cleaning a carpark or something. There is a couple of them and one's for a plumbing job do you know any plumbing company that – .... Okay, let me talk to them properly, there's a plumbing one coming soon and that's only facilities management. I think ... yeah, and there's another one, the carpark one's coming so what the – my people have said that well if you guys do this one properly with us – then we'll look at talk – doing more business with you guys you see?*

On 27 April 2009 Mr Ali phoned Mr Harambasic and had a further discussion about a plumbing contract. Mr Ali told Mr Harambasic to be on the lookout for information

on the prospective contract on the RailCorp website on about 5 May 2009. Mr Ali asked whether Mr Harambasic knew of any medium-sized company which could submit a tender for the contract. Mr Ali indicated that although the tender should not be in Unisec's name a deal could be done between Unisec and him.

During another telephone conversation on 14 May 2009 Mr Ali asked Mr Harambasic if he had checked the RailCorp website for prospective RailCorp contracts for cleaning services for City Rail multi-level carparks and plumbing services for RailCorp stations. Mr Ali also said "And ah, in a couple of weeks there's some other great one coming – which we want to work with you guys".

Wasim Khan was questioned at the public inquiry about his intentions relating to these future contracts. He told the Commission that over the months while working for RailCorp he had been looking at the tender process and ways in which it could be manipulated. He agreed that the security auditing contract was to be used as a "trial run". If he succeeded in obtaining money from Mr Harambasic he would do the same with other RailCorp contracts. He claimed the reason he asked Mr Ali to raise the other potential contracts with Mr Harambasic was to encourage Mr Harambasic to make the payment for the security guard auditing services contract. He maintained that Mr Ali was lying to Mr Harambasic about the possibility of future contracts in order to extract the maximum amount of money from him for awarding the security guard auditing contract. Wasim Khan told the Commission that he was not going to manage the plumbing contract tender process and that he handed the contract to another RailCorp employee in the last two weeks of his employment at RailCorp.

According to Mr Ali's evidence at the public inquiry, Wasim Khan told him that there were two other contracts Mr Harambasic could apply for.

The telephone intercepts indicate tenders for cleaning and plumbing services were discussed with Mr Harambasic as

<sup>1</sup> *Investigation into bribery and fraud at RailCorp*, Independent Commission Against Corruption, Sydney, 2008.



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serious propositions and not merely as an inducement for Mr Harambasic to part with money. However, there is no credible evidence of any agreement between the parties as to the precise terms of the intended transaction. Also, apart from some preliminary discussions, there is no evidence to show that steps were taken to corrupt the tenders.

## **Setting up businesses on his own account**

Wasim Khan also gathered information from RailCorp regarding tenders for a forensic cleaning contract which was to be advertised. He discussed this tender with Mr Ali. During the course of a telephone conversation with Mr Ali on 5 May 2009, he discussed buying a company and putting it into his father's name and Mr Ali's name because he did not want it discovered that he was involved in any business run by his family that was applying to do RailCorp work.

Wasim Khan obtained information from RailCorp about the three companies currently engaged by RailCorp to do this work and gave Mr Ali the contact details of the companies. Using this information Mr Ali telephoned one of the companies with a view to purchasing the company so that Wasim Khan and Mr Ali could tender for the contract using the company name. The scheme did not come to fruition as the person who answered Mr Ali's telephone call hung up on him before he could make any proposal.

The Commission is satisfied that Wasim Khan supplied Mr Ali with RailCorp information about the companies currently engaged by RailCorp to perform forensic cleaning work. However, there is no evidence before the Commission that information of this kind is either confidential or that Wasim Khan was aware that disclosing such information was forbidden by RailCorp. In the circumstances the Commission does not find that Wasim Khan engaged in corrupt conduct in divulging the name of the companies to Mr Ali.

# Chapter 5: Corruption prevention

## The Commission's corruption prevention role

The Commission's corruption prevention role is established under section 13(1) of the ICAC Act, as follows:

...

