

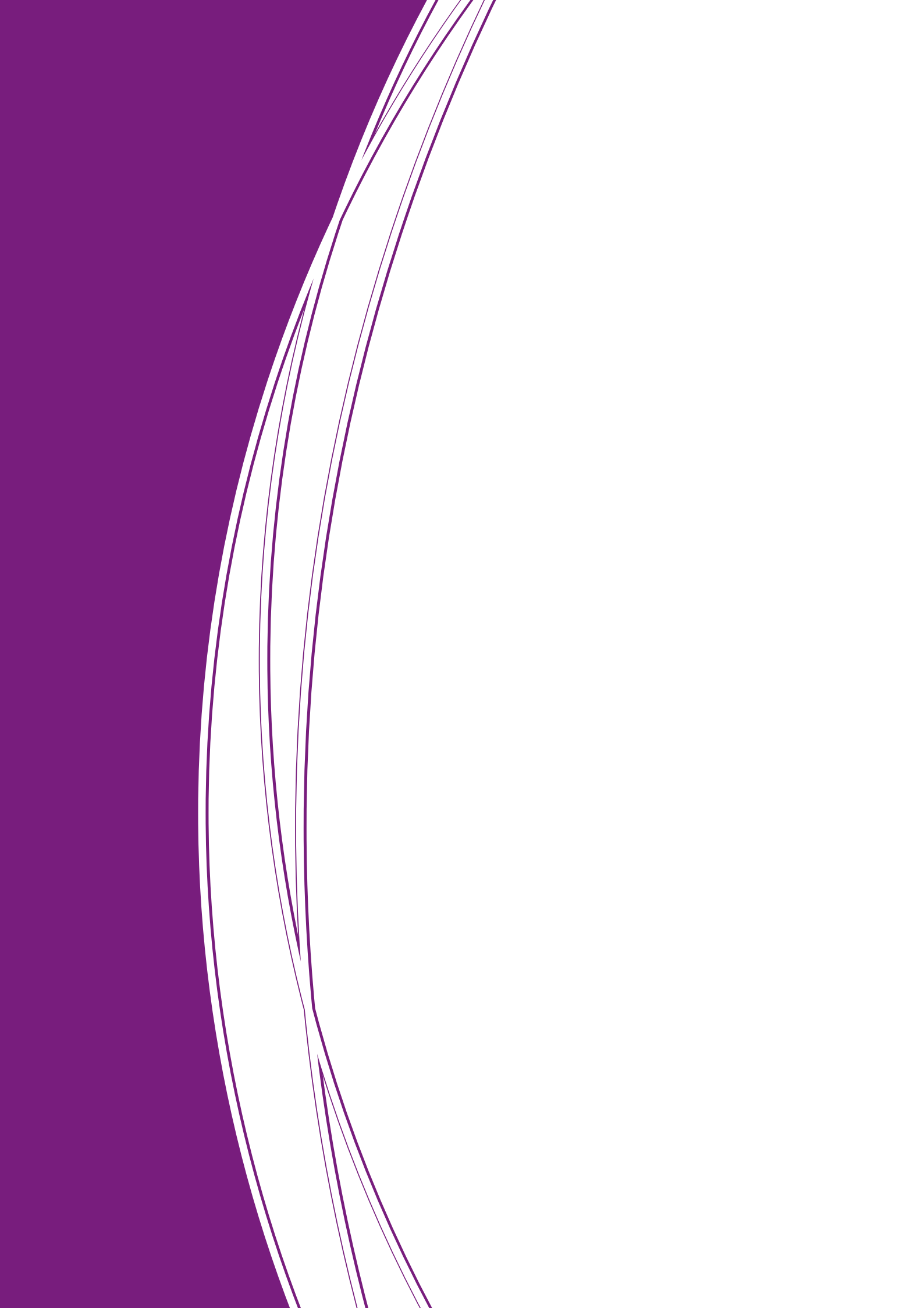
ICAC

INDEPENDENT COMMISSION
AGAINST CORRUPTION



**INVESTIGATION INTO A
HOUSING NSW OFFICER'S
FAILURE TO DECLARE
CONFLICTS OF INTEREST
AND SECONDARY
EMPLOYMENT**

ICAC REPORT
MAY 2010





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Madam 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 failure of a former officer of the Department of Housing (now Housing NSW) Frank Garzaniti, to disclose conflicts of interest or seek permission to engage in secondary employment.

Assistant Commissioner Theresa Hamilton 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*.

A handwritten signature in black ink, appearing to read 'D Ipp', is positioned above the name of the Commissioner.

The Hon David Ipp AO QC
Commissioner

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Executive summary

The investigation

This report concerns an investigation conducted by the Independent Commission Against Corruption (“the Commission”) into the conduct of a former officer of Housing NSW, Francesco (“Frank”) Garzaniti, during his employment at Housing NSW between 2001 and 2008. Mr Garzaniti failed to disclose an interest in Housing NSW contracts that were awarded to, or related to work that was carried out by, companies he and his friend and business associate Gianfranco (“Frank”) Santomingo had interests in, which enabled himself and Mr Santomingo to benefit financially. This report examines the conduct of both Mr Garzaniti and Mr Santomingo.

The investigation into this matter was commenced in November 2007, after the Commission received a report from Housing NSW concerning Mr Garzaniti’s failure to disclose his conflict of interest arising from his involvement in Housing NSW contract work through G&F Plant Hire Pty Ltd (“G&F”) and his close relationship with fellow director and shareholder Mr Santomingo.

Further enquiries conducted by the Commission confirmed that Mr Santomingo’s company, Greenfield Development Pty Ltd (“Greenfield”), obtained a casual lawns and grounds maintenance contract with Housing NSW in 2001 which was continually renewed until 2007 without going to tender or any other competitive process. This contract was eventually worth about \$2.7 million. Mr Garzaniti and Mr Santomingo were joint directors of G&F until 2007 when Mr Santomingo ceased his directorship and Mr Garzaniti became the sole director. G&F subcontracted to Housing NSW’s head contractor, Crossley McLean & Associates Pty Ltd (“Crossley McLean”), to perform demolition and tree lopping work for Housing NSW worth more than \$2.6 million over a number of years. Despite G&F being the actual subcontractor, the documentation relating to this work showed Greenfield as the company carrying out the work. It appeared that Mr Garzaniti may have breached Housing NSW policies requiring him to

notify Housing NSW of any conflicts of interest and to declare any secondary employment.

In the course of its investigation the Commission obtained a large volume of documents and information from Housing NSW, financial institutions and other organisations through the issuing of notices under sections 21 and 22 of the Independent Commission Against Corruption Act. The Commission also lawfully executed search warrants on Mr Garzaniti’s home where both Mr Garzaniti and Mr Santomingo had their offices and on the business premises of Crossley McLean to obtain additional evidentiary material relevant to the investigation.

In addition, the Commission interviewed a number of witnesses and conducted three compulsory examinations in January and February 2010. The transcripts of the compulsory examinations and other relevant evidence obtained during the course of the investigation were tendered at the public inquiry into this matter.

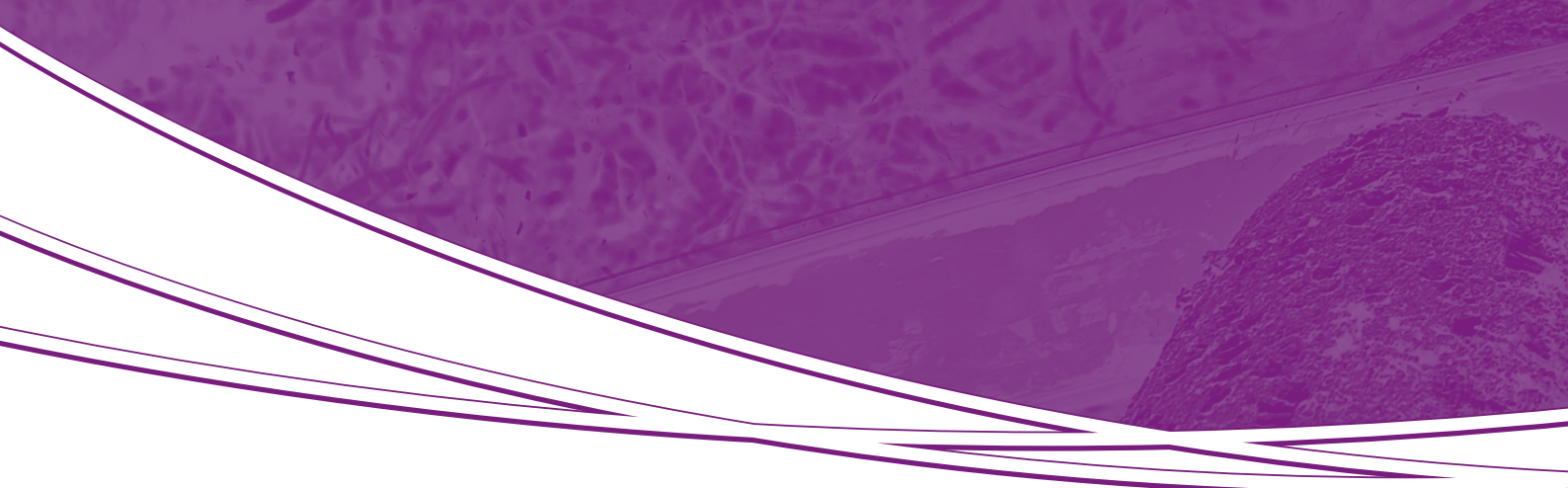
The public inquiry

During the course of the investigation evidence was obtained that indicated the likelihood that corrupt conduct had occurred. As part of its investigation the Commission therefore determined it was in the public interest to hold a public inquiry.

