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INDEPENDENT COMMISSION
AGAINST CORRUPTION



**INVESTIGATION INTO THE
MISUSE OF RESOURCES BY
A NSW MARITIME LEGAL
SERVICES BRANCH OFFICER**

**ICAC REPORT
SEPTEMBER 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 misuse of resources by an officer of the NSW Maritime Legal Services Branch.

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

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

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

Yours faithfully



The Hon David Ipp AO QC
Commissioner

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Summary of investigation and results

This investigation by the Independent Commission Against Corruption (“the Commission”) concerned the conduct of Tonette Kelly, Acting General Counsel of NSW Maritime. In particular, it was alleged that Ms Kelly was carrying on a conveyancing business at NSW Maritime during work hours, and was using the resources of the agency to do so.

It was also alleged that Ms Kelly had favoured certain individuals in relation to their appointment to positions and promotion within NSW Maritime’s Legal Services Branch.

Results

The Commission has made findings that three persons acted corruptly in this matter. Statements of opinion required by section 74A(2) of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) are made in respect of four “affected” persons.

In making findings of fact and corrupt conduct, the Commission applies the civil standard of proof of reasonable satisfaction, taking into account the decisions in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALFR 170 at 171.

Tonette Kelly

Chapter 2 of the report contains the Commission’s findings that Ms Kelly engaged in corrupt conduct in relation to the extent of her secondary employment and the use of NSW Maritime resources, including the facsimile machine. It also contains findings that Ms Kelly acted corruptly by making false and misleading representations to NSW Maritime officers about the extent of her secondary employment.

The Commission is of the opinion that the advice of the Director of Public Prosecutions (DPP) should be obtained with respect to the prosecution of Ms Kelly for the common law offence of misconduct in public office in relation to those matters.

As required by section 74A(2) of the ICAC Act, the Commission has expressed its opinion that consideration should be given to the taking of action against Ms Kelly in relation to this conduct, with a view to her dismissal.

Chapter 3 sets out findings of corrupt conduct in relation to the personal use by Ms Kelly of an online search facility paid for by NSW Maritime, the authority she gave for the payment of invoices for the searches she made, and the preparation of two documents relating to that use.

The Commission is of the opinion that the advice of the DPP should be obtained with respect to the prosecution of Ms Kelly for the common law offence of misconduct in public office in relation to the use of the search facility, and for the offence of making a false instrument under section 300(1) of the *Crimes Act 1900* with respect to a document that she prepared.

The Commission has expressed its opinion that consideration should be given to the taking of action against Ms Kelly in relation to this conduct, with a view to her dismissal.

The Commission also finds that Ms Kelly acted corruptly in arranging for NSW Maritime to pay Professional Indemnity Insurance (PII) on her behalf, and in the preparation of a reference for Nicholai Dacombe. Those findings are presented in chapter 4.

The Commission is of the opinion that the advice of the DPP should be obtained with respect to the prosecution of Ms Kelly for the common law offence of misconduct in public office in relation to the payment by NSW Maritime of PII premiums for her between 1999 and 2009.

The Commission is also of the opinion that consideration should be given to the taking of action against Ms Kelly in relation to the payment of the PII premiums, with a view to her dismissal. Certain matters, including the preparation of a false or misleading reference for Nicholai Dacombe, are to be referred to the Legal Services Commissioner.

NSW Maritime has already commenced disciplinary action against Ms Kelly that may lead to her dismissal. The Commission endorses that action by NSW Maritime.

Bonita (Bonnie) Dacombe

Chapter 4 contains a finding that Ms Dacombe acted corruptly by engaging in secondary employment without approval.

The Commission is of the opinion that consideration should be given to the taking of disciplinary action against Ms Dacombe in relation to her failure to obtain approval for secondary employment.

Nicholai Dacombe

The Commission has made a finding in chapter 4 that Mr Dacombe acted corruptly by providing false information to the Legal Profession Admission Board (LPAB) in his application for registration as a student-at-law.

The Commission is of the opinion that the LPAB should consider taking disciplinary action against Mr Dacombe. The Commission is also of the opinion that advice should be obtained from the DPP in relation to the prosecution of Mr Dacombe for an offence of giving false or misleading evidence to the Commission under section 87(1) of the ICAC Act.

Louise Kirychenko

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP in relation to the prosecution of Ms Kirychenko for any offence. The Commission is not of the opinion that consideration should be given to the taking of disciplinary action against Ms Kirychenko.

Corruption prevention response

Chapter 5 sets out the Commission's corruption prevention response to the conduct disclosed during the investigation. This chapter includes discussion of matters relating to secondary employment, and the recruitment and promotion of employees.

The Commission has made the following seven recommendations to NSW Maritime to minimise or prevent similar conduct from occurring in the future:

Recommendation 1

That all employees of NSW Maritime in a supervisory role undertake training (and refresher training) in the operation of policies on:

- secondary employment, including guidance on the identification and management of possible conflicts of interest that can occur within secondary employment
- use of public resources, including how to identify and manage possible conflicts of interest that can occur when using public resources for personal purposes
- recruitment processes, including their obligations under the personnel policies of NSW Maritime and applicable circulars and ministerial memoranda issued by the Department of Premier and Cabinet. Particular attention is to be given to the requirements of merit selection, disclosure of conflicts of interest, and impartial decision-making during recruitment of staff.

Recommendation 2

That all employees of NSW Maritime in a supervisory role ensure their staff understand their responsibilities in relation to the policies referred to in the previous recommendation.

Recommendation 3

That NSW Maritime includes in its audit program an audit (by way of sampling) of segregation of duties to ensure there is no end-to-end control of financial approval processes.

Recommendation 4

That NSW Maritime ensures that its Finance Branch is alert to the possibility of fraud and corruption, and takes steps to identify and report irregularities to the relevant general manager.

Recommendation 5

That supervisors monitor staff and be held accountable for the consistent adherence by staff to the policies relating to secondary employment, personal use of resources, recruitment, and performance management.

Recommendation 6

That NSW Maritime includes each of the policies referred to in the previous recommendations in the audit program.

Recommendation 7

That NSW Maritime ensures that managers and supervisors understand their responsibilities in relation to performance management, and requires managers and supervisors to hold annual, formal and documented performance discussions with their staff.

As part of the performance of its statutory functions, the Commission will monitor the implementation of the recommendations made in this report.

The recommendations will be communicated to NSW Maritime, with a request that an implementation plan for the recommendations be provided to the Commission.

The Commission will also request progress reports and a final report on the implementation of the recommendations. These reports will be posted on the Commission's website, www.icac.nsw.gov.au, for public viewing.

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 1: Background

This chapter sets out some background information in relation to this investigation and NSW Maritime. The roles of present and former officers of NSW Maritime that featured in the investigation are also set out. Not all of those persons were the subject of allegations nor are they the subject of adverse findings.

How the investigation came about

Early in 2009, two employees of NSW Maritime made protected disclosures to the Commission. They made several allegations about matters relating to the Legal Services Branch of NSW Maritime, including allegations that Ms Kelly, Acting General Counsel, was conducting a private conveyancing business at the premises of NSW Maritime during work hours, and using the resources of NSW Maritime to do so. It was also alleged that another solicitor at the Legal Services Branch, Bonnie Dacombe, was assisting her.

Some months after the investigation commenced, the Commission received reports under section 11 of the ICAC Act from the Chief Executive of NSW Maritime concerning the payment of PII premiums for Ms Kelly, and the use of online search services by Ms Kelly for private purposes.

If the allegations were substantiated, the conduct could constitute or involve corrupt conduct. The misuse of NSW Maritime resources for Ms Kelly's private benefit could involve conduct falling within section 8(1)(b), section 8(1)(c) and section 8(2)(a) of the ICAC Act. It could also involve disciplinary offences and criminal offences, including the common law offence of misconduct in public office.

Why the Commission investigated

The allegation that a senior public official was conducting a private business on work premises, and using the resources of NSW Maritime to do so, was serious. This was not the first time that such allegations had been made. In 2004, the

Commission had referred a similar allegation for investigation and report back relating to the conduct of a conveyancing business by Ms Kelly to NSW Maritime under section 53 of the ICAC Act. Although the investigator at that time reported that the small amount of private business did not amount to "running a business," the Commission continued to receive similar complaints.

The Commission's role is set out in more detail in the Appendix.

Conduct of the investigation

The Commission's investigation involved obtaining information and documents from various sources by issuing notices under section 21 and section 22 of the ICAC Act, as well as interviewing and obtaining statements from a number of witnesses.

Commission officers executed search warrants at residential premises associated with Ms Kelly. A large number of documents and files were seized and subsequently analysed.

Evidence was taken from five witnesses in compulsory examinations.

The public inquiry

The Commission reviewed the information that had been gathered during the investigation and the evidence of the witnesses who appeared at compulsory examinations. After taking into account this material 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.