- (d) *to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,*
- (e) *to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated,*
- (f) *to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct,*

...

Section 13 also establishes the corruption prevention functions that apply to investigations carried out by the Commission:

- 2. *The Commission is to conduct its investigations with a view to determining:*

...

- (b) *whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and*

- (c) *whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct,*

## Corruption prevention and this investigation

This chapter examines the factors that allowed Wasim Khan to commence his corrupt scheme. The key relevant factor is that Wasim Khan's colleagues on the tender evaluation committee ("TEC") were inexperienced in this type of work, particularly tender negotiation events. Had they been more experienced and/or received adequate training in the tendering process from RailCorp, it is likely that they would have challenged his decision to negotiate a price change with Unisec and Davis Langdon unilaterally, without reference to the category manager.

Five recommendations are made to RailCorp, all focused on improving its procurement systems and procedures in order to prevent future opportunities for corruption.

The roles of the business representatives on the TEC, Ms Ye and Mr Brennan, in the events exposed by this investigation are analysed simply in order to illustrate systemic weaknesses that facilitated Wasim Khan's corrupt conduct. There are no allegations of corrupt conduct against them.

## Responsibility for tenders

The key safeguards in place at RailCorp for tenders over \$150,000, such as the Security Guard Auditing (SGA) tender, are:

- an electronic procurement system that ensures several different people are involved in decisions in the procurement process;
- tender evaluation committees, which ensure that no single person controls the process and that

personnel from different areas of RailCorp are involved;

- training, which better ensures that staff know what to do, as well as that they will recognise and report corruption if it occurs; and
- category managers, who are responsible for checking that procurement managers, such as Wasim Khan, follow correct procedure.

This chapter focuses on the role of training, as this appears to be the safeguard that broke down in the matter that is the subject of this investigation.

Procurement in RailCorp is organised into nine different categories according to the type of good or service being procured. Most category managers have responsibility for only one procurement category. They are supported by procurement managers, such as Wasim Khan, in running procurement projects in accordance with RailCorp policies and procedures. Procurement managers are managed directly by the category managers.

Under the direction of his category manager, one of Wasim Khan's main duties was organising new contracts, including managing tender processes, assessing tender proposals and allocating contracts. Many of these duties are performed as part of the procurement manager's membership of a TEC.

The role of TECs is to assess proposals and recommend the allocation of contracts to suppliers. Procurement managers are responsible for ensuring that TECs comply with procurement policies and procedures. In a three-person TEC, such as that for the Security Guard Auditing (SGA) tender, the two other selected members are technical representatives from the business area in RailCorp that actually manages or uses the good or service being purchased. They have technical knowledge of the good or service that is being purchased.

Wasim Khan's duties as procurement manager included advising the category manager as to whether any aspects of the tender proposal needed to be clarified or renegotiated, and then obtaining permission to negotiate if the category manager considered negotiations necessary.

Procurement managers should form their views about the need for negotiations by consulting with the technical team members. Overall responsibility for whether a negotiation event should take place, and what will be negotiated, lies with the category manager.

See Appendix 3 for a description and summary of the procurement procedures that should have governed the SGA tender.

## Wasim Khan's motivations

During the public inquiry held as part of this investigation Wasim Khan gave evidence regarding his motivations and calculations. This section documents these in order to educate the public about the factors that can shape and drive corruption.

### **“I always knew that I wanted to try something corrupt”**

Research into preventing corruption distinguishes between individuals who actively look for opportunities to be corrupt, and individuals who do not actively look for opportunities but when an opportunity appears are ready to exploit it.<sup>2</sup> By his own evidence, Wasim Khan was a classic example of the individual who actively looked for opportunities:

*[Wasim Khan]: I always knew that there was a way - I always knew that I wanted to try something – corrupt.*

*[Counsel Assisting]: And what, over the months that you'd been working for RailCorp, you'd been looking at the process*

<sup>2</sup> This first distinction was first made in the 1972 Knapp Report into police corruption in New York City which coined the terms “meat-eater” and “grass-eater” respectively to characterise the two types. See William Bailey, *The Encyclopedia of Police Science*, second edition, Routledge, New York, 1995), p. 546.