The public inquiry was held over two days, commencing on 16 March 2010. Four witnesses, including Mr Garzaniti and Mr Santomingo, gave evidence. Assistant Commissioner Theresa Hamilton presided and Murugan Thangaraj acted as Counsel Assisting the Commission.

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

The Commission’s findings are set out in Chapter 4 of this report. The Commission found that Frank Garzaniti engaged in corrupt conduct by:

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- deliberately failing to declare a conflict of interest to Housing NSW and seek approval from Housing NSW for secondary employment, arising from his interest in G&F, which performed Housing NSW contract work as a subcontractor to Crossley McLean, from which he derived substantial personal financial benefits.
 - deliberately failing to declare a conflict of interest arising from his relationship with his friend Frank Santomingo, whose company Greenfield was used by Mr Garzaniti to conceal his and G&F's involvement in Housing NSW contract work, in order to retain the work and continue to benefit financially from it.

A statement is made pursuant to section 74A(2) of the ICAC Act that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of Mr Garzaniti for the common law offence of misconduct in public office.

Mr Garzaniti resigned from Housing NSW in February 2008 and accordingly no recommendation is made in respect of any disciplinary proceedings against him.

Corruption prevention issues

Chapter 5 of this report sets out corruption prevention issues and details the reforms implemented in recent years by Housing NSW for a more effective management of corruption risks associated with its maintenance procurement function, conflicts of interest and secondary employment.

In view of these reforms, no corruption prevention recommendations are made to Housing NSW in relation to this investigation.

Chapter 1: Introduction

This report concerns an investigation conducted by the Independent Commission Against Corruption (“the Commission”) into the conduct of a former officer of the Department of Housing (now called Housing NSW¹) Frank Garzaniti, during his employment at Housing NSW between 2001 and 2008. Mr Garzaniti failed to disclose an interest in Housing NSW contracts that were awarded to, or related to work that was carried out by, companies he and his friend and business associate Frank Santomingo had interests in, which enabled himself and Mr Santomingo to benefit financially. This report examines the conduct of both Mr Garzaniti and Mr Santomingo.

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.

This investigation was commenced in November 2007 after the Commission received a report from Housing NSW concerning Mr Garzaniti’s failure to disclose his conflict of interest arising from his involvement in Housing NSW contract work through G&F Plant Hire Pty Ltd (“G&F”) and his close relationship with fellow director and shareholder, Mr Santomingo.

Further enquiries conducted by the Commission confirmed that Mr Santomingo’s company, Greenfield Development Pty Ltd (“Greenfield”), obtained a casual lawns and grounds maintenance contract with Housing NSW in 2001 which was continually renewed until 2007. This contract was eventually worth about \$2.7 million. Mr Garzaniti and Mr Santomingo were joint directors of G&F until 2007 when Mr Santomingo ceased his directorship and Mr Garzaniti became the sole director. G&F subcontracted to Housing NSW’s head contractor, Crossley McLean & Associates Pty Ltd (“Crossley McLean”), to perform demolition and tree lopping work for Housing NSW worth more than \$2.6 million over a number of years. Despite G&F being the actual subcontractor, the documentation relating to this work showed Greenfield as the company carrying out the work. It appeared that Mr Garzaniti may have breached Housing NSW policies requiring him to notify Housing NSW of any conflicts of interest and to declare any secondary employment.

It was also alleged that Mr Santomingo, as a close friend and business associate of Mr Garzaniti, assisted Mr Garzaniti by allowing Mr Garzaniti to use Greenfield as a “dummy company” in relation to Housing NSW contract work, to enable Mr Garzaniti to conceal his conflict of interest from Housing NSW and thereby retain the work and continue to benefit financially from it.

The matter under investigation was, therefore, serious and the alleged conduct would, if established, constitute corrupt conduct within the meaning of the ICAC Act.

Conduct of the investigation

The Commission’s investigation involved an examination of a large volume of documents obtained from Housing NSW, financial institutions and other sources as well as interviewing and obtaining statements from a number of witnesses.

In order to gather relevant evidence, the Commission also obtained and executed search warrants under section 40 of the ICAC Act on the premises of Mr Garzaniti, Mr Santomingo and Crossley McLean.

1. The name of the Department of Housing was changed to Housing NSW in June 2008. For simplicity, “Housing NSW” is used throughout this report to refer to the Department of Housing / Housing NSW.

In addition, the Commission conducted three compulsory examinations to obtain further relevant evidence.

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 and the evidence given at the compulsory examinations. Taking into account these factors 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 matters being investigated which involved allegations of a deliberate failure to declare a conflict of interest by an officer of a core public sector agency in order to obtain substantial financial benefits
- There appeared to be sufficient evidence of corrupt conduct.
- It was considered desirable to expose the corrupt conduct for the purpose of educating and deterring others who might be minded to engage in similar conduct
- The risk of prejudice to the reputation of persons who would be called to give evidence at the inquiry was not, in the circumstances, undue.
- 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 public inquiry commenced on 16 March 2010 and was conducted over two days. Assistant Commissioner Theresa Hamilton presided at the inquiry and Murugan Thangaraj acted as Counsel Assisting the Commission. A total of four witnesses (former employee of G&F Amanda Bromley, former Housing NSW contracts manager Robert Miles, Mr Santomingo and Mr Garzaniti) gave evidence at the public inquiry.

In accordance with the usual practice of the Commission and the requirements of procedural fairness, the Commission served written submissions from Counsel Assisting which set out possible findings and recommendations on all witnesses who gave evidence at the public inquiry or on their legal representatives following the conclusion of the public inquiry and provided them with an opportunity to respond. Submissions received in response were considered in preparing this report.

Investigation findings and section 74A(2) statements

The Commission's findings are set out in Chapter 4 of this report. The Commission found that Frank Garzaniti engaged in corrupt conduct by:

- deliberately failing to declare a conflict of interest to Housing NSW and seek approval from Housing NSW for secondary employment, arising from his interest in G&F, which performed Housing NSW contract work as a subcontractor to Crossley McLean, from which he derived substantial personal financial benefits, and
- deliberately failing to declare a conflict of interest arising from his relationship with his friend Frank Santomingo, whose company Greenfield was used by Mr Garzaniti to conceal his and G&F's involvement in Housing NSW contract work, in order to retain the work and continue to benefit financially from it.

A statement is made pursuant to section 74A(2) of the ICAC Act 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 Mr Garzaniti for the common law offence of misconduct in public office.

Mr Garzaniti resigned from Housing NSW in February 2008 and accordingly no recommendation is made in respect of any disciplinary proceedings against him.

Corruption prevention issues

Chapter 5 of this report sets out corruption prevention issues and details the reforms implemented in recent years by Housing NSW for a more effective management of corruption risks associated with its maintenance procurement function, conflicts of interest and secondary employment.

In view of these reforms, no corruption prevention recommendations are made to Housing NSW in relation to 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

Housing NSW owns and maintains well over 100,000 properties in the state. As a consequence, Housing NSW requires significant services including lawns and grounds maintenance, demolition and tree lopping. Numerous contractors are needed to carry out the necessary work.

Francesco Garzaniti, known as “Frank”, was employed by Housing NSW from June 1986 until he resigned in February 2008. He was a Senior Client Services Officer from 1994 and Acting Team Leader from 2000 at Housing NSW’s Macquarie Fields office. Mr Garzaniti has been friends with Gianfranco Santomingo, also known as “Frank”, for a number of years.

Robert Miles was Housing NSW’s Contracts Manager for the Greater Western Sydney Division from 2000 until 2009, that is, during the period relevant to this investigation.

In 1994, shortly before Mr Garzaniti was promoted to Senior Client Services Officer, Mr Santomingo registered Greenfield Development Pty Ltd (“Greenfield”). The company was engaged in landscaping and excavation work. Mr Santomingo has been the sole director and shareholder of the company since 1997. Greenfield obtained a short term casual lawns and grounds maintenance contract (“the lawns contract”) from Housing NSW in March 2001. The contract was repeatedly renewed on a casual basis without being subjected to tenders or any other competitive process until around May 2007. Housing NSW paid Greenfield in excess of \$2.7 million for these services over this period.

Mr Garzaniti and Mr Santomingo registered G & F Plant Hire Pty Ltd (“G&F”) in 2004. The company hired out plant and equipment and often retained subcontractors to perform required work. Mr Garzaniti and Mr Santomingo were both directors and shareholders of G&F until February 2007, when Mr Santomingo resigned from his directorship and Mr Garzaniti paid him \$65,000 to buy out his interest in the company. Mr Garzaniti then remained as G&F’s sole director and shareholder.

Crossley McLean & Associates Pty Ltd (“Crossley McLean”) was appointed by Housing NSW as its multi-trade head contractor from July 2002 until October 2008. During this period, Crossley McLean provided Housing


NSW with a range of services including demolition and tree lopping and retained both Greenfield and G&F as subcontractors, notwithstanding that neither G&F nor Greenfield held the licences required to perform demolition and tree lopping work.

Until shortly after Mr Garzaniti resigned from Housing NSW in February 2008, the work orders for the demolition and tree lopping work from Crossley McLean continued to be issued in the name of Greenfield, notwithstanding that the majority of the work was being done by G&F or by subcontractors hired and paid by G&F. G&F was paid directly by Crossley McLean. Between April 2005 and June 2008, Crossley McLean paid G&F over \$2.6 million. Mr Garzaniti was a director and shareholder of G&F throughout this period. Crossley McLean’s senior management includes former employees of Housing NSW.