In making that determination, the Commission considered the following matters:

- the seriousness of the alleged conduct, involving the use by a senior public official of public resources for her own benefit

- the public interest in exposing the matter outweighed the public interest in preserving the privacy of the persons concerned in the matter
- the public exposure of this matter may assist other agencies to review their own systems and encourage other persons that are aware of similar conduct to come forward.

The public inquiry took place over four days commencing on 19 April 2010. The Hon David Ipp AO QC, Commissioner, presided at the inquiry and Jeremy Gormly SC was Counsel Assisting the Commission. Ms Kelly and 14 other witnesses gave evidence.

At the conclusion of the public inquiry, Counsel Assisting the Commission prepared submissions setting out the evidence, and the findings and recommendations that could be made based on that evidence. These submissions were provided to Ms Kelly, NSW Maritime and other persons who might be the subject of adverse findings, and they were invited to respond. All submissions received by the Commission in response have been taken into account in preparing this report.

NSW Maritime

The Maritime Authority of NSW is a statutory corporation responsible for marine safety, regulation of commercial and recreational boating, and oversight of port operations. The public authority responsible for similar functions from 1936 until 1995 was the Maritime Services Board (MSB). It was disbanded in 1995 and replaced by the Waterways Authority. On 1 September 2004, the Waterways Authority adopted the trading name of “NSW Maritime,” and the use of this name continued after the creation of the present corporation in 2006. For convenience, the authority is generally referred to in this report as NSW Maritime.

NSW Maritime is responsible for managing property built on the submerged lands in Sydney Harbour, Newcastle Harbour and other ports. More than 2,000 leases have

been granted and are managed by NSW Maritime. The authority also provides strategic advice on ports and maritime matters to the NSW Government.

There are a number of divisions in NSW Maritime, each of which is managed by a general manager. The reporting arrangements for the branches within the divisions have varied. Until late 2007, both the Employee Relations Branch and the Legal Services Branch were part of the Corporate Services Division. The Legal Services Branch was then transferred to the Policy and Strategy Division. Following a recent reorganisation, the Legal Services Branch has moved back to Corporate Services.

Chief executives and other managers

The events described in this report took place over several years. Three former chief executives and a number of other managers gave evidence in the inquiry.

Matthew Taylor

Mr Taylor was the Chief Executive of the Waterways Authority from September 1999 to January 2004. In March 2003, he approved Ms Kelly’s application to undertake conveyancing work as secondary employment.

Christopher Oxenbould

Mr Oxenbould was Chief Executive from mid-January 2004 to March 2008, except for a seven-month period in 2006 when he was Acting Chief Executive at Sydney Ferries. Brett Moore acted in Mr Oxenbould’s position during that period of absence. During Mr Oxenbould’s term, the Commission referred allegations concerning Ms Kelly to NSW Maritime. Mr Oxenbould engaged a barrister, John Clark, to conduct the investigation of these allegations.

Stephen Dunn

Mr Dunn joined NSW Maritime as the Deputy Chief Executive in August 2007. He became the Acting Chief Executive after Mr Oxenbould left, and was appointed as Chief Executive in July 2008.

At the time allegations about Ms Kelly's use of NSW Maritime resources for secondary employment were brought to his attention in 2009, Mr Dunn defended Ms Kelly. He relied on assurances given to him by Ms Kelly, information provided to him about her secondary employment, and his knowledge of the Clark report¹. When more information came to light, Mr Dunn decided to report certain matters about Ms Kelly to the Commission under section 11 of the ICAC Act. That section requires certain persons, including the principal officer of each NSW public authority, to report any matter that s/he suspects on reasonable grounds concerns or may concern corrupt conduct.

Susanne Ohanian

Ms Ohanian has been the Manager Human Resources (formerly known as Employee Relations) of NSW Maritime for about 12 years. She had known Ms Kelly throughout this period. For some years, Ms Ohanian had had some issues about the recruitment practices in the Legal Services Branch for engaging contractors, partly because Ms Kelly did not go through the Human Resources Branch, as was the usual practice.

Paul Robinson

Mr Robinson was General Manager Business Services between 1997 and 2003. Ms Kelly reported directly to him during that period. He resigned from NSW Maritime in 2008.

Legal Services Branch

This investigation principally concerns the conduct of some of the officers of the Legal Services Branch. The branch is made up of approximately 20 permanent and temporary staff, including a number of solicitors, paralegal and administrative staff.

Much of its work is concerned with property matters, including the leasing of foreshore structures. These foreshore structures include private facilities (such as jetties and pontoons), community facilities (such as boat ramps and wharves), and commercial and industrial business activities. The branch also has a role in the enforcement of regulations relating to boating safety and marine pollution. These duties are clearly of a public nature.

During the course of the investigation, it became clear that the Legal Services Branch was dysfunctional. Some members were obviously close to Ms Kelly and have been strong supporters of her. Other members of the branch, including those who made the complaints to the Commission, encountered difficulties dealing with Ms Kelly and those close to her in relation to the performance of their duties. The Commission does not intend to canvass the details of "who liked or disliked whom" unless they are relevant to the matters under investigation.

Tonette Kelly

Ms Kelly joined NSW Maritime in 1988, shortly after being admitted as a solicitor. In 1995, the then MSB was disbanded and Ms Kelly was transferred to the new Waterways Authority as Manager Legal Services. At that stage, Legal Services consisted of two solicitors and a legal clerk, and only conducted prosecution work. As the branch took on increased responsibilities, Ms Kelly became responsible for more staff and her position was regraded. On 15 January 2004, she was appointed as Manager Legal Services at a Senior Officer 1 level. After another redesign and regrading of her position, Ms Kelly was appointed to the Senior Officer 3 position of Acting General Counsel, effective from 4 February 2008. At the time the investigation commenced, the branch included a total of 20 staff, including 15 qualified lawyers.

Ms Kelly has worked at a senior level at NSW Maritime for a number of years and is one of the longest serving of all senior officers. She has served under many chief executives and has seen the organisation move through its various statutory stages.

Ms Kelly is the most senior legal officer at NSW Maritime and is consulted by chief executives and other senior officers about legal matters relating to other parts of NSW Maritime. As the manager of the Legal Services Branch, she acknowledged in her own submissions that she is a hard manager that expects every staff member to perform to a high standard. It was not suggested in evidence that her legal work was anything other than competent.

Ms Kelly testified at the public inquiry for almost two days. She was not a satisfactory witness. She was very much an advocate for her own cause and was frequently unnecessarily argumentative. Often, she was also evasive in her answers. In many cases, her evidence was refuted by other witnesses, as detailed later in this report. The Commission does not regard her to be an honest or reliable witness.

Louise Kirychenko

Louise Kirychenko is a relative newcomer to NSW Maritime. She commenced as a property contractor in July 2007, and was appointed to the permanent position of

¹ The report was written by barrister John Clark, who was engaged by NSW Maritime to undertake an investigation of allegations pertaining to Ms Kelly in 2004.

Deputy General Counsel and Principal Solicitor Property and Planning in April 2008.

She has two roles. In her role as Deputy General Counsel, she assists Ms Kelly with the management of the Legal Services Branch, including supervision, reporting to the executive, and acting for Ms Kelly in her absence. In the Principal Solicitor Property and Planning role, Ms Kirychenko is responsible for managing the commercial section of the property area (in conjunction with Ms Dacombe), and acting for NSW Maritime in leasing and conveyancing matters. Ms Kirychenko is a strong supporter of Ms Kelly and admires her skills and hard work.

Bonita (Bonnie) Dacombe

Bonnie Dacombe began working at NSW Maritime in 1998 as a legal clerk, initially in a part-time but later in a full-time capacity. Apart from a six-month period of absence, she has been employed in the Legal Services Branch since that time. She had known Ms Kelly for two or three years before she commenced work at NSW Maritime. In August 2000, she was admitted as a solicitor. She obtained a position of solicitor at NSW Maritime in 2005, and in 2008 was promoted to the position of Principal Solicitor, Property and Planning.

Nicholai Dacombe

Nicholai Dacombe is the younger brother of Bonnie Dacombe. He commenced work as a Legal Clerk at NSW Maritime in September 2008 on a contract through recruitment agency, Hays Office Support ("Hays"). Mr Dacombe left NSW Maritime in November 2009.

Chapter 2: Tonette Kelly Conveyancing

Ms Kelly has held a practising certificate since September 1999 that allows her to undertake private practice as a solicitor. Although employed in a full-time position at NSW Maritime, Ms Kelly operated a private practice called Tonette Kelly Conveyancing. Until recently, the practice was listed on the NSW Law Society's website. The telephone number and email address given on the website for contacting Ms Kelly were her contact details at NSW Maritime. She also undertook other legal work using a letterhead styled "Tonette Kelly – Solicitor".

The conveyancing work undertaken by Ms Kelly mostly related to the sale and purchase of residential properties. Typically, persons who are buying and/or selling a property engage a solicitor to make the necessary inquiries and prepare the contract.