*and looking for ways in which it could be corrupted. Is that correct?*

*[Wasim Khan]: Correct, yes.*

The opportunity that arose for Wasim Khan was the negotiation event engineered by himself for the SGA tender.

Specifically, Wasim Khan realised that the difference in price between Unisec's proposal and the incumbent's proposal would allow him to use the negotiation event to increase Unisec's price and obtain a bribe, while keeping the tender within budget:

*[Wasim Khan]: I saw that [the increase in the scope of works from 56 to 72 hours] as an opportunity to increase the amount and - - -*

*[Commissioner]: So you could get the money?*

*[Wasim Khan]: So that I could get the money.*

When asked about the precise reason why he wanted to "try something", Wasim Khan gave evidence that his contract with RailCorp was coming to an end and he had a young family to support. However, it is highly unlikely that a desire to get money to tide over his family during a period of unemployment was the genuine reason motivating Wasim Khan.

First, Wasim Khan had been told that his contract would probably be extended. Second, the Commission obtained telephone intercepts between Wasim Khan and Mr Ali showing that while at RailCorp Wasim Khan had received an offer of employment in a private firm, but that Wasim Khan thought that staying at RailCorp would give him more "advantages". Whether "advantages" meant opportunities for engaging in corruption or simply better career prospects, is unclear. What is clear is that he had other opportunities for employment. The likely reasons Wasim Khan engaged in corruption were greed (for more money) and because he thought he could get away with it.

### Calculations about being caught

Individuals' perceptions regarding the likelihood of being detected and punished for corruption are useful in informing the Commission and the agency involved about whether existing systems deter individuals motivated to act corruptly. Detection systems and other obstacles to corruption can cause individuals to take additional risks, and therefore cause them to reassess whether those risks are worth taking. The hope is that some such individuals will be entirely dissuaded from engaging in corruption.

Wasim Khan gave evidence about his calculations regarding the opportunity for corruption presented to him by the SGA. First, having realised that he could engineer a negotiation event he sought advice from his father, Mohammed Khan, and then a family friend, Mr Ali. Wasim Khan wanted to know whether Mr Ali, who was experienced in business, thought that the SGA tender would be a good one to corrupt.

Second, Wasim Khan sought to minimise any contact he had with Unisec by using a middleman. Unisec representatives already knew Wasim Khan from the pre-tender briefing for the SGA tender and other communications with RailCorp. Wasim Khan gave evidence that he did not overtly involve himself in the request for a bribe from Unisec, as he thought this would be a useful strategy to avoid detection. This was because he was aware that the Commission's previous investigations into RailCorp exposed scams involving RailCorp employees' direct involvement with companies to which they awarded work:

*[Commissioner]: Just going back to when you started working in RailCorp and you heard these stories about investigations [by the Commission into RailCorp], why didn't you think that you would, like other people at RailCorp, get caught?*

*[Wasim Khan]: Because the honest answer to that is a lot of these people had direct involvement with the companies, whereas with - with the scheme that I'd put together I thought that there is an indirect way and that I would get away with it.*

Having received Mr Ali's advice that the SGA tender would be a good one to corrupt, Wasim Khan then went about using a middleman to minimise the risk that his scheme would be detected. As discussed in Chapter 3, Wasim Khan asked Mr Ali to perform this role and Mr Ali agreed. When Mr Ali was in Fiji, Wasim Khan asked his father (Mohammed Khan) and then his cousin (Tabrez Khan) to act as intermediaries, both of whom also agreed.