Crossley McLean had previously employed Amanda Bromley as part of its administrative staff. Ms Bromley later performed a similar role for Mr Garzaniti and Mr Santomingo as an employee of G&F from November 2006 to December 2007.

Garzaniti Excavations Pty Ltd was registered in 1995 by Mr Garzaniti and his brother Tony Garzaniti, with their respective wives becoming directors in 2002. The company performed demolition work and also hired out its equipment. Other than Garzaniti Excavations’ equipment being used on occasions in the demolition work for Housing NSW through Crossley McLean, there is no evidence that the company carried out any work for Housing NSW or for Crossley McLean.

A significant number of substantial payments were exchanged between the respective individuals and entities during the period 2002 to 2008. For example, between July 2002 and February 2004, around \$200,000 was paid by Greenfield to Garzaniti Excavations. Between April 2003 and February 2006, Greenfield paid over \$280,000 to accounts controlled by Mr Garzaniti. Between May 2005 and May 2007, G&F paid over \$150,000 to Greenfield. Crossley McLean paid G&F over \$2.6 million between April 2005 and June 2008.



Mr Garzaniti had obligations to declare conflicts of interest. He was also required to seek permission before undertaking any secondary employment. These obligations arise specifically from Housing NSW's Code of Conduct and Ethics which was in operation during the period of Mr Garzaniti's employment at Housing NSW, which states:

Situations in which a conflict of interest arises or is possible are to be avoided.

Conflict of interest situations arise when we have a personal interest in a matter which could improperly influence or appear to improperly influence us in the performance of our duties.

In many cases only the individual will be aware of the potential for conflict. It is the individual's duty to avoid these situations or disclose them to a supervisor.

In managerial positions vigilance is required in responding to real and perceived conflicts of interest.

.....

Staff may engage in secondary employment or outside business activities but must obtain prior approval from the Department of Housing. At all times secondary employment or business activities must not adversely affect the proper, honest and efficient performance of duties as a Department of Housing employee.

Secondary employment is usually part-time work in a another job that is secondary to the main job for which the public official is employed. Secondary employment can be prohibited for public sector employees where there is a conflict or potential for a conflict of interest between the employee's official duties and the secondary employment.

Chapter 3: The contracts and the conflicts of interest

Amanda Bromley

Amanda Bromley was employed by G&F from November 2006 to December 2007 as a clerical assistant, carrying out such duties as accounting, bookkeeping and issuing of contract orders from Crossley McLean to G&F's subcontractors. She obtained this position through a referral from Crossley McLean where she had worked previously. She took her instructions at G&F mainly from Mr Garzaniti, but also from Mr Santomingo and she reported to both of them. There were no other employees that she worked with at the time.

She was aware that Greenfield was Mr Santomingo's company, however she said she did not receive any phone calls on behalf of Greenfield or otherwise have anything to do with the company.

She told the Commission that Greenfield was the company that had the contracts with Crossley McLean for demolition and tree lopping, however G&F did the work under those contracts, received payments from Crossley McLean for the work and paid G&F's subcontractors who actually performed the work. Part of her duties at G&F consisted of accounting and bookkeeping including banking. She received invoices from G&F's subcontractors such as Attitude Excavations and Fine Cut Tree Services which were addressed to G&F and she arranged for payment by using the G&F bank account.

She did not observe Greenfield doing any of the contract work or retaining any subcontractors to carry out the work on its behalf. However, the work orders issued by Crossley McLean were made out to Greenfield, not G&F.

She said Mr Garzaniti took an active role in administering or managing the Crossley McLean contracts. He subcontracted them to other contractors and attended meetings in relation to G&F with Crossley McLean.

According to Ms Bromley, G&F received 15% of the contract price from Crossley McLean for running the tree lopping contract.

She told the Commission that she had never seen any invoices between G&F and Greenfield, nor had she seen any invoices between either of those companies and Garzaniti Excavations.

Ms Bromley was considered to be a credible witness and the Commission accepts that she has given truthful and reliable evidence.


Robert Miles

The contracts

Mr Miles told the Commission that as a Contracts Manager for the Greater Western Sydney Division at Housing NSW, he was responsible for maintaining contracts for this division. His duties included ensuring that there were current contracts available at all times and providing support for the local teams on contract interpretation and application.

The Macquarie Fields office, where Mr Garzaniti was the Senior Client Services Officer and later Acting Team Leader, fell within the Greater Western Sydney Division which was an amalgamation of the Western Sydney Region and South West Region and was serviced by more than 20 Housing NSW local teams. A local team usually had a team leader, a senior client services officer, client services officers, technical staff and administrative staff.

Mr Miles said that prior to the changes which took place in the last five years, Housing NSW contracts were dealt with by way of a tendering process or, in the case of casual contracts, arranged through a quote system. He said that before these changes, there was very little information available relating to contract administration. He was not sure when Housing NSW's code of practice for procurement came into existence. However, during the period relevant to the Commission's investigation there was a requirement that contracts valued at \$30,000 or more had to undergo a formal tender process or a select tender. In a select tender, Housing NSW nominates the



contractors to submit tenders. Casual contracts would not necessarily go to a full tender but might go through a select tender and be formalised that way, in which case there would still be some sort of tender process involved.

Under the old system, if casual contracts were continually renewed at a local level there would not have been any competitive process involved in the renewal. If the casual contracts had gone to a formal tender process, they would have been taken away from the local team and managed by the divisional contracts section of Housing NSW.

Mr Miles was unable to say how Greenfield originally came to obtain the lawns and grounds maintenance contract from Housing NSW. He said that a number of the lawns and grounds maintenance contracts between Greenfield and Housing NSW should have gone through a competitive process. He also said that when casual contracts were being renewed or rolled over without undergoing such a process he, as the Contracts Manager for the relevant geographical area, should have been informed of this fact. This did not happen. He identified Mr Garzaniti as the officer with the responsibility for notifying him about the contracts being continually renewed.

Mr Miles said that there were other casual contracts apart from those held by Greenfield which were also rolled over in the same fashion as the Greenfield contracts. He said, however, that given the casual lawns and grounds maintenance contract between Housing NSW and Greenfield ultimately ran for over six years and was worth approximately \$2.7 million in total, someone in Housing NSW should have examined whether or not it should have gone to tender.

Mr Miles agreed that the result of continually renewing casual contracts was that no other companies were requested to quote or tender. This lack of competitive process meant that there was no opportunity for Housing NSW to obtain cheaper contractors.

Conflict of interest

Mr Miles was shown a Housing NSW email dated 24 July 2003 which contained a request made by Mr Garzaniti to Mr Brown to authorise the extension of several casual lawns and grounds maintenance contracts held by Greenfield. This request was subsequently approved by Mr Brown. Mr Miles said that Mr Garzaniti should have declared a conflict of interest in this matter given that he had a personal relationship with Mr Santomingo. Mr Garzaniti did not do so.

Mr Miles said that if Mr Garzaniti had advised Housing NSW of such a conflict of interest, Housing NSW would have investigated the matter and considered issues such as how long the contract had been running, whether there was anything being done to formalise the contract, whether there was any untoward activity going on and whether the contract should be terminated.

Mr Miles was also shown a Housing NSW email dated 9 February 2005 in which references were made to Mr Garzaniti seeking to increase the value of one of Greenfield's casual contracts. He told the Commission that in this instance also Mr Garzaniti should have advised Housing NSW that he had a friendship with the principal of Greenfield. He stated that if such a disclosure of conflict of interest had been made by Mr Garzaniti there would have been no increase, or at least the matter would have been reviewed and a determination made as to whether or not the increase should be granted.

Mr Miles was shown a further Housing NSW email dated 6 June 2005 in which a reference was made to the IHS Transaction Centre. He explained this was where contractors' claims are sent for processing and payment. He said that in relation to the Greenfield contracts or invoices, the IHS Transaction Centre regarded Mr Garzaniti as the contact person and this was again a situation where Mr Garzaniti's potential conflict of interest should have been disclosed.

Mr Miles was referred to a tax invoice dated 2 March 2006 in the amount of \$3,927 which was issued by Greenfield to Housing NSW. This invoice was approved and signed by Mr Garzaniti. The approval of this particular invoice by Mr Garzaniti was within his financial delegation. Mr Miles said that where Mr Garzaniti's friend was seeking payment, Mr Garzaniti should have disclosed his relationship and he should not have been involved in approving the payment.

According to Mr Miles, if Mr Garzaniti's company and Greenfield were giving each other work, that would have precluded Greenfield from having a direct contract with Housing NSW. If Mr Garzaniti was involved in the decision-making or part of the decision-making about Greenfield, Housing NSW would not have allowed the Greenfield contract to continue. If Housing NSW believed Mr Garzaniti had an involvement with a contractor such as Greenfield, there would have been a review to examine the nature of the conflict and to determine whether it was an actual conflict. If Housing NSW then determined that Mr Garzaniti was involved in any way with Greenfield or receiving a financial benefit from Greenfield, the contract between Greenfield and Housing NSW would have been terminated.

The Commission accepts Mr Miles' evidence as to what action Housing NSW could have taken if it had been aware of Mr Garzaniti's conflict of interest.

Frank Santomingo

Mr Santomingo started Greenfield in 1994. The company was engaged in landscaping, excavation and property maintenance work. He stopped operating the company at the end of 2006.