This chapter examines the extent of the practice undertaken by Ms Kelly, and the false and misleading representations that she made in that regard. Matters relating to the use of an online search facility paid for by NSW Maritime will be covered in the next chapter.

Approval to engage in secondary employment

In common with most public authorities, NSW Maritime has a policy requiring employees to apply for approval to engage in employment outside the workplace. This is because of the need to avoid conflict between public and private interests, and to ensure that the ability of an officer to do their public sector job is not compromised.

Early in 2003, Mr Robinson, then General Manager Business Services of the Waterways Authority and Ms Kelly's supervisor, became aware that Ms Kelly was undertaking conveyancing for private clients. He was given three facsimiles that obviously related to private conveyancing matters, one of which bore the letterhead of Tonette Kelly Conveyancing. Mr Robinson spoke to Ms Kelly, then Manager Legal Services, and was told that she did "about half a dozen conveyancing matters per year for

family and friends". Mr Robinson was concerned that the resources of the agency were being used for a private matter, and advised Ms Kelly to apply for approval to engage in secondary employment.

Ms Kelly prepared a memorandum dated 7 March 2003 and sent it through Mr Robinson to Mr Taylor, then Chief Executive of the Waterways Authority. A copy of that memorandum is reproduced as Figure 1. In paragraph 5 of the memorandum, Ms Kelly acknowledged the need for her to be seen to comply fully with the Staff Code of Ethics and Conduct.

Ms Kelly informed Mr Taylor that she had done seven conveyancing matters the previous year for family and friends, mostly without payment, and anticipated undertaking a maximum of 10 matters in that year. There was no reference to the use of telephone and facsimile facilities, and the memorandum indicated that all conveyancing work would be done from home. Mr Robinson relied on the statements that Ms Kelly had made to him about the amount of work she was doing and, after noting his support for the application, gave the memorandum back to Ms Kelly. In his note of support he referred to the "small amount of conveyancing".

Mr Taylor endorsed the memorandum with the word "approved" and signed and dated it in his usual fashion. Although at the public inquiry he had no direct recollection of seeing the document, he accepts that he did sign and approve it. Mr Taylor wrote the date as 18/3 whereas Mr Robinson had dated the memorandum as 19/3. Neither Mr Robinson nor Mr Taylor could explain the apparent anomaly, which appears to be no more than an error by one of them in noting the date.

Mr Robinson does not recall seeing the document after Mr Taylor had signed it, although he was aware that Mr Taylor had approved the secondary employment. Mr Robinson assumed that the original document would have been placed on Ms Kelly's personnel file in accordance with the usual practice.

Figure 1

Waterways Authority Memorandum

From: Tonette Kelly. Legal Manager.
To: Matthew Taylor. Chief Executive.
Through: Paul Robinson. General Manager, Business Services.
Date: 7 March, 2003.

Re: SECONDARY EMPLOYMENT

1. I refer to Clause 3.8 of the Staff Code of Ethics and Standard of Conduct and would hereby seek your approval to undertake a limited amount of legal conveyancing work from home in addition to my Waterways Authority duties.
2. I note that last year I undertook seven conveyancing matters, four of which were unpaid for family members and friends and three of which were paid.
3. I estimate that this year I will undertake a maximum of ten matters.

Work Involved

4. Approximately four hours work is involved in a conveyancing matter which means that on average I will spend less than one hour a week undertaking the work.
5. Although a very small amount of time is involved I am conscious of the fact that it is essential that I be seen to be complying fully with the Staff Code of Ethics and Conduct in view of the fact that I am required to provide Senior Management with legal advice in relation to it.
6. I note that I do not believe that there is any conflict of interest between the conveyancing work and my Waterways Authority work as the conveyancing work is totally unrelated to it and in no way makes use of any knowledge that I obtain as the Legal Services Manager.
7. It would be greatly appreciated if you could approve the work.
8. Thank you for your assistance.

T Kelly
TONETTE KELLY
LEGAL MANAGER

11/10/03
Matthew,
tonette's private work is supported. I
do not believe the small amount of conveyancing
in any way impairs upon her commitment to
the Authority nor the independence of her advice.
Paul
19/3/03

Approved
M Taylor 18/3

The Clark investigation

On 26 October 2004, the Commission received an anonymous complaint alleging that Ms Kelly was running a conveyancing business from NSW Maritime premises, and using the resources of the agency to do so. The complainant also alleged that Ms Kelly had employed a personal friend to work in the Legal Services Branch, and that the friend might be working in the conveyancing business during public time. The Commission decided to refer the allegations to NSW Maritime for investigation and report back, pursuant to section 53 and section 54 of the ICAC Act.

NSW Maritime engaged a barrister, Mr Clark, to undertake the investigation. He commenced his investigation on 18 November 2004. His report was dated 30 December 2004. During the current investigation, the Commission obtained the original report and the annexures from NSW Maritime, including interview transcripts and Ms Kelly's written response.

On 24 November 2004, then NSW Maritime Chief Executive Mr Oxenbould gave Ms Kelly a copy of a letter prepared for him by Mr Clark, informing her of the allegations and the appointment of Mr Clark to investigate them. Later that same day, Ms Kelly produced a copy of the approval of 7 March 2003 to Mr Oxenbould from her own records. The existence of this approval document had previously been unknown to Mr Oxenbould. He said that the document provided to him was a single sheet of paper without attachments. He provided a copy of the document to Mr Clark.

At the end of the Clark inquiry, Mr Oxenbould arranged for a copy of the approval document to be placed on Ms Kelly's personnel file, which is held under lock and key in the office of Ms Ohanian, Manager Human Resources.

Mr Clark interviewed a number of Ms Kelly's colleagues in the Legal Services Branch and other NSW Maritime officers, some of whom knew that Ms Kelly did some private work. Mr Loughman, Senior Legal Clerk of the Legal Services Branch, said that he had seen a letterhead indicating that she was conducting a private practice run from her home. Mr Robinson and Ms Ohanian told Mr Clark that they had seen facsimiles at NSW Maritime addressed to Ms Kelly and involving conveyancing. Ms Ohanian also told Mr Clark that she had discussed the matter with Ms Kelly a year or two before the interview, and had overheard telephone conversations involving Ms Dacombe and Ms Kelly that could have been about conveyancing contacts. Ms Dacombe informed Mr Clark that she had assisted Ms Kelly by making a total of five telephone calls on her behalf, but said she had no knowledge of Ms Kelly doing conveyancing at work. In the public inquiry, Ms Dacombe agreed that her statement to Mr Clark that she had no knowledge of Ms Kelly doing conveyancing at work had not been true.

On 10 December 2004, Mr Clark gathered together the transcripts of all the interviews and other information, and forwarded them to Ms Kelly. He asked her to respond in writing and/or take part in an interview. Ms Kelly sent a detailed written response to Mr Clark on 22 December 2004, in which she stated:

...since receiving an approval from the former Waterways Authority Chief Executive on 18 March, 2003, to conduct such work I have undertaken a limited amount of paid conveyancing work (2003 – 6 paid matters and 2 unpaid matters for family/friends 2004 – 9 paid matters and 1 unpaid matter for family/friends).

She made this statement, which is consistent with the relatively low level of activity reported by her colleagues, secure in the knowledge that no one had said otherwise. She informed Mr Clark that she conducted all her conveyancing work at home, apart from making and receiving fewer than two phone calls per week while at work. Mr Clark did not seek to interview Ms Kelly and accepted her submissions. He made no attempt to test the version given by Ms Kelly.

Mr Clark concluded that the limited amount of conveyancing work undertaken by Ms Kelly, with approval from March 2003, could not be regarded as a business. He found no evidence that Ms Kelly had been running a business from the premises of NSW Maritime. He noted that there was limited use of the resources of NSW Maritime within the limits permitted by the agency's Code of Conduct and Ethics.

In relation to the allegations concerning the engagement of Ms Dacombe, he concluded that there was no evidence of impropriety in relation to her engagement as an employee of NSW Maritime or that she was employed to work on conveyancing activities on behalf of Ms Kelly.

As she did in the present inquiry, Ms Kelly downplayed her friendship with Ms Dacombe, misleading Mr Clark. In fact, Ms Dacombe had been a bridesmaid for Ms Kelly in 1997. Ms Kelly has said that she asked Ms Dacombe to be a bridesmaid, not because of close friendship, but because she needed someone "who lived close and who was short". The Commission rejects this explanation.

NSW Maritime accepted Mr Clark's report, which concluded that "Ms Kelly emerges from this investigation with her reputation still unblemished".

How much conveyancing was Ms Kelly doing?

In December 2009, Commission officers applied for and executed search warrants at two residential premises. They seized many boxes of files relating, in the main, to the sale and purchase of properties during the period from 2003 to 2009. The Commission did not seize many earlier files, although a

record of the files was made using a video camera. Ms Kelly told the investigators that a number of files relating to work done in 2007 and part of 2008 had been destroyed by water after a pipe broke. The Commission also seized a number of computers and other electronic storage devices, which were forensically examined.