### "The start of something big"

Wasim Khan's plans for establishing a corrupt scheme extended beyond the SGA tender to other RailCorp contracts. Telephone intercepts and documents obtained by the Commission demonstrated his interest in corrupting other tenders for cleaning and plumbing services. Wasim Khan gave evidence that he planned to use the SGA

tender as a test run to see whether he could get away with corrupting it, and then move on to bigger and better contracts:

*[Counsel Assisting]Q: It was a trial run, wasn't it?*

*[Wasim Khan]A: Yeah. Yeah, that's right, yes.*

*Q: And it was a trial run which you intended, if you stayed working at RailCorp, to carry over into other contracts, didn't you?*

*A: Yes, it could potentially, yes.*

*Q: Bigger and better contracts than a mere contract for \$170,000?*

*A: Correct, yes.*

*Q: So this was really the start of something big?*

*A: That's right.*

It is only because Unisec reported the matter and the Commission took quick action in response, that Wasim Khan's plan for a more extensive corrupt scheme involving multiple tenders was terminated.

## **Inadequately trained staff – a major risk**

The two business members of the TEC, Ms Ye and Mr Brennan, had not received training in the Procurement Procedures that applied to the SGA tender, nor in RailCorp's online procurement system, ARIBA. Having properly trained TEC members would better ensure that the correct process is followed in the first place, as well as increasing the likelihood that corrupt behaviour by a TEC member is recognised and reported by other TEC members.

If RailCorp had provided proper training in the Procurement Procedures to the other two members of the TEC, Ms Ye and Mr Brennan, they would have learnt that:

- The category manager had to approve both the decision to negotiate and the negotiation strategy;
- If the scope of works was inadequate, this was an issue for the business unit to resolve, not the procurement manager; and
- If the scope of works needed to be changed significantly, the process most likely had to be cancelled and the tender readvertised.

If properly trained, Ms Ye and Mr Brennan should also have felt confident enough to report to the category manager any attempt by Wasim Khan to hold a negotiation event without approval.

### **Recommendation 1**

That RailCorp revises its procurement training for staff and contractors to explicitly address the risks for corruption and non-compliance in direct negotiations, including negotiations over scope of works.

### **Recommendation 2**

That RailCorp establishes and publicises a way for TEC members to obtain advice should they have a query about whether proper procedure is being followed for a tender.

### **Recommendation 3**

That RailCorp makes it a requirement that staff and contractors receive training in both ARIBA (RailCorp's new electronic procurement system) and its new Procurement Procedures before they obtain users rights in ARIBA.

## **Analysis supporting Recommendations 1 to 3**

RailCorp policy is that in order to be a member of a TEC, a staff member needs access and user rights in RailCorp's electronic procurement system, ARIBA. ARIBA contains catalogues of suppliers for many goods and services and automatically directs users to a supplier from the catalogue, thereby removing the need for the requestor to identify a provider. ARIBA automatically segregates duties between the different people who requisition, approve and receipt the procurement of goods and services by requiring identification details from different people for each stage of a transaction. ARIBA also generates reports on transactions for audit purposes.

TEC members need to be able to log on to ARIBA and register their involvement in various stages of a tender in order for the tender to progress to each step. The only way to obtain ARIBA access and user rights is to undertake RailCorp's training course on ARIBA.

The SGA tender was an unauthorised exception in this respect, in that it was organised on paper rather than through ARIBA. In fact, the two business members of the TEC, Ms Ye and Mr Brennan, were not even able to access ARIBA because they had not received training in it and consequently did not have user rights. They could not perform any tasks in ARIBA, such as electronic approvals required for the SGA tender. Only Wasim Khan had

access to ARIBA, because only he was trained in it and therefore only he had user rights.

Ms Ye and Mr Brennan also had not been trained in the Procurement Procedures that applied to the SGA tender.

RailCorp policy does not require training in the Procurement Procedures before a staff member can participate in a TEC or obtain access to ARIBA, RailCorp's electronic procurement system.

Linking training in ARIBA and the Procurement Procedures on the one hand, to the receipt of user rights in ARIBA on the other, should better ensure that only sufficiently qualified and skilled personnel are able to participate in TECs. Recommendation 3 addresses this issue.