He met Mr Garzaniti in about 1995 or 1996 through people he (Mr Santomingo) worked for and they subsequently became friends. Mr Santomingo said they started the company G&F together in August 2004 when they decided to go for a RailCorp contract. He resigned as a director of G&F in February 2007.

Lawns and grounds maintenance contract with NSW Housing

Mr Santomingo agreed that Greenfield had a casual lawns and grounds maintenance contract ("lawns contract") with Housing NSW from 2001 until 2007. This contract consisted of a number of individual contracts which related to various geographical regions managed by Housing NSW and were worth different amounts of money.

He denied that he obtained any assistance from Mr Garzaniti in securing the lawns contract. He conceded that before entering into the contract he would have spoken to Mr Garzaniti about it, however he claimed not

to remember what sort of discussions he had with Mr Garzaniti on this subject.

When asked whether he ever thought it strange that the contracts were rolled over with no one else quoting in competition, he replied that he was asked to put in new quotes when the contracts were rolled over and he did so. He claimed that he did not know whether anyone else was quoting for the contracts at the time. He denied that he talked to Mr Garzaniti to find out how much more money Housing NSW would be prepared to pay for the contracts prior to putting in his quotes.

No Housing NSW records are available to show how Greenfield originally obtained the lawns contract.

There is no evidence to suggest Mr Garzaniti was in a position to exercise any influence in the decision-making process for the awarding of the lawns contract.

Mr Santomingo denied that G&F was involved in any of the work done for Housing NSW and maintained that Mr Garzaniti had no role in Greenfield at all. He stated that G&F took over the Crossley McLean contracts after August 2004 as a result of family problems that he was experiencing around that time. When asked why in those circumstances G&F did not also take over the lawns contract, he replied that was because Greenfield had employees doing the work. He agreed that Greenfield also had employees doing the Crossley McLean contract work and could not explain why G&F took over the Crossley McLean contracts but not the lawns contract.

Demolition and tree lopping work

Mr Santomingo said that Crossley McLean subcontracted some Housing NSW work to either Greenfield or to G&F. Greenfield worked for Crossley McLean as a subcontractor from about 2002 onwards. He said Greenfield did some rubbish removal, tree lopping and bobcat work, while G&F did some tree lopping and all the demolition work and G&F would also pay any subcontractors retained.

Mr Santomingo admitted that even when G&F actually did the tree lopping and demolition work, the work orders from Crossley McLean continued to come to Greenfield in Greenfield's name when they should have been issued in G&F's name. He accepted that it was his responsibility to arrange for the work orders to be issued in G&F's name but he failed to do so.

He agreed that as a director of Greenfield he had a duty to ensure the company's documentation was in order and that there was no reason why he would not tell Crossley McLean that the name in which the work orders were issued was incorrect. He also agreed that even though G&F commenced doing the demolition work for Crossley

McLean in 2004, anyone looking at the work orders would think that it was Greenfield that was performing the work. He further agreed that in these circumstances, Housing NSW would not have realised that G&F was the company being paid for this work.

He confirmed that in relation to tree lopping work, subcontractors were also used to perform the work. He said that these subcontractors received work orders from G&F or Greenfield and were paid by G&F. He conceded that the work orders were again in the name of Greenfield and should have been changed to G&F.

He accepted that although G&F was doing work for Housing NSW through Crossley McLean, the relevant documentation did not reflect this and he himself had not told anyone at Housing NSW that it was G&F that was doing the work and not Greenfield. He claimed to have informed Crossley McLean of this fact, but did not remember when he did so or their response.

In relation to not correcting the name in the Crossley McLean work orders, Mr Santomingo offered the excuse that he was preoccupied with other things around 2004. When it was drawn to his attention that he had several years within which to do this, he agreed that he could have done it but it just did not happen.

When asked if he believed at the time that Mr Garzaniti could not have a contract directly with Housing NSW because of his position at Housing NSW, he claimed he did not know and said it never crossed his mind to think about such a thing. He claimed that he did not know what a conflict of interest was.

He initially resisted, but later reluctantly conceded, that in relation to the contracts where the work orders were in the name of Greenfield but the work was actually performed by G&F, Greenfield was in fact used as a dummy company for those contracts.

Mr Santomingo negotiated the percentages to be paid to Greenfield or G&F by Crossley McLean. He said the percentage Greenfield received from Crossley McLean depended on the job, with the highest percentage being about 12%. He denied, however, that Greenfield and G&F received this fee for doing nothing more than getting other subcontractors in, saying that they did do some of the work such as supplying machinery, trucks and labouring.

Despite Mr Santomingo's assertion that he had employees that were doing some of the Crossley McLean contract work and had equipment that he hired out to be used on these projects, he failed to produce any invoices to the Commission and none was found by the Commission under the search warrant. He could not offer the Commission an explanation for this, other than to claim

that all his records were taken by his former wife's solicitors or seized by the Commission.

He was shown two demolition contracts entered into between G&F and Crossley McLean and Greenfield and Crossley McLean respectively on 26 April 2007. He signed the contract between G&F and Crossley McLean. He said he would have spoken to Mr Garzaniti about this contract and he worked out the fee to be received by G&F pursuant to the contract with Mr Garzaniti's consent. He was asked why he negotiated the rate with Crossley McLean on behalf of G&F and signed the contract some two months after he ceased being a director or shareholder of G&F and at a time when he was experiencing personal problems so serious as to render him, according to him, incapable of "thinking straight". He was not able to give a satisfactory explanation.

When it was suggested to him that the reason was because he and Mr Garzaniti had agreed that it would be better to have Mr Santomingo's name on the contract with Crossley McLean for Housing NSW work rather than Mr Garzaniti's, he said he did not remember. He also claimed not to remember how many contracts were signed with Crossley McLean, why identical contracts between Crossley McLean and G&F and between Crossley McLean and Greenfield were signed on the same day, or why he himself signed both contracts.

He ultimately conceded that if Housing NSW ever found out that the company of one of its senior officers was doing work for Housing NSW, it would have been a problem for Mr Garzaniti.

In respect of the contract between Greenfield and Crossley McLean, he acknowledged that by April 2007, Greenfield was not looking for contracts and was unable to explain why in those circumstances he then proceeded to sign the contract on 26 April 2007. He agreed that G&F undertook contract work for Crossley McLean after the contract was signed and also agreed that Greenfield did not do any work under the contract.

Payments

Mr Santomingo was asked about the exchange of payments between relevant individuals and companies over the years. His answers to these questions were, on the whole, vague.

In relation to payments made by G&F to Greenfield, he said Mr Garzaniti paid him weekly for work done by Greenfield based on an hourly rate which depended on what equipment was being used, what hours he put in and the type of work he did. He said he kept a tally of the hours worked in his head.

This would involve him remembering over a week how many hours up to 10 different people worked, what type of equipment they were using and mentally calculating the different rates applicable to himself, the other workers and the equipment that was hired out. The Commission rejects Mr Santomingo's evidence on this matter.

When asked why the cheques he received from Mr Garzaniti so frequently happened to be multiples of \$11,000 rather than different amounts, which would be expected given Mr Santomingo's evidence as to the different rates applied for each job, he said he did not know.

He said he paid his workers by cheque, but did not know where the records or cheque butts were. Although he claimed to have issued invoices in respect of payments of employees and provision of services and equipment to G&F, no such invoices were found by the Commission. When asked how many invoices he gave to Mr Garzaniti, he said he did not know. He denied that any of the payments was a reward for allowing Greenfield to be used as a company name for the benefit of Mr Garzaniti.

He was later shown a schedule of payments made by G&F to Greenfield during the period May 2005 to May 2007 totalling approximately \$150,000. He said the payments were for work done and claimed the round figures were exactly the same as the invoices that he provided G&F. When asked how he would work out how much he was owed, he said he did not know. When asked if this was something he kept in his head in line with his previous evidence, he again said he did not know.

He agreed that between July 2002 and February 2004 approximately \$200,000 was paid by Greenfield to Garzaniti Excavations. He said these payments were for work performed by Garzaniti Excavations. He did not know where the records relating to these payments were, although he claimed he had kept all such records. He did not know why most of these payments were also in round figures rather than different amounts.

He was asked about the payments totalling approximately \$281,000 made by Greenfield to accounts relating to Mr Garzaniti between April 2003 and February 2006. He said they were payments for works done by Garzaniti Excavations for Greenfield. The reason why some payments were to Garzaniti Excavations and others to Mr Garzaniti himself was because Mr Santomingo made the cheques out to whomever Mr Garzaniti requested. He admitted that he did not seek permission from Mr Garzaniti's brother, Tony Garzaniti, who was the co-owner of Garzaniti Excavations, to pay Mr Garzaniti directly.

Most of these payments were in round figures. He was asked to explain how that happened. His answer was: "I

don't know. It just so happened that it happened like that". He later suggested that he made interim payments while waiting to be paid by the head contractor and when he was paid out by the head contractor he would then make the payment in full. However, when asked if between April 2003 and February 2006 these payments added up to the invoices he was given, he was unable to say that was the case and could not offer any evidence to support his claim that the balance owed was eventually paid.

Mr Santomingo was referred to the payments totalling approximately \$2.7 million made by Housing NSW to Greenfield between 2001 and 2007. He was informed that out of this amount, there was no record of about \$500,000 paid in the first two years being banked and asked if he knew where the money went. He initially claimed that he did not know and then said Housing NSW gave him cash cheques which he cashed at the Commonwealth Bank even though he did not have an account with the Commonwealth Bank.