The picture that emerged during the analysis of the material seized from Ms Kelly was quite different from that conveyed to Mr Clark. A series of spreadsheets was located on the hard drive of a computer seized from Ms Kelly's residence headed "Tonette Kelly Conveyancing Clients". Each spreadsheet related to a financial year and listed the names of clients, addresses of the relevant properties, and recordings of the receipt of fees.

The entry for the first client is dated 29 October 1999, shortly after Ms Kelly obtained a practising certificate and the relevant insurance that permitted her to engage in practice on her own account. The spreadsheets that were tendered in evidence covered the period from that date until 30 June 2008. The receipt numbers ran in a continuous sequence from 1 to 699, and included information relating to the files created in 2007 and 2008 that were later destroyed.

Ms Kelly and her legal representative were given an opportunity to review the material before the spreadsheets were tendered. Her counsel did not accept that the fees were accurate. No attempt was made to challenge the rest of the information in the spreadsheets.

Most of the physical files from the years 2004 onwards were marked with file numbers. The file number on each physical file generally corresponded to the receipt number for the particular entry on the spreadsheet. The spreadsheets contain

a list of the clients of Tonette Kelly Conveyancing and can be used to estimate the volume of work done by Ms Kelly.

Figure 2 shows the number of client files for each calendar year. The data for the years from 1999 to 2007 is derived from the spreadsheets, and the data for later years is derived from the physical files seized. The Commission seized a total of 84 files relating to conveyancing contracts exchanged in 2008, and there were 102 files relating to matters in 2009.

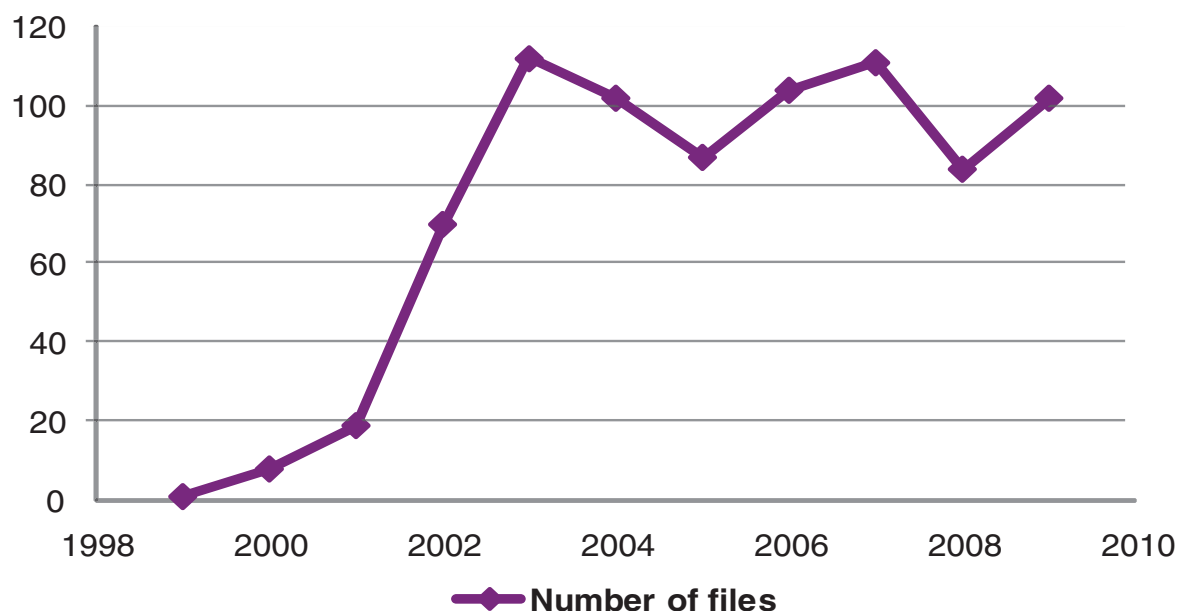
Commission officers have estimated from client fee disclosure letters and settlement sheets that Ms Kelly's gross income from each matter varied from \$900 to \$1,400. For an average of two matters per week, this would amount to an annual turnover of about \$120,000.

This figure would normally include disbursements, such as title searches and inquiries with councils and other public authorities. No accounting records were located so it is difficult to estimate Ms Kelly's taxable income. Ms Kelly had not declared her income from secondary employment on the tax returns obtained by the Commission. She was not registered for GST even though her turnover exceeded \$75,000. These matters will be referred to the Australian Taxation Office for appropriate action.

As noted earlier, Ms Kelly told Mr Clark in December 2004 that she undertook approximately 10 transactions per year. This was a gross understatement. By this time Ms Kelly had reached a level of practice involving approximately 100 clients per year, mainly involving conveyancing matters.

Ms Kelly was cleared of any wrongdoing by Mr Clark. Perhaps emboldened by the outcome of Mr Clark's investigation, Ms Kelly continued to conduct and even

Figure 2



expand her private practice. At no time did she indicate to the management team of NSW Maritime the true extent of her practice, and that it was considerably greater than what she had disclosed to Mr Taylor.

Ms Kelly did not confine her practice to family and friends, to her local neighbourhood or to her work colleagues. She claims to have placed only one advertisement in a real estate agent's booklet. She believes a fridge magnet, advertising a number of local businesses (including Ms Kelly's), may have been part of this advertising package.

Although most of Ms Kelly's private work related to conveyancing, the Commission also seized files relating to non-conveyancing work, such as family law, wills and unfair dismissal.

The Commission is satisfied that Ms Kelly acted for clients, mainly in relation to conveyancing, to the extent set out above. In so doing, Ms Kelly engaged in secondary employment at a level well beyond that approved by Mr Taylor, and has done so consistently since 2003.

Renewal of the approval

In August 2009, articles were published in the *Sydney Morning Herald* in which allegations were raised concerning the use of NSW Maritime resources by Ms Kelly for secondary employment. Mr Dunn discussed those allegations with Ms Kelly and asked her to reapply for approval for secondary employment.

Ms Kelly wrote to Mr Dunn on 18 August 2009 to provide the assurances that he sought from her in relation to the claims that had been made in the media. She gave Mr Dunn a copy of the memorandum dated 7 March 2003 with the approval of Mr Taylor that has been referred to previously. She also attached two pages setting out what was generally done in relation to a purchase and sale, in which she stated that the impact on the Waterways Authority was that she would "receive/make 3–4 short phone calls (Maybe 1 Fax)". These two pages do not appear in the original report prepared by Mr Clark nor could Mr Robinson remember them. Ms Kelly accepts that Mr Clark did not have the additional two pages that were added to the approval some time later, but does not know when they were added.

On 24 August 2009, Mr Dunn granted Ms Kelly ongoing approval for her secondary employment on the basis that she was not to use any NSW Maritime resources. Mr Dunn cancelled that approval in March 2010.

NSW Maritime amended the Code of Conduct and Ethics in August 2009 by including a clause prohibiting the use of NSW Maritime resources in secondary employment, including telephones, stationery, fax, mobile phone or computer equipment or services.

False and/or misleading representations

The Commission has identified several false and/or misleading representations made by Ms Kelly to the chief executives and others in relation to secondary employment. The evidence concerning these representations is discussed below.

Application to Mr Taylor

In her original application for approval to undertake secondary employment, dated 7 March 2003, Ms Kelly sought approval to undertake "a limited amount of legal conveyancing work from home".

Ms Kelly also informed Mr Taylor that she had done only seven matters in 2002 and expected to do a maximum of 10 matters in 2003.

Ms Kelly said that the information was true. She agreed that NSW Maritime would base its decision on whether or not to grant approval on the basis of the information provided by her. The number of matters that she undertook in 2002 was considerably understated. The Commission seized 26 files for that year. On the basis of the client lists, Ms Kelly worked on 70 matters in 2002, 112 matters in 2003, and 102 matters in 2004.

The Commission finds that the application to Mr Taylor contained false statements and is satisfied that Ms Kelly deliberately misled him as to the extent of her work in order to increase the chances of her application being approved.

Submissions to Mr Clark

In her submission to Mr Clark in December 2004, Ms Kelly denied using the resources of NSW Maritime other than "in relation to the use of the phone to receive and make a small number of phone calls". She estimated this as fewer than two calls per week.

She also stated:

I note that all my conveyancing work is done at home including receipt and perusal of mail, receipt and checking of Faxes, preparation of Faxes and sending of Faxes.

It was suggested to Ms Kelly during the public inquiry that this statement was false. She initially replied "No, the whole statement is not false". She then conceded that some faxes had been sent from work and the "all" was incorrect.

During the analysis of the physical files seized by the Commission, information concerning the faxes sent by Ms Kelly was recorded. Ms Kelly attached the confirmation sheet to each fax she sent. It was therefore possible to

identify the fax machine that had been used on each occasion.