Had they received the proper training, the TEC members would most likely have recognised that the negotiation event organised for the SGA tender did not comply with the Procurement Procedures in two key respects. First, the negotiation strategy was not approved by the category manager. Second, the negotiation event included negotiations over the scope of works in that Unisec was asked to requote based on 72 hours, whereas the original tender documents had asked for a quote based on 56 hours. A change such as this, to the scope of works, was the responsibility of the business unit and should have been agreed to by the business unit prior to any negotiation.

The basic cause of this non-compliance was that none of the team members, including Wasim Khan, understood the procedures for conducting negotiating events or their role in them. This was contrary to the Procurement Procedures, which state that "Each team member must understand their role in the negotiation process – both individually and as part of the Team"<sup>3</sup>.

Ms Ye had previous experience with two tenders but had never been involved in a negotiation event and had no training in the Procurement Procedures. She gave evidence that she had read the former procedures on RailCorp's intranet, but was not aware until the public inquiry for this investigation that RailCorp had introduced new procurement procedures, suggesting that RailCorp had not adequately promoted the new procedures internally. Not surprisingly, Ms Ye gave evidence that she did not understand the procedures governing a negotiation event:

*[Counsel Assisting]Q: Did you understand that there were only certain situations in which such face-to-face negotiations take place?*

*[Ms Ye]A: No.*

*Q: Did you understand that those face-to-face negotiations just couldn't involve a unilateral change in the scope of works that was being contemplated by Wasim Khan?*

*A: No.*

Mr Brennan's manager should have been on the TEC but because he was busy with other work he sent Mr Brennan instead, telling him that participating in the tender process would help further his professional development. However, Mr Brennan had never been involved in any procurement process and had also never received training in the Procurement Procedures.

Ms Ye gave evidence that she challenged Wasim Khan on issues that she thought were within her area of expertise and responsibility. For example, Wasim Khan wanted the contract for the SGA tender to allow Unisec to be paid in advance at a pro rata monthly rate calculated on the annual value of the contract. Ms Ye argued that Unisec should only be paid in response to invoiced work, and sought advice from her supervisor. She followed up the issue with Wasim Khan and insisted that Unisec be paid based on its invoiced amounts, an arrangement to which he finally agreed.

However, both Ms Ye and Mr Brennan gave evidence that they ceded to Wasim Khan responsibility for the decision to enter into negotiations and to develop a negotiation strategy. This was because Wasim Khan was the procurement manager and they assumed he knew what he was talking about on the issue of procurement process. Ms Ye stated that she did not know the TEC was not allowed to unilaterally change the scope of works, and followed the direction of Wasim Khan as he was the TEC chairman: "I didn't realise that because we believed we were led by the chairman, which is someone from procurement and they have procurement expertise".

Even though he had received some training in the Procurement Procedures, Wasim Khan himself also appeared to be genuinely confused about the proper process, and did not know that the category manager had to approve the negotiation strategy.

*[Counsel Assisting]Q: Did you discuss the negotiating strategy with the category manager?*

*[Wasim Khan]A: Well – with the category manager?*

*Q: Yes?*

<sup>3</sup> Procurement Procedures, RailCorp, Sydney, 2008, Section 4.2.2.5.2.

A: *No, because this is all – the – the policies keep changing at RailCorp. That’s a very recent policy that’s come about. What you’re talking about there is a few weeks old. Or maybe about a couple – two – two months old.*

Q: *Who do you think, at the time that you were doing this in March of this year, who was it that you had to discuss this negotiation strategy with?*

A: *With regards to, there was no process around negotiation strategy as to who needed to sign off on it.*

When Counsel Assisting the Commission took Wasim Khan through the steps outlined in the Procurement Procedures for entering into a negotiation event, Mr Khan claimed “I didn’t know I had to do these steps”.

While there had been a change in policy, the new process – including the need to get approval from the category manager for a negotiation event – is clearly explained in the Procurement Procedures. These procedures were in place in October 2008, four months before the SGA tender was advertised, and Wasim Khan should have followed them.