Mr Santomingo consistently and firmly denied the suggestion that Greenfield was used as a front company to conceal the fact that G&F was doing Housing NSW work. He dealt with unwelcome questions by simply claiming that he did not know the answers to them or by offering explanations which were nonsensical or not credible. For example, his assertion that he kept a tally in his head as to how many hours he and up to 10 people working for him put in using different equipment for any given job and at the end of the week could calculate in his head how much was owed to Greenfield by G&F, is simply not realistic or believable. He also claimed that he cashed half a million dollars worth of cash cheques from Housing NSW and then later admitted he made this up. The Commission does not regard Mr Santomingo as a credible or truthful witness.

Frank Garzaniti

Mr Garzaniti confirmed that as a Senior Client Services Officer and later as the Acting Team Leader at the Macquarie Fields office of Housing NSW, part of his duties involved contract administration including recommending such actions as increases in budgets, acceptance of certain quotes, extension of casual contracts and progress payments.

He also confirmed that in addition to working for G&F, he worked for Garzaniti Excavations during his employment at Housing NSW. He ran the financial administration side of the company, although his brother, Tony Garzaniti, had the controlling interest in it. He also agreed that Garzaniti Excavations did some work for Greenfield at various times but said the work was for private landscaping jobs and to his knowledge was not work for Housing NSW.

Conflict of interest

Crossley McLean

Mr Garzaniti told the Commission that Crossley McLean retained Greenfield, G&F and Garzaniti Excavations as subcontractors to do work for Housing NSW as well as for work not related to Housing NSW. He agreed that G&F did Housing NSW work for Crossley McLean over a number of years totalling about \$2.6 million, the majority of which he thought was for demolition work. He confirmed that some of the senior management and owners of Crossley McLean were former employees of Housing NSW whom he knew.

He agreed that Crossley McLean gave Greenfield tree lopping work notwithstanding that Greenfield was not a licensed arborist. He also agreed that when Greenfield stopped doing this work, which he believed was in 2005 or 2006, G&F took over the work, notwithstanding that G&F did not have a licence as an arborist and had to use licensed subcontractors. He said that when the tree lopping work was completed, the subcontractors got paid what they were owed for the work done and then the balance of the contract value was shared between G&F and Crossley McLean.

He conceded that G&F had no licence to carry out demolition work and only minor experience in this field prior to being retained by Crossley McLean as the subcontractor primarily responsible for the demolition work.

At the public inquiry, Mr Garzaniti initially denied attending any meetings with Crossley McLean and other subcontractors. After being reminded of his evidence to the contrary given at his compulsory examination, he said he attended numerous meetings with Crossley McLean and their supervisors on behalf of Housing NSW. As one of the purposes of those meetings was to address any problems with the work done for Housing NSW, Mr Garzaniti was asked what would have happened if someone had had a problem with G&F's work. He replied that he did not know. It was suggested to him that in such a case he would have been at the meeting as a Housing NSW employee and also as a director of G&F and he was asked how he would have dealt with that situation. He said his brother could have attended the meeting on behalf of G&F.

He admitted that he did not advise Housing NSW that his company G&F was one of the subcontractors to Crossley McLean.

He agreed that Crossley McLean's work orders remained in the name of Greenfield for years until he resigned from Housing NSW in February 2008 even though G&F, not Greenfield, was the company doing the work

and getting paid by Crossley McLean. He accepted this meant that for all ostensible purposes as far as Housing NSW was concerned Greenfield was doing the work. He further accepted that there was no official connection or documentary evidence available to Housing NSW to link G&F to this work until after he resigned from Housing NSW. He denied that this was the result of a deliberate decision on his part, saying that he did not get around to correcting the work orders. He accepted, however, that he saw the work orders were wrong yet chose not to do anything, even though he had several years within which to rectify the situation. He also accepted that the practical effect of this arrangement was that Greenfield was being used as a barrier between G&F and Housing NSW as far as the relevant documentation was concerned.

Mr Garzaniti agreed that he did not want any contract relating to Housing NSW work to have his signature on it and that he made sure someone else signed it. He further admitted that when Crossley McLean wanted their Contracts Terms and Conditions signed in April 2007, he knew it was for Housing NSW work and got Mr Santomingo to sign off on it, because he was hiding the fact that G&F was involved in this work and did not want his own signature on the document.

Mr Garzaniti accepted that he knew what his obligations regarding conflict of interest were from at least 1994 when he was appointed as a Senior Client Services Officer. He also agreed that there are some aspects of conflict of interest that are so obvious that one does not need to be told about them. He said he now accepted that he ought to have notified Housing NSW of his involvement in G&F. The Commission is satisfied that at all relevant times, Mr Garzaniti knew he had a conflict of interest and knew that he was obliged to inform Housing NSW of that conflict of interest, but deliberately failed to do so. The Commission is also satisfied that Mr Garzaniti deliberately failed to do anything to change the name on the work orders from Greenfield to G&F, so as to disguise from Housing NSW the fact that G&F was doing work for Housing NSW.

Mr Garzaniti acknowledged that if he had told Housing NSW about his relationship with G&F and G&F's relationship with Housing NSW, the contract G&F had with Crossley McLean for Housing NSW work may have been terminated or at least reviewed. He admitted that he was aware of the risks involved in Housing NSW becoming aware of his conflict of interest and he therefore did not tell anyone about G&F's involvement in Housing NSW work.

He claimed that his decision to conceal his conflict of interest and his decision not to seek permission for secondary employment from Housing NSW were not deliberate. It was pointed out to him that he had once sought permission from Housing NSW to work at a service station. He agreed that he had declared this secondary

employment on that occasion, because there was no chance of it being rejected or of there being other adverse ramifications for himself such as a contract at stake. He was also reminded that in 2000 he sought approval from Housing NSW to work as a truck driver for Garzaniti Excavations and he agreed that he put in this application knowing it would be successful. The Commission is satisfied that Mr Garzaniti's decision to conceal his conflict of interest and his decision not to seek secondary employment approval were deliberate decisions.

Greenfield

Mr Garzaniti said he did not notify Housing NSW of his relationship with Greenfield because there was no relationship, nor of his friendship with Mr Santomingo because he did not realise at the time that he had an obligation to do so. He admitted however that, in hindsight, he should have made such a disclosure. The Commission is satisfied that Mr Garzaniti knew at all relevant times that he should have disclosed his relationship with Mr Santomingo to Housing NSW.

Mr Garzaniti did not dispute Mr Miles' evidence that the IHS Transaction Centre of Housing NSW regarded Mr Garzaniti as the contact person in relation to Greenfield contracts.

He also agreed that the process of ongoing renewal of the casual lawns contracts instead of putting them out to tender meant that Greenfield faced no competition. He said, however, that the direction to keep lawns contracts in the Campbelltown area as casual contracts rather than using the tender process came from the contracts manager at the time.

He was shown a document called Contractor's Claim for Payment, issued by Greenfield to Housing NSW in 2006, claiming payment for work done on the lawns. He admitted he signed the document on behalf of Housing NSW to confirm that the work had been completed satisfactorily and to facilitate payment of the claim to Mr Santomingo. He was also shown a tax invoice dated 2 March 2006 issued by Greenfield to Housing NSW which he again admitted he signed as a step in the process of Mr Santomingo being paid.

He accepted that another aspect of his involvement was his recommendation that the contract be renewed with Greenfield. He also agreed that he had made recommendations to increase the value of a Greenfield contract and, although it was only a minor increase, it occurred at a time when he and Mr Santomingo were partners in G&F and that in those circumstances he should not have been involved in the decision to seek a budget increase in respect of a Greenfield contract.

Mr Garzaniti denied however, as did Mr Santomingo, that he helped Greenfield obtain the Housing NSW lawns contract. There is no evidence to indicate that he did help Greenfield obtain this contract. The Commission is also satisfied that Mr Garzaniti's recommendations as to payment for work completed, budget increases or contract extensions for Greenfield's lawns contract with Housing NSW were within his official administrative and financial delegation and there is no suggestion that any of his actions in this regard were outside his authority. However, given that the owner of Greenfield was a personal friend and a close business associate of his, the conflict of interest which arose in respect of Mr Garzaniti's performance of such duties is obvious.

Mr Garzaniti agreed with the evidence given by Mr Miles that, had he disclosed his relationship with Mr Santomingo to Housing NSW, the Greenfield contract with Housing NSW may have been jeopardised. He also accepted that he would no longer have had any role in approving invoices for Greenfield or making any recommendations with respect to increasing budgets for that company.

Payments

Mr Garzaniti agreed that he received and used payments from Greenfield, G&F and Garzaniti Excavations.

He claimed, however, that he did not derive a personal benefit from the work that G&F did through Crossley McLean for Housing NSW because, if G&F had not received work from Crossley McLean, it would have got other work so the overall financial situation would not have been different. The Commission rejects his evidence on this point. He clearly derived a financial benefit from Housing NSW work performed by G&F.

He agreed that between April 2003 and February 2006, Greenfield paid about \$281,000 into his account. He said that these payments were for work done by or equipment hired from Garzaniti Excavations for Greenfield. He said Mr Santomingo would pay either him or Garzaniti Excavations according to his instructions. He could not provide any particular reason why all payments from Greenfield for work done by Garzaniti Excavations went into his personal account after February 2004.

He explained that most of the payments were for \$11,000 because Greenfield would sometimes have to wait 60 to 90 days to get paid and Mr Santomingo would pay him \$10,000 plus GST which made it easier to keep a running tally.