A total of 112 faxes were located amongst the files dating from 2001 to 2004 (inclusive), all of which had been sent from fax machines located at NSW Maritime premises. Of the 112 faxes, 97 had been sent between March 2003 and December 2004.

Ms Kelly's submissions to Mr Clark on the extent of her work were consistent with the disclosures in the 7 March 2003 document (her original application for approval) in stating that she had done only a few matters. She stated that she had undertaken "a limited amount of conveyancing work" and referred to eight matters in 2003 and 10 matters in 2004.

Ms Kelly denied that this statement was false or misleading. She argued that Mr Clark was investigating the work done at NSW Maritime's premises and she did not have to tell him about other conveyancing work.

The Commission seized eight conveyancing files from 2003 and 14 files from 2004. As mentioned, however, the client lists found on the spreadsheets showed a total of 112 matters in 2003 and 102 matters in 2004. These figures are substantially greater than those disclosed to Mr Clark.

As noted earlier, Ms Kelly also misled Mr Clark as to the extent of her friendship with Ms Dacombe prior to her first employment as a casual clerk at NSW Maritime.

The Commission is satisfied that Ms Kelly's submission to Mr Clark contained false or misleading statements in relation to the extent of her work, the proportion of work done at home, the use of the NSW Maritime fax machine, and her relationship with Ms Dacombe.

Discussions with Mr Oxenbould

Mr Oxenbould said that he had discussions with Ms Kelly in 2004 after informing her of the Clark investigation and after the receipt of the report. In a statement to the Commission he said:

She indicated to me the work involved in her secondary employment was very minor. At some stage Ms. Kelly told me that she was doing a 'handful' of conveyancing matters per year, and that some she was doing pro bono and others for family members and friends.

His understanding was that she was not going to use office facilities and would take steps to remove her contact details at NSW Maritime from the listing on the Law Society website for Tonette Kelly Conveyancing.

Mr Oxenbould's evidence at the public inquiry was to the same effect both as to volume of work and use of

resources. He also said that he stressed to Ms Kelly the problem of perception if she continued to use the facsimile machine for private work. Ms Kelly told him that her conveyancing was "very minor in its nature. It was only a few cases a year". Mr Oxenbould said he acknowledged that there might be some incidental phone calls that Ms Kelly would have to take. Ms Kelly did not challenge the evidence of Mr Oxenbould described in this paragraph.

These discussions took place during and shortly after the Clark inquiry. For the reasons set out in the previous section in relation to the false statements that Ms Kelly made to Mr Clark, the Commission finds that Ms Kelly's representations to Mr Oxenbould about the number of matters she handled were false.

Letter to Mr Dunn on 18 August 2009

Ms Kelly wrote a letter to Mr Dunn dated 18 August 2009 after allegations about her conveyancing practice had been published in the *Sydney Morning Herald*. In that letter, she requested that she be allowed to retain her current secondary employment approval and make limited use of the NSW Maritime phone for that purpose.

In support of her application, she enclosed a copy of the original approval signed by Mr Taylor in 2003 and the two sheets of paper setting out what was involved in doing conveyancing work. She implied that the two sheets had accompanied her application to Mr Taylor and that she had discussed the use of the Waterways Authority phone and fax with him. As noted earlier, there is some doubt as to when the two pages were attached to the approval document of 7 March 2003.

According to Ms Kelly's letter of 18 August 2009, she and Mr Taylor had worked on the basis of five phone calls a day being approximately \$5 per week, at a time when she was doing approximately 15 additional hours at the Waterways Authority for which she was unpaid.

In the letter she then stated:

My usage has not changed but what has changed is that:

(a) in 2004 I obtained my own Personal Facsimile so I receive no Facsimiles at work...

Mr Dunn relied on that statement as an assurance that she had not used the NSW Maritime fax machine since 2004. The approval he granted on 24 August 2009 did not permit any use of NSW Maritime resources.

Ms Kelly also referred in her letter to the extra unpaid hours that she worked, valued at about \$1,800 per week at her salary rate, and noted that the costs of phone calls would be no more than \$5 per week – the same as estimated in 2003.

Ms Kelly did not disclose in this letter the increase in her conveyancing work that had taken place since the original approval was granted. Mr Dunn told the Commission that she had used the term, “a handful of conveyances for family and friends” when speaking with him.

In the letter, she noted:

All Conveyancing correspondence and Facsimiles go to my home address which is where I conduct the business with assistance from my husband (who works from home) in relation to answering urgent Facsimiles (of which there are not many).

The statement in that paragraph that Ms Kelly’s conveyancing business was conducted from home is false. There is substantial evidence to show that was not the case.

Ms Kelly agreed that conveyancing involved a large component of organisation and it was necessary to do much of this during business hours. Ms Kelly also did most of the settlements herself. These were also done during business hours.

She asserted that she did no more than three or four hours a week at work on conveyancing, and that all she had to do was take phone calls. As has been noted, the Commission tallied up the number of faxes sent by Ms Kelly from NSW Maritime. A total of 4,568 faxes sent from the NSW Maritime machines were located in the files seized from Ms Kelly’s home. The files spanned the period from 2001 to 2009, although some were missing, and the majority were conveyancing matters.

Ms Kelly worked long hours at NSW Maritime, but the fax imprint times indicate that she sent faxes relating to her private practice from NSW Maritime premises at various times of the day. Ms Kelly frequently used the facsimile machine at NSW Maritime on her conveyancing work.

There is no doubt that Ms Kelly did some work from her home, but in 2009, when 801 faxes were sent from NSW Maritime, only 211 were sent from her home facsimile machine, even though the number of the latter machine appeared on her letterhead.

The home facsimile machine and the line were paid for by NSW Maritime which, in the ordinary course, was acceptable given the seniority of Ms Kelly and the possibility that she might be called upon to deal with matters outside business hours. However, it appears to have been heavily used for Ms Kelly’s private purposes. A total of 248 facsimiles sent from that machine were found in the seized conveyancing files, 211 of which were sent during the year 2009.

Ms Kelly used the NSW Maritime phone number in a Century 21 advertisement and on a Century 21 fridge

magnet (both advertised her conveyancing business), and on her letterhead. Ms Kelly may have received some telephone calls at home about conveyancing matters but she was at work for more than half the hours in a day, from 6am to 7pm. Although Ms Kelly may have spoken with clients from home by telephone, there is a compelling inference that she also made and received many telephone calls at the NSW Maritime offices during business hours.

Ms Kelly appears to have made and received a large number of telephone calls in the course of her work at NSW Maritime. Her connection through a switchboard means it is not possible to track the number of calls made and received by her.

The Commission does not accept Ms Kelly’s assertion that little or no time was spent doing conveyancing at work and most of it was done at home by others. The evidence outlined above demonstrates otherwise. Significant amounts of conveyancing work were done by her at NSW Maritime during the course of the business day and using the agency’s facilities.

In August 2009, when seeking the renewal of her approval to undertake secondary employment, Ms Kelly misled Mr Dunn by giving him the memorandum of 7 March 2003, and failing to disclose the true extent of her work. In addition, she misled Mr Dunn by asserting that her usage of the phone and fax had not changed since that time, although she no longer received faxes at NSW Maritime, and giving the impression that her business was conducted from home.

Non-disclosure of change in circumstances

Neither Mr Taylor nor Mr Oxenbould were told of any change in the volume of work involved in Ms Kelly’s conveyancing practice. On 18 August 2009, when she applied for the renewal of her secondary employment approval, Ms Kelly did not inform Mr Dunn that the volume of work was far greater than that declared in her earlier application to Mr Taylor.

Ms Kelly agreed in her evidence at the public inquiry that there came a time when she spent several hours a week undertaking the conveyancing work in NSW Maritime’s office in contrast to the less than one hour per week referred to in her application to Mr Taylor dated 7 March 2003.

Many officers of NSW Maritime knew that Ms Kelly did conveyancing work. Some officers of NSW Maritime, including some managers, had engaged her to do such work for them. Some of those working in the Legal Services Branch saw faxes from time to time or took telephone calls for her.

In 2003, Mr Taylor gave his approval to the secondary employment for which Ms Kelly applied on the basis of her representations as to the extent of the work she would do while being so employed. That was a continuing representation. The circumstances under which Ms Kelly made that representation gave rise to a duty upon her to correct that representation once altered facts made it incorrect². This duty was reinforced by the mutual duty of trust and confidence that is an implied term of a contract of employment.³ When the information that was the basis of Mr Taylor's approval for secondary employment changed and ceased to be true, Ms Kelly had a duty to disclose the truth to her employer. She failed to do so.

Acts of dishonesty or similar conduct that are destructive of the mutual trust between the employer and employee are generally sufficient grounds for summary dismissal.⁴ The Commission finds that Ms Kelly's conduct was indeed destructive of the mutual trust.