In his evidence Wasim Khan also indicated that he misunderstood what matters could be negotiated as part of a negotiation event.

*[Commissioner]Q: Do you think there’s any limit on how much you can discuss after tenders have closed and before a contract is awarded?*

*[Wasim Khan]A: My understanding is that it stays within the tender evaluation committee and we can discuss within the evaluation committee ...*

Q: *Anything?*

A: *Anything, yes.*

The TEC is not able to negotiate “anything”. Aidan Hughes (RailCorp’s Executive General Manager, Commercial Services) gave evidence that neither the procurement manager, the business area representatives, nor the TEC as a whole, are permitted to unilaterally change a scope of works in any fundamental way. If a change is necessary, the whole tender process should

probably be stopped, the scope of works rewritten, and then a new tender process commenced. Changing the scope in any substantial way during the negotiation event would alter what the tender was about, and therefore be unfair to firms that had submitted a proposal against the original scope.

The rationale for entering into a negotiation event is that if RailCorp can use it to optimise the transaction in terms of obtaining better value for money, then it should do so. However, RailCorp received worse value for money as the negotiation event resulted in the scope of works changing from 56 to 72 – a 30 per cent increase in the number of hours billable to RailCorp. This was a significant change that should not have been made.

## Previous recommendation on RailCorp procurement

As mentioned, given Wasim Khan’s corrupt motivations it is unlikely that even if he had known or been trained in the proper procedures, he would have followed them. Nevertheless, it is reasonable to expect that all staff are trained in the activities they are expected to do, especially in a specialised, high-risk activity such as procurement.

The Commission has previously made a recommendation to RailCorp regarding training and procurement that is relevant to corruption prevention issues exposed by this investigation. The final report for the *Investigation into defrauding the RTA and RailCorp in relation to provision of traffic management services* recommended that “RailCorp, as a matter of priority, provide training to all staff with responsibilities for procurement” (Recommendation 14).<sup>4</sup>

That recommendation was designed to ensure that only suitably qualified and skilled people made decisions about the expenditure of public money on RailCorp’s procurement of goods and services. RailCorp reported in its 24-month progress report on the status of recommendations from the report that over 2,000 people had been trained to date in its procurement procedures.<sup>5</sup>

As this broad recommendation regarding the need for RailCorp to ensure staff are properly trained in procurement has already been made, no additional recommendation will be made here.

<sup>4</sup> *Investigation into defrauding the RTA and RailCorp in relation to provision of traffic management services*, Independent Commission Against Corruption, Sydney, December 2006, p. 76.

<sup>5</sup> A copy of RailCorp’s progress report is available on the Commission’s website, [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au).

## Other opportunities for detection

It is useful to consider other ways to detect schemes such as Wasim Khan's in the absence of properly trained staff and any specific reports about an individual's conduct. In this instance, the corrupt conduct was only detected after Unisec reported to the Commission that they had received a telephone call soliciting a bribe.

Public sector organisations must have their own systems and processes in place to deter and detect such corrupt conduct. One method is to require managers to check the work of their staff, especially when it involves expenditure of public funds. Another is to have procurement systems which provide information that can be used to detect fraud and corruption.

### Recommendation 4

That RailCorp implements a system of random auditing to be done by senior managers of their middle managers' procurement approvals. Internal Audit should then audit the senior managers' audit. When approving officers approve orders that vary from standard procedures, penalties should be enforced.

### Recommendation 5

That within two years of ARIBA becoming fully operational, a performance/operations review is undertaken to ascertain whether ARIBA assists RailCorp and individual managers to detect fraud and corruption. Copies of the final report should be sent to the Commission and the relevant Minister

## Analysis supporting Recommendations 4 and 5

Wasim Khan's efforts to corrupt a tender and have it awarded to Unisec were successful in that Unisec was officially awarded the SGA contract, and informed about this in a letter dated 15 May 2009. It was only Unisec's action in reporting an attempt to solicit a bribe, and the subsequent investigation, that prevented the scheme from coming to fruition.