In their compulsory examinations, both Mr Garzaniti and Mr Santomingo claimed that the payments exchanged between G&F and Greenfield were payments for work performed or services provided by and for each other's

company and that these payments were made pursuant to invoices issued.

In line with this earlier evidence, Mr Garzaniti said there would have been invoices in relation to G&F and Garzaniti Excavations and as far as he was aware they were in his office. He accepted that none was found by the Commission and was unable to offer any explanation for this.

When asked how Garzaniti Excavations would know what income it made in a particular year for tax purposes, given that some cheques payable to that company by Greenfield were in fact made out to himself on his instructions, Mr Garzaniti said there would have been a ledger and some informal records which would have been passed on to the accountant. He stated that he assumed these documents were also in his office and was unable to provide an explanation as to why they were not there or where they could be.

In relation to the payments made by G&F to Greenfield between May 2005 and May 2007 in the amount of approximately \$150,000, Mr Garzaniti was again asked about the amounts of individual payments being in round numbers. He said that this was because when work was done by one of the entities for another, there would be a ballpark figure worked out and part payments of that figure would be made until the time that the full amount was paid out. He claimed that using these round figures made the bookkeeping easier. He did not agree that this also made it easier to move money around.

He said the invoices relating to work between him and Greenfield were also in his office together with the bookkeeping records. Again, however, he could not explain why these records were not found by the Commission at his office.

He denied that one possible explanation for the lack of invoices to support the transfers between the accounts of Mr Garzaniti and the various companies was that all the money that came into those companies was treated as common money and got transferred between the interested parties as he wished.

He was referred to the payments made by Crossley McLean to G&F between April 2005 and June 2008 of approximately \$2.6 million and to the tender made by G&F to RailCorp in June 2007, in which he listed Crossley McLean as part of work completed by G&F in both the past and ongoing work.

He said the tender was not prepared by him but by an external consultant engaged by him. However, he conceded that his claim in the tender that the work completed by G&F during the five years preceding the application had a contract value of \$3.5 million was not

accurate and was an exaggeration to get the job. He rejected the suggestion that the figure of \$3.5 million would be roughly accurate if it included the Greenfield contract to Housing NSW, saying that the figure was just plucked out of the air because it “sounds good” and there was no basis for it. He said the same was the case with his further claim that the work in progress G&F had was an ongoing contract with Crossley McLean worth \$2 million.

He was also referred to a document titled “E-Financial Assessment Kit” by Kingsway Financial Assessments Pty Ltd. This document included a certification by him, dated 3 March 2008, to the effect that the information he provided in the assessment was true and correct. He explained that this was an independent financial analysis of his business conducted on behalf of and forwarded to RailCorp in relation to the RailCorp tender to ensure that G&F was capable of doing the work. He said his claim that G&F had a number of contracts with Housing NSW for both demolition and tree lopping was an oversight and it should have said the contracts were with Crossley McLean, not Housing NSW.

Taxation matters

Mr Garzaniti agreed that both G&F and Garzaniti Excavations did work for which they were paid appropriately and that he himself was remunerated through director’s fees or dividends for his contributions to these companies. He did not disclose income from these sources in his individual tax returns. He admitted that he signed tax returns prepared by his accountant knowing that they were limited to his Housing NSW salary and “bits and pieces of other stuff”. He accepted that his tax returns did not disclose the substantial amounts of money that he had withdrawn from G&F and Garzaniti Excavations on which he had an obligation to pay taxes, while those amounts were used as deductions for those companies as expenses, thereby benefiting the companies in their tax returns. He told the Commission that this matter was now being addressed.

Mr Garzaniti denied that his failure to declare income from these sources had anything to do with a desire to conceal his involvement in the Housing NSW work undertaken by G&F.

Chapter 4: Findings of fact and corrupt conduct and section 74A(2) recommendations

This chapter sets out the Commission's findings and contains statements under section 74A(2) of the *Independent Commission Against Corruption Act 1988* (NSW) ("the ICAC Act").

Findings of fact

Based on the evidence set out in this report, the Commission is satisfied that the following facts have been established to the requisite standard of proof.

1. At all relevant times, Mr Garzaniti was an employee of Housing NSW and part of his duties involved administration of Housing NSW contracts, including approving payments of invoices and making recommendations for budget increases and for extension of contracts.
2. As an employee of Housing NSW Mr Garzaniti was under an obligation to declare any conflict of interest and to seek permission to carry out any secondary employment.
3. At all relevant times, Mr Garzaniti and Mr Santomingo were close friends and business associates.
4. Greenfield Development Pty Ltd ("Greenfield"), a company of which Mr Santomingo was the sole director and shareholder, obtained a casual lawns and grounds maintenance contract ("the lawns contract") from Housing NSW in 2001, which was subsequently renewed on a number of occasions until 2007 without undergoing any competitive process.
5. As part of his normal official duties, Mr Garzaniti on occasions processed or verified work done by Greenfield resulting in payment of money to Greenfield and also made recommendations for the extension of or budget increases in relation to the lawns contract.
6. Despite being aware of his duty to declare a conflict of interest, Mr Garzaniti deliberately failed to notify Housing NSW of his friendship with Mr Santomingo, the principal of the company carrying out lawns contract work for Housing NSW, while he, as part of his duties as a senior Housing NSW officer, had the role of approving invoices, recommending budget increases or recommending contract renewals for Greenfield and exercised this role on occasions.
7. From about 2005 to 2008, G & F Plant Hire Pty Ltd ("G&F"), a company originally owned jointly by Mr Garzaniti and Mr Santomingo and from 2007 solely by Mr Garzaniti, carried out demolition and tree lopping work for Housing NSW through Housing NSW's head contractor Crossley McLean & Associates Pty Ltd ("Crossley McLean"), using subcontractors who were hired and paid by G&F.
8. Mr Garzaniti used Greenfield to disguise the fact that G&F performed the demolition and tree lopping work for Housing NSW through Crossley McLean by not taking any action to remove Greenfield's name, as the company ostensibly carrying out the work, from the work orders issued by Crossley McLean.
9. G&F received payments directly from Crossley McLean which totalled approximately \$2.6 million between 2005 and 2008.
10. Mr Garzaniti derived significant personal financial benefits as a result of the contract work for Housing NSW done by G&F through Crossley McLean.
11. Despite being aware of his duty to declare a conflict of interest arising from the involvement of G&F in work conducted for Housing NSW and despite being aware of his obligation to seek permission to engage in secondary employment in relation to his interest in G&F, Mr Garzaniti

deliberately failed to notify the conflict of interest to Housing NSW or to seek authorisation from Housing NSW to engage in secondary employment.

12. Mr Garzaniti deliberately failed to declare his conflicts of interest or to seek Housing NSW approval for secondary employment in order to conceal his involvement in Housing NSW contract work and thereby continue to benefit financially from that work. He was at all times aware that if he declared his conflicts of interest or divulged to Housing NSW his interest in G&F and the Housing NSW work undertaken by G&F, there was a risk that action might be taken by Housing NSW to terminate the relevant contracts.

Corrupt conduct

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

For the conduct of Mr Garzaniti and Mr Santomingo to come within section 8 of the ICAC Act, it would be necessary to demonstrate that their conduct adversely affected or could have adversely affected either directly or indirectly the honest or impartial exercise of official functions by a public official (section 8(1)(a) of the ICAC Act), or their conduct could adversely affect either directly or indirectly the exercise of official functions by any public official and could involve any of the matters set out in section 8(2) paragraphs (a) to (y) of the ICAC Act.

Conduct is not corrupt unless it also comes within the terms of section 9(1) of the ICAC Act. For present purposes this means that the conduct must be capable of constituting or involving a criminal offence or a disciplinary offence in the case of Mr Garzaniti and a criminal offence in the case of Mr Santomingo.

Mr Garzaniti

Mr Garzaniti's deliberate failure to disclose any of his conflicts of interest or to seek permission for secondary employment was conduct which constituted or involved the dishonest or partial exercise of a part of his official functions and therefore falls under section 8(1)(b) of the ICAC Act.

Mr Garzaniti's failure to declare a conflict of interest or seek permission for secondary employment could also affect the exercise of official functions by other public officials within Housing NSW. Housing NSW officials were dealing with Crossley McLean and Greenfield on the implicit understanding that there was no connection to Mr Garzaniti. Further, Housing NSW officials were dealing with Mr Garzaniti on the basis that he had no involvement with either of these companies. That is why they were prepared to include him in matters concerning invoice payments, budget increases and casual contracts being rolled over. Similarly, the IHS officials would not have looked to Mr Garzaniti as the contact person for the Greenfield contract if they had the benefit of the knowledge of Mr Garzaniti's conflict of interest. Different decisions in relation to the Greenfield lawns contract (for example, whether it should have been continually renewed for over six years), or in relation to the demolition and tree lopping contracts with Crossley McLean, may have been made by the relevant Housing NSW officers had they been advised of Mr Garzaniti's conflict of interest in these matters. Mr Garzaniti's deliberate failures could involve misconduct on his part. His conduct therefore also falls under section 8(2) of the ICAC Act.

The deliberate omissions by Mr Garzaniti referred to above could involve misconduct in public office. His conduct could therefore constitute or involve a criminal offence and satisfies the requirements in section 9(1)(a) of the ICAC Act.