Ms Kelly was asked to respond to the proposition that in circumstances when an approval had been granted on the basis of a small amount of conveyancing of seven-to-10 matters per year, and that had increased to more than 100 matters, she was under an obligation to inform her employer of the increase. She said she was not obliged to do so because she did not think the approval was sought on the basis of the number of matters that she would be responsible for, but rather on the number of matters she was doing and the time it would take. She said that she was doing the work in relation to only seven-to-10 matters.

She accepted that her employer would make a decision on the information provided and that if that information ceased to be correct there was an onus on her to inform her employer. She argued that the situation had not changed in her case and therefore there was no such obligation on her. She did not think that there was any need to disclose the increased work because the secondary employment approval was based on there being no conflict of interest and the time spent was not relevant.

The Commission does not accept Ms Kelly's argument. There was a significant difference between the number of matters she was undertaking and the number of matters she had represented to Mr Taylor that she was undertaking.

In addition to the requirement to disclose the change in circumstances arising from the implied term of mutual trust and confidence, Ms Kelly had an obligation from August 2006 to make such disclosures in accordance with the Code of Conduct and Ethics.

In August 2006, Ms Kelly signed an employee declaration confirming that she had read the new Code of Conduct and Ethics. Clause 3.6 of the code sets out the requirements relating to secondary employment. Clause 3.6.1 deals with the requirements to seek prior approval from the chief executive and to provide details of the type of work and the hours proposed to be worked. If Ms Kelly wished to vary the nature or extent of secondary employment, it was incumbent upon her to seek approval in writing, providing the details of the variation sought (Clause 3.6.2). She failed to do so.

The express provision relating to variation was not in the previous version of the code. However, at least by 2006, Ms Kelly must have known that she should make a written application to vary her approval, given the extent of her practice.

The reasons that Ms Kelly proffered for her continuing failure to disclose the increase in her work included:

- everybody knew she did conveyancing (this submission is a testament to the amount of conveyancing she was in fact doing)
- no one enforced the code of conduct in relation to secondary employment (Ms Kelly did not provide any evidence of that)
- numerous other NSW Maritime lawyers had done conveyancing before her (she produced evidence of only one, more than 20 years ago, who did a personal transaction for her)
- most of the work from 2000 to 2005 was done by her sister (even if this is a correct assertion it does not assist Ms Kelly in relation to the period from 2006 onwards).

None of these submissions (even if correct – which is not accepted) is a satisfactory reason for her continuing failure to make proper disclosures, particularly when coming from a senior public official, who is legally trained and who must have known that any change in circumstances would be relevant to her employer's decision to continue approval for secondary employment. Ms Kelly acknowledged that she should set an example to junior staff by complying with the relevant policies.

Ms Kelly acknowledged in her submissions that she did some conveyancing work at NSW Maritime, including the use of the telephone, fax machines and some use of the Legalco/Espreon online search facility. As set out earlier, the evidence is that she did work involving many files while at NSW Maritime and attended most settlements of conveyancing transactions in the city. Whether the work was done at home or at NSW Maritime did not affect her obligation to disclose the change in circumstances relating to the volume of her conveyancing work. She did not make such a disclosure.

² *Brownlie v Campbell* (1880) 5 App Cas 925 at 950; *With v O'Flanagan* (1936) Ch 575 CA; *R.T & Y.E. Falls Investments Pty Ltd v State of New South Wales* (2007) NSWCA 18.

³ *Concut Pty Ltd v Worrell* (2000) 176 ALR 693; *Russell v The Trustees of the Roman Catholic Church* (2008) 72 NSWLR 559.

⁴ *Concut Pty Ltd v Worrell*, per Kirby J at 51.

Corrupt conduct discussed in this chapter

In making findings of fact and corrupt conduct, the Commission applies the civil standard of proof of reasonable satisfaction, taking into account the decisions in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALFR 170 at 171.

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 conduct, which has been found as a matter of fact, comes within the terms of section 8(1) or section 8(2) of the ICAC Act. In making that determination, it is necessary to consider whether or not the person had the necessary “mental element”; an actual or imputed appreciation that what was being done was, in the context in which it was done, carried out for a reason that is unacceptable.⁵ This does not, however, mean that simply because a person does not at the relevant time believe that his or her conduct is corrupt, the Commission is precluded from making an adverse finding.⁶ The third and final step is to determine whether the conduct also satisfies the requirements of section 9 of the ICAC Act.

The Commission is satisfied that Ms Kelly acted corruptly by engaging in secondary employment at a level well beyond that which had been approved, and in utilising the resources of NSW Maritime, including the facsimile machines, for her personal benefit. She knew the basis on which the approval was given by Mr Taylor, and knew that it was unacceptable to engage in secondary employment to the extent that she did without seeking approval to do so.

Such conduct constitutes or involves a breach of public trust and comes within section 8(1)(c) of the ICAC Act. For the purposes of section 9(1) of the ICAC Act, it could involve the common law offence of misconduct in public office and a disciplinary offence of misconduct.

The Commission is satisfied that Ms Kelly knowingly misled the chief executives and Mr Clark on a number of occasions in relation to her secondary employment. The false and misleading representations made by Ms Kelly were contained in:

- the application to Mr Taylor dated 7 March 2003
- the submissions to Mr Clark in December 2004
- the discussions held with Mr Oxenbould in late 2004
- the letter to Mr Dunn on 18 August 2009
- the continuing failure to disclose changes in circumstances from 2003 to 2009.

⁵ *Greiner v ICAC* (1992) 28 NSWLR 125, per Mahoney JA at 162.

⁶ *Ibid*, per Gleeson CJ at 140.

Ms Kelly acted corruptly with respect to each of these matters because her conduct:

- involved a breach of public trust and therefore comes within section 8(1)(c) of the ICAC Act
- adversely affected, directly or indirectly, the exercise of official functions by the chief executives, and could involve official misconduct under section 8(2)(a) of the ICAC Act.

For the purposes of section 9(1)(a) of the ICAC Act such conduct could constitute or involve the common law offence of misconduct in public office. Such conduct could also constitute or involve reasonable grounds for dismissal for the purposes of section 9(1)(c) of the ICAC Act.

Section 74A(2) statements

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

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

An “affected” person is defined in section 74A(3) of the ICAC Act as a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with an investigation.

The Commission is satisfied that, in respect of the matters canvassed in this chapter, Ms Kelly comes within the definition of an “affected” person.

Ms Kelly gave her evidence following a declaration made pursuant to section 38 of the ICAC Act. The effect of that declaration is that her evidence cannot be used against her in any subsequent criminal prosecution, except a prosecution for an offence under the ICAC Act.

Such offences include those under section 87(1) of the ICAC Act of giving false or misleading evidence to the ICAC and offences under section 80(c) of the ICAC Act of making false or misleading statements to a Commission officer. In this case, the evidence to prove such offences overlaps that required to prove other more serious offences. In all the circumstances, the Commission is not of the opinion that consideration

should be given to obtaining the advice of the DPP in relation to the prosecution of Ms Kelly for offences under section 87(1) and section 80(c) of the ICAC Act.

In the course of the investigation, the Commission has obtained other evidence that would be admissible in the prosecution of Ms Kelly. In particular, the evidence of Mr Robinson, Mr Dunn, Mr Taylor and Ms Ohanian is admissible against Ms Kelly. There is also much admissible documentary evidence available, including the numerous conveyancing files seized from her residence and NSW Maritime records.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Kelly for the common law offence of misconduct in public office in relation to:

- engaging in secondary employment beyond the scope of her approval between 2003 and 2009
- misleading Mr Taylor in her application for secondary employment in 2003
- misleading Mr Clark during the investigation held in late 2004
- misleading Mr Oxenbould in late 2004
- misleading Mr Dunn in the letter of 18 August 2009
- the failure to notify successive chief executives of the extent of her conveyancing business.

As an employee of NSW Maritime, Ms Kelly is a public official, as defined in the ICAC Act. The duties of the Legal Services Branch derive to a significant extent from statute and are intended to benefit the public. Accordingly, officers of that branch fall within the common law definition of “public official”.

In *R v Huy Vinh Quach*,⁷ the Victorian Court of Appeal identified the elements of the common law offence of official misconduct as:

- a public official
- in the course of or connected to his public office
- wilfully misconducts himself, by act or omission
- without reasonable excuse or justification
- where such misconduct is serious and meriting criminal punishment, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

Redlich JA, with whom the other members of the Victorian Court of Appeal agreed, emphasised that, generally:

...the conduct must be so far below acceptable standards as to amount to an abuse of the public's trust in the office holder.

In the opinion of the Commission, Ms Kelly's conduct may amount to the common law offence of misconduct in public office. The Commission has taken into account the responsibilities of her office, as the most senior legal officer in NSW Maritime, and the nature and extent of the departure from those responsibilities.

As noted earlier, section 74A(2) of the ICAC Act requires the Commission to express its opinion in relation to the taking of disciplinary action or action with a view to the dismissal or termination of an employee.