The Tender Evaluation Report – which informs the decision to award a contract – for the SGA tender, was signed off by the TEC. The Submission for Approval to Award Contract was prepared by the manager of the business area involved, signed off by his general manager, endorsed for funds availability by a general manager in the Finance

division, and approved by RailCorp's Chief Operating Officer. The category manager then used the Submission for Approval to Award Contract document as the basis for the official letter to Unisec informing it that RailCorp had awarded it the tender.

Why did all these people endorse the awarding of the contract to Unisec? It is possible that Wasim Khan convinced the manager from the business area of the need to change the scope, and the TEC representatives from the business area might have done the same given that they were also persuaded by Wasim Khan that this was necessary (see page 12, Chapter 2). However, supporting documentation for the Tender Evaluation Report (TER) for the SGA tender included the scope of works, and an analysis of this and information on the negotiation event contained in the TER clearly shows that the scope had been changed by the TEC.

The Commission's *Investigation into bribery and fraud at RailCorp – Eighth Report* (December 2008) found that a system of random audits by managers of the activities of staff would have helped detect corruption and deter individuals motivated to commit corrupt conduct. The system would be implemented not by audit, but by managers who randomly select samples of work of their staff and review it for compliance.

Recommendation 23 in *Investigation into bribery and fraud at RailCorp – Eighth Report* addresses the issue of managers checking the work of their staff. That recommendation is relevant to the matter under investigation here and is reiterated in Recommendation 4 of this report. It is designed to ensure that there is some way to catch improper decisions after the fact, given that it may be very difficult to catch corrupt actions/decisions at the time. By publicising the fact that random audits are carried out, managers may also deter staff from engaging in corrupt conduct.

In response to Recommendation 23 in *Investigation into bribery and fraud at RailCorp – Eighth Report*, RailCorp's implementation plan states that as part of managing staff members' performance, managers will check that their staff have approved things correctly.<sup>6</sup> When asked during the public inquiry for this investigation about RailCorp's implementation of Recommendation 23, Aidan Hughes (RailCorp's Executive General Manager, Commercial Services) stated:

<sup>6</sup> The implementation plan can be found on the ICAC's website at [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au).

*... I think there is an opportunity for RailCorp to consider inserting into the procurement space dedicated audit resources, who on a random basis, pick up a particular file, and go through the documentation and look for adherence. It's a – we're in a new world in ARIBA, and I think this is a timely lesson for us, that we have an issue here that we need to tighten some controls around, and I think specifically inside the procurement workflow, we need to look at dedicated audit.*

As RailCorp's electronic procurement system, ARIBA, is new, its capacity to assist RailCorp and individual managers to detect fraud and corruption should also be assessed once it has been fully operational for some time. The kind of information required from such a review includes:

- the proportion of transactions complying with policy and procedure;
- whether ARIBA assists managers to check the work of their staff; and
- whether additional dedicated resources are required to perform random audits of transactions through ARIBA.

Whether, as Mr Hughes suggests, specific staff within the Strategic Procurement and Supply Division should also have responsibility for auditing transactions – in addition to both checking by managers and RailCorp's Internal Audit program – will become known once ARIBA is fully operational and the review outlined in Recommendation 5 has taken place.

## 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 New South Wales, 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 section 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 section 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 co-operating 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: Corrupt conduct defined and the relevant standard of proof

Corrupt conduct is defined in section 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in either or both sections 8(1) or 8(2) and which is not excluded by section 9 of the ICAC Act. An examination of conduct to determine whether or not it is corrupt thus involves a consideration of two separate sections of the ICAC Act.

The first (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.*

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 section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) *a criminal offence, or*
- (b) *a disciplinary offence, or*
- (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.*

Three steps are involved in determining whether or not corrupt conduct has occurred in a particular matter. The first step is to make findings of relevant facts. The second is to determine whether the conduct, which has been found as a matter of fact, comes within the terms of sections 8(1) or 8(2) of the ICAC Act. The third and final step is to determine whether the conduct also satisfies the requirements of section 9 of the ICAC Act.