The elements of the common law offence of misconduct in public office are that a public officer acting in that capacity and without reasonable excuse or justification wilfully misconducts himself/herself by act or omission, for example, by wilfully neglecting or failing to perform his/her

duty (which in this case was to disclose conflicts of interest or seek approval for secondary employment), where such misconduct is serious (as opposed to being trivial) and deliberate.

One of the well-established examples of the offence is the use by a public official of his/her official position to obtain a personal benefit or advantage in circumstances involving a conflict of interest between his/her personal interests and public duties, as in this case.

Mr Garzaniti was a Senior Client Services Officer and then Acting Team Leader of Housing NSW. The work undertaken by Greenfield and G&F was directly within the scope of his duties, as he was involved in all such contracts in the relevant geographical area. He deliberately failed to disclose his conflicts of interest and to seek approval for secondary employment in order to conceal his involvement with G&F and his relationship with Mr Santomingo. Mr Garzaniti derived significant personal financial benefits from payments in excess of \$2.6 million received from Crossley McLean in respect of the work done by G&F.

Mr Garzaniti's conduct could also constitute or involve a disciplinary offence and satisfies the requirements of section 9(1)(b) of the ICAC Act. The fact that Mr Garzaniti has resigned from Housing NSW, and is therefore not subject to a disciplinary offence, is not an impediment to describing his conduct during his employment there as corrupt as provided in section 9(2) of the ICAC Act.

The Commission finds that Mr Garzaniti engaged in corrupt conduct, by deliberately failing to declare his conflicts of interest to Housing NSW or to seek permission for secondary employment, in order that he could continue to benefit financially from Housing NSW work performed by G&F.

The Commission also finds that Mr Garzaniti engaged in corrupt conduct by deliberately failing to declare his conflict of interest to Housing NSW arising out of his relationship with Mr Santomingo.

Mr Santomingo

Mr Santomingo is not a public official. For his conduct to come within section 8 of the ICAC Act it must be either conduct that adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions under section 8(1)(a) of the Act, or be conduct that adversely affects or that could adversely affect, either directly or indirectly, the exercise of official functions by a public official under section 8(2) and involve any of the matters in paragraphs (a) to (y) of that section. Further, his conduct must be conduct which

constitutes or involves a criminal offence under section 9(1)(a) of the ICAC Act.

The evidence of Mr Santomingo was in many respects unsatisfactory, his attitude to the public inquiry was at times unhelpful and some of his actions in relation to this matter were highly suspicious. However, the Commission is of the view that there is insufficient evidence to establish that his conduct constitutes or involves a criminal offence so as to satisfy the requirement of section 9(1) of the ICAC Act.

The Commission therefore does not make any findings of corrupt conduct against Mr Santomingo.

Section 74A(2) statement

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

- (a) *obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*
- (b) *the taking of action against the person for a specified disciplinary offence,*
- (c) *the taking of action against the person as a public official on 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 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, Frank Garzaniti and Frank Santomingo are "affected" persons.

Mr Garzaniti

The Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions ("the DPP") with respect to the prosecution of Mr Garzaniti for the common law offence of misconduct in public office.

Mr Garzaniti made some limited admissions during the course of his evidence to the Commission. However his evidence was given under objection, and pursuant to section 37(3) of the ICAC Act it is not admissible against him in any criminal proceedings except in respect of offences under the ICAC Act.

Nevertheless, the DPP, in determining whether to prosecute Mr Garzaniti for the above offence, would have available other evidence including Housing NSW records and financial records as well as the evidence of Ms Bromley and Mr Miles.

As Mr Garzaniti has already resigned from his position at Housing NSW, the Commission is not of the opinion that consideration should be given to the taking of disciplinary action against him for misconduct whilst in employment with Housing NSW.

Mr Santomingo

There is insufficient evidence to indicate that Mr Santomingo's conduct could constitute or involve a criminal offence.

The Commission is therefore not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Santomingo for any criminal offences.

Chapter 5: Corruption prevention

This investigation has examined behaviour that took place in Housing NSW's Macquarie Fields local office between 2001 and 2008.

During that period the evidence shows that Frank Garzaniti, a long time staff member at the Macquarie Fields office, deliberately

- failed to disclose his conflict of interest in the management of Housing NSW lawns and grounds maintenance contracts, and
- failed to declare his secondary employment associated with Housing NSW contract work provided through Housing's Multi-Trade Contractor, Crossley McLean & Associates Pty Ltd.

Mr Garzaniti was a Senior Client Service Officer and Acting Team Leader. In these roles he was responsible for the oversight of tenancy management within the local area and liaison with maintenance contractors. He was responsible for the creation and administration of lawns and grounds maintenance contracts ("lawns contracts"). Frank Garzaniti was therefore in a position to have significant influence over the administration and daily management of the Greenfield lawns contract. He also met regularly with representatives from Crossley McLean & Associates.

Mr Garzaniti deliberately concealed his close connection with Frank Santomingo, the sole director of Greenfield Development Pty Ltd, and his work for Crossley McLean. Nevertheless, it is of concern that his activities went undetected for such a long period of time. The evidence suggests that Mr Garzaniti was not closely supervised and his performance was not subject to regular review.

The consequences of Mr Garzaniti's deliberate actions and the failure by Mr Garzaniti's supervisors to more closely monitor and account for his activities were serious. Frank Garzaniti was able to use his position as a public official to unfairly achieve significant financial gain. Housing NSW is unable to determine, with any certainty, whether it achieved the best value for money in its payments to those businesses linked to Mr Garzaniti.

Since these activities took place, much has changed within Housing NSW. In recent years Housing NSW has implemented a range of fundamental reforms which go to the better management of maintenance procurement, conflicts of interest and secondary employment.

For this reason, the Commission makes no corruption prevention recommendations in relation to this investigation. How Mr Garzaniti's activities took place and the reforms that Housing NSW has undertaken to better manage corruption risks are detailed below.

1. Managing corruption risks in maintenance procurement

Lawns and maintenance contracts, 2001 to 2007

During the period of Frank Garzaniti's activity, Housing NSW maintenance procurement was conducted through the use of multi-trade contractors and individual local contracts.

In 2000 Housing NSW transitioned to a Multi-Trade Contract system. Multi-trade contractors were engaged by Housing NSW to undertake the delivery of maintenance and repair services on Housing NSW-managed properties. The multi-trade contractors were also responsible for engaging trade subcontractors to complete the required works.

At this time, the multi-trade contractors did not provide lawn maintenance services. Local offices were responsible for calling for quotations for casual lawns contracts. These contracts were tendered, assessed, approved and managed locally. Local casual contracts were requested by the Senior Client Service Officer and approved by the Team Leader.

In 2001 the South West Sydney Regional Office commenced a process to centralise all tenders and contracts. This process was progressively implemented as existing lawns contracts expired. Housing NSW has advised that the Macquarie Fields, Airds, Minto, Claymore

and Rosemeadow contracts were delayed due to issues associated with Radburn housing estates including large common areas, no clear boundary descriptions, clarity of land ownership and on-going re-titling and subdivision works as part of the Neighbourhood Improvement Program.

Between 2004 and 2008 South Western Sydney Region and Western Sydney Region were combined into Greater Western Sydney Division. The letting of contracts and variations became more centralised, with local teams referring most of the casual lawns contracts to the Greater Western Sydney Divisional office. This Division commenced open tender calls for the rationalisation of lawns and grounds maintenance and common area cleaning in August 2006. Housing NSW has advised that it was necessary to extend many of the casual lawns contracts whilst tendering was in progress.

It is unclear how Greenfield was first engaged to undertake lawn maintenance services for Housing NSW. However, once Greenfield was engaged as a casual contractor, Frank Garzaniti was able to exploit the uncertainty created by structural change within Housing NSW. Greenfield's casual lawn and maintenance contract was extended over a seven year period and resulted in Greenfield receiving approximately \$2.7 million from Housing NSW.

Crossley McLean & Associates – multi-trade contractor

In 2002 Crossley McLean and Associates was appointed as one of 18 multi-trade companies and was awarded contracts for the Campbelltown area.

Crossley McLean retained both Greenfield and G&F Plant Hire as subcontractors and paid them over \$2.6 million.

Frank Garzaniti failed in his obligations to Housing NSW. Garzaniti did not inform the Department that his company, G&F, was receiving Housing NSW work as a subcontractor to Crossley McLean.

Maintenance Reform Program and New Maintenance Contracts

During recent years Housing NSW has undertaken a reform agenda to institute a planned approach to its maintenance responsibilities. Housing NSW has informed the Commission that, historically, maintenance had been managed through “a responsive regime”. The previous contract system did not provide opportunity to identify planned works or to bundle works into work programs in order to receive discounted prices.

Under this reform agenda Housing NSW aimed to:

- change the basis of remuneration from using a schedule of rates to calculating the cost of the majority of maintenance services to be delivered using fixed unit prices,
- provide uniform quality assurance through contractors being required to have quality assurance systems in place and appointing quality supervisors,
- ensure internal independent audit and quality reviews of both the contractor's quality assurance system and of the maintenance work undertaken,
- streamline service delivery arrangements to avoid duplication,
- provide regional and metropolitan business and training opportunities to promote participation of locally employed workforce and subcontractors.

In line with the Maintenance Reform Program, new multi-trade maintenance contracts were awarded in late 2008.

- The New Maintenance Contracts operate across 22 contract areas which cover the state. Six contractors have been appointed to deliver the full range of maintenance services including lawns and grounds maintenance and cleaning services to most areas of NSW. The contract term is five years and is subject to review at years 2 and 5. There are options to extend to a maximum of a seven-year term.