The Commission is of the opinion that consideration should be given to the taking of action against Ms Kelly in relation to the conduct described in this chapter, with a view to dismissing her. NSW Maritime has advised the Commission that disciplinary proceedings have commenced against Ms Kelly. The Commission endorses that action.

⁷ (2010) VSCA 106 at [46]; see also [41–47], per Redlich JA; *Sin Kam Wah and Lam Chuen Ip v HKSAR* (2005) HKCFA 27, especially at [45–46], per Mason NPJ.

Chapter 3: Misuse of NSW Maritime's Espreon account

Legalco and Espreon searches

Some of the most important tasks that a solicitor does in relation to conveyancing are to confirm the title details of a property and ascertain whether or not there are any likely impediments to the enjoyment of land after it is purchased. There are a number of companies that provide an online facility for performing the requisite searches on payment of a fee. One such company is Espreon Pty Ltd, previously known as Legalco. NSW Maritime and Ms Kelly each had accounts with Legalco/Espreon.

Ms Kelly had access to the NSW Maritime account and she used it to conduct title searches related to her private conveyancing work. During the examination of the physical files seized from Ms Kelly's residence the Commission recorded the number and type of searches done on each of the Legalco/Espreon accounts.

The total number of searches made on the NSW Maritime account and found on the seized files for the period from 1 July 2003 to 1 October 2009 was 824, at a cost to NSW Maritime of \$10,269. As noted earlier, many files were missing and this amount is a minimum value.

When an invoice came in from Espreon, Mr Loughman arranged for a payment voucher to be prepared and forwarded to Ms Kelly for approval. The original invoices were forwarded to the Finance Branch with the voucher, and a copy of the invoice was retained in the Legal Services Branch.

Ms Kelly approved payment by NSW Maritime, knowing that many of the searches the subject of the invoices had been conducted for her personal conveyancing business, and without disclosing the benefit to her personally. She acknowledged that she had never reimbursed NSW Maritime for her use of this facility.

Ms Kelly also conducted searches on her own Legalco/Espreon account. All of those searches were inquiries that would be unlikely to be related to NSW Maritime, such as searches on Sydney Water records. If she had done these

searches on the NSW Maritime account, there was a real prospect that the improper use of the account would have been queried and revealed. Ms Kelly's conduct shows that she was careful to use the NSW Maritime account in circumstances where the details on the invoices would not arouse any suspicion about the extent of her private conveyancing work. When the nature of the searches being conducted could arouse suspicion, she used her private account to conduct searches and inquiries.

Ms Kelly's defence to the allegation that she had misused the Legalco/Espreon account was based on two documents: another approval dated in 2003, and an undated document that was referred to in the public inquiry as the "Hi" document.

Another approval comes to light

On 30 November 2009, Ms Kelly sent a four-page facsimile to Mr Dunn. It included a copy of the signed approval dated 7 March 2003, and two pages outlining the work involved in each of the sale and purchase of a property. There was also a copy of a memorandum dated 20 March 2003 from Ms Kelly addressed directly to Mr Taylor in which she sought approval to use the Legalco/Espreon online search facility of NSW Maritime on the basis that she would regularly reimburse NSW Maritime. A copy of this memorandum is reproduced in Figure 3.

Although similar in form to Figure 1, the document was not signed by Ms Kelly nor had it been sent through to Mr Robinson (this was also the case for the original memorandum dated 7 March 2003). Ms Kelly said her practice was to send documents directly to the chief executive, and she had sent the earlier memorandum through to Mr Robinson as he had asked her to prepare it.

The document was endorsed with the handwritten word "approved" and what appeared to be the signature of Mr Taylor.

Ms Kelly could not recall when she received the document back from Mr Taylor after its approval on 28 March 2003,

and assumed that she had sent the original to the Human Resources Branch for placement on her personnel file.

The first time Ms Kelly produced this document was when it became apparent that inquiries were being made about her conveyancing work and perhaps about her use of Espreon. Ms Kelly sought to explain this by saying her use of the Espreon account or its predecessor Legalco had not previously been an issue.

However, in her December 2004 submission to Mr Clark, Ms Kelly had noted:

In relation to searches and enquiries I note that I have a Legalink Account and order and receive documents by email and fax.

At that time, she had clearly turned her mind to the issue of searches and enquiries but made no mention of the use of the Legalco/Espreon account that was paid for by NSW Maritime.

Ms Kelly denied that the memorandum dated 20 March 2003 was a forgery created by her to secure the appearance of approval for her use of the resources of the Waterways Authority.

In her written submissions to the Commission, Ms Kelly submitted that Mr Dunn must have seen the memorandum before he wrote to her on 24 August 2009, because he had referred to “databases” when modifying her approval to undertake secondary employment. In the letter, Mr Dunn had written:

Your secondary employment approval is modified by this letter. The use of NSW Maritime photocopiers, phones, faxes, emails, computers, databases, or other media resources is not permitted when associated with your secondary employment.

The word “databases” is not necessarily limited to those available on the internet. It could also refer to the internal databases maintained by NSW Maritime in relation to its official functions. As noted in chapter 5, the NSW

Maritime Code of Conduct and Ethics was amended in August 2009 by the insertion of a paragraph in similar terms to the above. The Commission does not accept Ms Kelly’s argument on this point.

Ms Kelly admitted that she had never reimbursed NSW Maritime for the use of the Espreon account by personal cheque as foreshadowed in the memorandum. She asserted that she had approached someone in the accounts department, intending to make a payment by cheque for the use of Espreon as proposed in the 20 March 2003 document. She had shown the person a copy of the approval and attempted to pay by way of personal cheque. She asserted that this person told her she could pay by way of additional hours. This was a reference to paragraph 5 of the memorandum (Figure 3).

Ms Kelly was unsure of the identity of the person she had approached but acknowledged that it would have been someone senior. Theo Poullos, Management Accountant at NSW Maritime for the last eight years, was the person responsible for issues of the kind that Ms Kelly wished to raise. He had no recollection of any conversation with Ms Kelly in 2003 or since regarding an arrangement or approval to permit the offsetting of payments for the alleged authorised use of Legalco/Espreon by Ms Kelly against unclaimed hours of work.

For the reasons given later in this chapter, the Commission considers that there was no reasonable prospect of any public officer of NSW agreeing that she “pay” for her use of Espreon in that way.

Mr Taylor denied that it was his signature on the document. The Commission accepts Mr Taylor’s denial.

Mr Taylor also told the Commission that he would not have approved that part of the document dealing with the use of the Legalco/Espreon account for private purposes. He pointed out that even if he had “had a mind to approve it”, he would have first consulted Mr Robinson and the finance officer (which he did not). He would also have required Ms Kelly to sign the document and for it also to be signed

Figure 3

Waterways Authority Memorandum

From: Tonette Kelly. Legal Manager.
To: Matthew Taylor. Chief Executive.
Date: 20 March, 2003.

Re: SECONDARY EMPLOYMENT

1. I refer to the approval that you granted in relation to my Secondary Employment on 18 March, 2003, enabling me to conduct a limited amount of conveyancing work in my own time and thank you for same.
2. I note that the approval was granted in accordance with Clause 3.8 of the Waterways Authority Staff Code of Ethics and Standard of Conduct Document.
3. Pursuant to Clause 3.15 of the Waterways Authority Staff Code of Ethics and Standard of Conduct Document approval can be given by a Supervisor to use Waterways Authority resources for private purposes.
4. In this regard I would like to seek your approval to use the Waterways Authority Legalco account to undertake on line searches for private purposes and I will ensure that a personal Cheque is made payable to Waterways at regular intervals.
5. I note that I will at no time be in debt to the Waterways Authority when it is considered that each month for the last five years I have worked a minimum of thirty additional hours for which I do not claim payment ie. a minimum of \$1,470.00 per month. Consequently the Waterways Authority and the NSW taxpayer will at no time be disadvantaged in any way.
6. Please let me know if you require anything further.

TONETTE KELLY
LEGAL MANAGER

Approved
Matthew Taylor
28/3/03

by her general manager, Mr Robinson. This did not occur. Indeed, Mr Robinson does not recall ever discussing the use of Legalco/Espreon with Ms Kelly.

Mr Taylor's evidence is supported by the report of Michelle Novotny, an expert document examiner. In her examination of the handwritten word "approved" appearing on the memorandum dated 20 March 2003, and the same word on the memorandum dated 7 March 2003, she found that the only difference was that the tail on the end of the word was shorter on the later document. Ms Novotny referred to "the coincidences in form, relative spacing of letters, size and slant that are more than one would expect to observe between two naturally handwritten entries written by one person". Ms Novotny concluded that the handwritten entries "approved" were images of the one handwritten entry and that one (or both) was the product of some form of physical or digital "cut-copy-and-paste" method.

No persuasive reason was advanced for the Commission not to accept Ms Novotny's expert opinions, and the Commission does accept them.