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 section 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.

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 is no right of appeal against findings of fact made by the Commission nor, excluding error of law relating to jurisdiction or procedural fairness, is there any appeal against a determination that a person has engaged in corrupt conduct. 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. 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 *Rejfeek 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).

As indicated above, the first step towards making a finding of corrupt conduct is to make a finding of fact. Findings of fact and determinations set out in this report have been made applying the principles detailed in this Appendix.

## Appendix 3: Procurement procedures relevant to tender negotiations

RailCorp has Procurement Procedures that apply to all procurement activities.<sup>7</sup> The document was introduced to RailCorp on 27 October 2008. It replaced the procedures that existed before that date. The Procurement Procedures applied to the SGA tender organised by Wasim Khan.

There are five basic steps in the procurement process:

1. identifying the need for a good/service
2. ordering/requesting the good/service
3. receiving the good/service
4. processing an invoice
5. paying the supplier.

Step 2 includes the procedures for planning, developing and managing a contract between RailCorp and a supplier – what is known as “source to contract (S2C)”. As the SGA tender involved the creation of a contract between RailCorp and the successful supplier, the S2C process applied.

Within the S2C process, the procedure for evaluating, negotiating and awarding contracts is at 4.2.2.2.5 of the Procurement Procedures, which includes the diagram, reproduced below, summarising the process:

Section 4.2.2.2.5 guides the decision to enter into a negotiation event as well as what can actually be discussed. Negotiation involves development of a negotiation strategy and the negotiations themselves, which are covered in 4.2.2.2.5.2 and 4.2.2.2.5.3 respectively.

The category manager is responsible for developing the procurement strategy for a particular good or service and organising the tender process, including that it complies with policies and procedures. Depending on the value, risk and complexity of the goods and services being procured, further approvals may be required.

Several teams are involved in the overall process. The category manager identifies a procurement cross-functional team (PCFT), comprised of both procurement and business areas, that actually implements the tender process.

### 4.2.2.2.5 Evaluate, Negotiate and Award Contract

This is 5<sup>th</sup> step in the Source-to-Contract process.



This second and final ‘execute’ phase of the overall S2C process involves evaluation of supplier responses, negotiating with short-listed tenderers and awarding a supply contract.



#### Note

All members of the Evaluation Team must complete RailCorp’s ‘Deed of Confidentiality & Conflict of Interest Declaration Template’ prior to accessing any RFx responses.

<sup>7</sup> RailCorp, *Procurement Procedures* (Sydney 2008).

A negotiation team and an evaluation team, usually subsets of the PCFT, are identified to perform certain tasks of the tender. The evaluation team makes the final recommendation to the category manager about which tenderer should be selected. In small tenders, such as the SGA tender, the PCFT, the negotiation team and the evaluation team usually comprise exactly the same people. This was the case for the SGA tender.

The procurement manager takes the lead in developing the procurement strategy and organising the tender process, including that it complies with policies and procedures.

The key steps in a negotiation event as outlined in the Procurement Procedures are:

- The category manager identifies a negotiation team;
- The negotiation team develops a list of items for negotiation and any questions that need to be asked. This becomes the negotiation strategy;
- The negotiation strategy is approved by the category manager;
- The negotiation team conducts negotiations with each tenderer;
- Records are made of the negotiation discussions; and
- The evaluation team recommends to the category manager which supplier should be selected to provide the good/service.

These sections do not specifically mention what can or cannot be negotiated. However, the Procurement Technical Policy that accompanies the Procurement Procedures states that the “specification supporting the procurement activity is to be unambiguous”. Specifications are contained in the scope of works document for each tender.

A scope of works details the technical details of the good or service that is required. It is typically developed by the business area involved in the tender, as it is representatives from this area that understand the technical requirements.



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