- Schedule 15 to the multi-trade contracts is Housing NSW's Statement of Business Ethics and Contractor's Code of Conduct. It includes requirements in relation to ethical conduct, conflicts of interest, gifts and benefits and reporting of corrupt conduct. This was re-issued to all contractors in October 2009.
- Clause 12 of the Conditions of Contract provides that the contractor's subcontracts must be on terms fully consistent with the contractor's contract. In addition, the main contractor is required to provide Housing NSW with copies of all its standard form contracts.
- Responsibility for managing maintenance sits with the Housing Contact Centre for responsive maintenance and asset teams within divisions for all other maintenance delivered under the contract. Local office team leaders have no direct contact with maintenance contractors under the New Maintenance Contract.
- The performance of contractors is monitored on a quarterly basis under the contract. In addition, Housing NSW has instituted monthly internal performance reporting concerning contractor performance. A revised performance management framework is currently under development and will be implemented in the near future.
- Some other maintenance is carried out by contractors other than multi-trade contractors. However, this is mostly complex works by specialised contractors (e.g. on heritage buildings) engaged through the Department of Services and Technology or through Housing NSW's Asset Division. In the main, there is no need for local or casual contracts. In rare cases of particular need, local or casual contracts may be tendered after consultation with Housing NSW's Contracting and Procurement Unit.
- The New Maintenance Contract incorporates a quality and audit regime for both the contractors and Housing NSW. The contract includes minimum inspection requirements, regular reporting of results and strict variation controls.

2. Managing corruption risks in conflicts of interest

Code of Conduct requirements and training

Housing NSW's Code of Conduct and Ethics has consistently included provisions relating to the identification, declaration and management of conflicts of interest.

Frank Garzaniti was registered as completing Code of Conduct training in August 2001. Garzaniti admitted to the Commission that he understood his responsibilities in relation to the declaration of conflicts of interest and should have declared his friendship with Frank Santomingo and his involvement with G&F Plant Hire.

In 2000 Housing NSW's Code of Conduct and Ethics advised staff that "in many cases only the individual will be aware of the potential for conflict. It is the individual's duty to avoid these situations or disclose them to a supervisor."

The current Housing NSW Code of Conduct and Ethics contains more detailed conflict of interest provisions. Staff are required to inform their line manager of a conflict as soon as possible and agree on a strategy to manage the situation. The Code requires the use of a Conflicts of Interest Form (to be registered with Business Assurance) to record and confirm an on-going strategy for managing the conflict. Code of Conduct training has been mandatory for Housing NSW staff for some time. The aim of such training is to ensure that staff are aware of their responsibilities and understand their obligations. The training also helps to clarify issues associated with day-to-day ethical decision-making.

During 2000 Code of Conduct and Ethics training was provided to Housing NSW staff by NSW Businesslink. Since 2004–05 Housing NSW's Business Assurance Unit has been responsible for providing Code of Conduct training. Housing NSW has advised that the current training is comprehensive and interactive. In 2005–06 an intensive roll-out of Code of Conduct training was conducted across Housing NSW. Since 2007 regular induction Code of Conduct training has been conducted for new employees. All staff are required to undertake regular refresher Code of Conduct training.

Since 2008 Housing NSW has provided a specialised Managing Conflicts of Interest training program. This training is being provided to all staff. The training module defines and illustrates conflicts of interest and provides advice on strategies to assist in managing them. It is designed to raise awareness amongst staff about potential conflicts of interest and how they should be identified and managed.

The Commission considers that such specific training, tailored to the Housing NSW work environment, together with a more rigorous and effective Code of Conduct training program, will assist staff and managers to identify and manage such issues effectively. Such training must, of course, be complemented by controls to detect and manage deliberate non-compliance.

Management capability

During a seven-year period Frank Garzaniti administered a contract that was undertaken by one of his close friends and subsequent business partner. From 2004 he also took an active role in the day-to-day management of G&F Plant Hire.

While Mr Garzaniti took deliberate steps to conceal his actions, it is of concern that his actions were not detected sooner.

In recent years Housing NSW has implemented an integrated corruption prevention strategy including a revised Code of Conduct and Ethics and a revised Statement of Business Ethics and associated training initiatives with a focus on development of middle management skills.

NSW Housing's Code of Conduct and Ethics makes managers responsible for ensuring that the officials they supervise "understand, follow and have up-to-date training on the Code of Conduct and Ethics". Managers are also "held accountable for unsatisfactory acts or errors by officials under their supervision if they are so serious, repeated or widespread that they should have known of them and corrected them".

Mr Miles, the Contracts Manager for the Greater Western Sydney Division, told the Commission that someone in Housing NSW should have examined whether the Greenfield lawns contract should have gone to tender, rather than being extended over a period of more than six years. However, such checking did not occur.

The provisions introduced by Housing NSW make accountability for the actions of subordinate staff more explicit. Had they been in place and actively implemented at the time of the conduct under investigation, they would have reduced the likelihood of applications made by Mr Garzaniti for extensions to casual contracts being approved by more senior staff without checking.

The current Code also requires managers to take responsibility for the effective management of conflicts of interest. Managers need to:

- be aware of the risks of conflicts of interest amongst the Housing NSW officials that they manage,
- provide advice to officials on how to manage conflicts of interest, and

- record conflicts of interest on Housing NSW's Conflict of Interest Register via the Business Assurance Unit.

The first roll-out of the specialised Managing Conflicts of Interest training program was targeted at middle management with the aim of assisting them to manage conflict of interest issues arising from their workplace.

Since 2009 Housing NSW has run induction sessions for staff recently appointed to management positions. Within that induction there is a module, Creating an Ethical Workplace, which focuses on how a manager can identify and address conflict of interest issues that arise for their staff.

Contractors

Frank Santomingo carried out contract work for Housing NSW for approximately seven years and yet, in his evidence to the Commission, he displayed little apparent understanding of the implications of carrying out public sector work and the need to manage possible conflicts of interest.

The New Maintenance Contracts require multi-trade contractors to comply with Housing NSW's Statement of Business Ethics. Contractors are required, among other obligations, to declare any conflicts of interest arising from the commercial activities within Housing NSW, cooperate in preventing unethical practices and report corrupt conduct, including the conduct of any person which directly or indirectly adversely affects or could adversely affect the honest or impartial exercise of official functions. Contractors are under an obligation to ensure the same level of compliance for all their subcontractors. Poor performance by contractors in this area can lead to part of their payments being withheld.

Similar provisions apply to all Housing NSW contractors. The current Statement of Business Ethics requires all Housing NSW's commercial partners to report any conflicts of interest and to seek advice on managing the situation effectively. A copy of the Statement of Business Ethics is attached to all contracts. In-house contractors are required to adhere to Housing NSW's Code of Conduct and Ethics and to undertake induction training.

3. Managing corruption risks in secondary employment

In 2000, Housing NSW's Code of Conduct and Ethics required staff to obtain approval for any secondary employment. It provided that:

Staff may engage in secondary employment or outside business activities but must obtain prior approval from the Department of Housing. At all times secondary

employment or business activities must not adversely affect the proper, honest and efficient performance of duties as a Department of Housing employee.

While Mr Garzaniti deliberately failed to notify Housing NSW of his work with G&F and Garzaniti Excavations, comprehensive secondary employment policies and procedures, including requirements for regular review of secondary employment arrangements, can reduce the risk of staff and managers failing to declare or effectively manage secondary employment issues.

In 2003 Housing NSW strengthened this provision by requiring that approval for secondary employment could only be provided by an executive director or general manager.

In September 2008 Housing NSW implemented a Secondary Employment Policy. The policy supports the Code of Conduct and Ethics by providing staff and management with advice on how to implement the secondary employment provisions of the Code of Conduct and Ethics.

The current policy and associated procedures more comprehensively address conflict of interest issues. Currently, it is the responsibility of the staff member, his/her line manager and the respective Executive Director/General Manager to monitor a secondary employment situation, particularly if there is a conflict of interest involved. The current secondary employment application form requires agreement between all parties on the measures that will be undertaken to manage/mitigate conflict of interest and other risks, though it is expected that most of the day-to-day monitoring will be undertaken by the line manager. Any approvals that have conflict of interest issues identified are to be registered with Business Assurance and placed on its Conflicts of Interest Register.

Secondary employment approvals are required to be kept:

- by the officer making the application
- by the line manager monitoring the staff member
- on the personnel file of the staff member

- if there is a conflict of interest issue, on Business Assurance's Conflict of Interest Register.

Secondary employment approvals are limited to two years at a time to allow for periodic review of the circumstances. Staff are required to inform their line manager of any changes to secondary employment activities during the approval period. Staff who move to another division during the approval period are required apply for a renewed approval from their new general manager or executive director.

In summary

The corrupt conduct set out in this report began in 2001 and continued until 2008. Subsequently, and in part in response to the conduct exposed by this and previous Commission investigations, Housing NSW has:

- fundamentally changed its maintenance procurement system,
- implemented a revised Secondary Employment Policy,
- ensured that its Code of Conduct and Ethics training is comprehensive, interactive and provided on a regular basis,
- introduced specialised conflicts of interest training, and
- implemented training initiatives that focus on the improvement of middle management skills.

The Commission is of the view that these initiatives should assist Housing NSW in the management of the corruption risks relevant to this investigation, namely those associated with its maintenance procurement function, management of conflicts of interest and management of secondary employment issues.



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 are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into



account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission. 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 facts 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 *Rejcek 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.



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