Mr Oxenbould did not know that NSW Maritime used a legal search facility called Legalco/Espreon. He had not heard of any document in which Mr Taylor had authorised Ms Kelly's use of Legalco/Espreon for private use, provided that she paid with a cheque, nor had it been raised in discussions.

It appears that the first time that the memorandum dated 20 March 2003 had been seen by anyone within NSW Maritime was 30 November 2009, when Ms Kelly faxed a copy to Mr Dunn. As admitted by Ms Kelly, there was no copy of it on her personnel file. Had standard practice been followed a copy would have been on that file.

In summary:

- Mr Taylor denied that the signature was his on the memorandum dated 20 March 2003
- Mr Taylor would not have given the approval Ms Kelly sought
- Ms Novotny concluded that the two handwritten entries "approved" are images of the one handwritten entry and, in her expert opinion, that conclusion casts doubt on the genuineness of one of the two memoranda
- Ms Kelly failed to produce the document to either Mr Clark or to Mr Oxenbould during the Clark inquiry
- Mr Robinson did not discuss the use of Legalco/Espreon with Ms Kelly
- Ms Kelly did not produce the document to Mr Dunn in answer to the *Sydney Morning Herald*

articles that began appearing in August 2009

- Ms Kelly failed to produce the document with her letter of 18 August 2009 in her application to Mr Dunn for a renewal of her secondary employment approval
- the use of a legal search facility had not been raised with Mr Dunn in discussions with Ms Kelly in August 2009
- Ms Kelly took care to use her own Legalco/Espreon account for searches that might be identified as being for non-Maritime purposes. She would not have needed to do that had the document been genuine.

The Commission is satisfied that the memorandum dated 20 March 2003 is a forgery prepared by Ms Kelly to assist her to justify her use of the Legalco/Espreon search facility for private purposes.

The "Hi" document

On 21 December 2009, Ms Kelly wrote letters about the investigation to Mr Dunn and a Commission investigator. This was within a few days of the execution of a search warrant at Ms Kelly's home. By that time, Mr Dunn was aware that Ms Kelly had misused the Legalco/Espreon search facility.

Ms Kelly attached a handwritten document, which was referred to in the public inquiry as the "Hi" document. Copies of 16 Legalco invoices, dated during 2003 and 2004, were also attached. Each such invoice had been approved for payment by Ms Kelly.

The "Hi" document was undated and not addressed to anyone in particular. On its face it appears to have been written at the request of an unknown person after Ms Kelly had sent her submission to Mr Clark in December 2004. It reads:

Hi

Is this what you wanted from Accounts as this is all they had?

The usage for the Branch is way under my non-claimed hours, so my usage is definitely covered.

I have given a written statement to the Investigator. Can you please give him this if you think the investigation covers it as I didn't cover it.

Thanks

Tonette

Ms Kelly said that she had prepared the document after writing her submissions to Mr Clark. She said that she

would have had to speak to someone in accounts to get the copies of the invoices that were attached. She could not remember to whom she spoke. She conceded that in 2004 the relevant invoices may have been available in the Legal Services Branch area. In view of the Commission's doubts as to the credibility of Ms Kelly, this evidence cannot be relied upon.

Even though she had been directed on 23 October 2009 not to attend the office, Ms Kelly entered the NSW Maritime building in Kent Street on a number of occasions. On 9 November 2009 she was there between 9.10 pm and 10.48 pm. Ms Kelly denied that she had photocopied Legalco invoices that evening. The Deputy Chief Executive of NSW Maritime, Tony Middleton, told Mr Dunn that he had seen Ms Kelly in the office on 20 November 2009, and that she was photocopying at the time.

Ms Kelly maintained that the Legalco invoices were in the Finance Branch at Rozelle and that there was insufficient space for the copies to be kept at the Kent St offices. Mr Loughman gave evidence in the public inquiry that copies of the Legalco invoices were kept at the Legal Services Branch in Kent St in large manila folders. If this evidence is correct, Ms Kelly would have been able to photocopy invoices on 9 November 2009 or at some other time that month. After the public inquiry was complete, Mr Loughman changed his evidence in this respect and said that those invoices that were more than two years old had been destroyed in early 2008 at the direction of Ms Kelly.

Accordingly, it is not known for certain how Ms Kelly was able to obtain copies of the 2003 and 2004 Legalco invoices that were attached to the "Hi" document.

Ms Kelly suggested that she had given the "Hi" document to either Mr Robinson or to the chief executive to give to Mr Clark. She claimed that she wrote it because Mr Clark's report dealt with conveyancing and not with use of resources. Her reasoning in this respect is not clear to the Commission. In any event, her own submission to Mr Clark dealt extensively with the issue of resources. It also informed Mr Clark that she used a Legalink search account for her conveyancing practice. She dealt with the issue of searching in conveyancing but did not disclose to Mr Clark her use of the Maritime Legalco/Espreon facility.

Mr Robinson had not seen the "Hi" document before the current inquiry nor was it referred to by Mr Clark in his report. Mr Clark was shown the handwritten document and the attached invoices in a compulsory examination before the Commission. He had not seen the "Hi" document or the attached invoices before. He had no recollection of ever calling for, or having an interest in, invoices of the type attached to it. Mr Oxenbould knew nothing about Legalco prior to the present inquiry so it is unlikely that he had asked Ms Kelly to prepare such a

document. No copy was produced by NSW Maritime in response to section 22 notices relating to the investigation.

The Commission is satisfied that this document was prepared by Ms Kelly in the last months of 2009 in an attempt to bolster her contention that she had permission to use the Legalco/Espreon facility from 2003.

Ms Kelly's justification for the use of resources – unpaid hours of work

Throughout the inquiry, and in later submissions to the Commission, Ms Kelly asserted that she reasonably believed that the cost to NSW Maritime of her using resources in performing conveyancing work, including the Legalco/Espreon search facility, could be offset against unclaimed additional hours of work by her. Ms Kelly worked extremely long hours, even allowing for conveyancing activities at work. She routinely worked from 6 am to 7 pm each week day but never made any claim for overtime or additional hours.

She did not admit that she had done anything wrong and said "I don't believe that I used Maritime's time, and I believe that I paid for everything I did". By this, she meant that she had compensated NSW Maritime for the cost of searches and other use of its resources by not claiming payment for additional hours.

Ms Kelly submitted that she had raised the concept of offsetting the costs of searches and other expenditure against unclaimed hours of work on no less than three occasions and was never told that it was "an inappropriate philosophy".

The first of these occasions was said by Ms Kelly to be in the memorandum dated 20 March 2003 regarding the use of Legalco for her secondary employment (Figure 3). In paragraph 5 of that memorandum, Ms Kelly notes, "I will at no time be in debt to the Waterways Authority when it is considered that each month for the last five years I have worked a minimum of thirty additional hours for which I do not claim payment". For the reasons stated earlier, the authenticity of this document is not accepted by the Commission.

The second occasion this concept was raised by Ms Kelly was in her submissions to Mr Clark, in which she referred to her use of the telephone and noted it was within the permitted level of private use. She went on to state that she had worked at least 60 hours per month for the previous two years, with payment being made for 21 additional hours per month but with no payment for additional hours after her promotion to a senior officer position in January 2004. She noted:

This, in effect, means that since January a time donation worth approximately \$4,000 per month has been given to the NSW public.

There is no mention in the submission to Mr Clark of the use of the Legalco/Espreon facility or any offsetting of the use of search facilities against her additional hours.

She also raised the issue in her letter to Mr Dunn on 18 August 2009. After referring to her discussions with Mr Taylor about the use of telephone and fax, she stated:

My usage has not changed but what has changed is that:

- (a) In 2004 I obtained my own Personal Facsimile so I receive no Facsimiles at work; and*
- (b) since 2006 I have worked at least 25 Additional Hours a week (not 15) without any pay.*

The value of those Additional Hours currently would be at least \$1,800.00 per week at my Salary Rate but if you had to get an External Lawyer to do the work the cost would be approximately \$10,000.00 per week (at an hourly rate of \$500.00 which is low).

The cost of the phone calls would be no more than \$5.00 per week.

I cannot imagine that the NSW Tax Payer is going to feel hard done by.

It is my strong belief that in any employment relationship there must be give and take and I believe that I give.

There is no mention of her use of the Legalco/Espreon online search facility in this letter. Although Mr Dunn renewed Ms Kelly's approval, he did prohibit the use of any NSW Maritime resources, including the telephone.

There was an issue in the public inquiry about whether or not Ms Kelly was entitled to claim overtime and/or additional hours under the various versions of the enterprise agreement that were in place during the period from 2001 to date. Copies of the agreements were tendered in the public inquiry. Senior Counsel appearing on behalf of NSW Maritime provided a helpful analysis of the provisions in separate submissions on the agreements. He identified some cross-referencing errors in the agreements that he submitted could be resolved by interpreting the agreements to remove inconsistencies that would otherwise arise.

In summary, he submitted that during the period from 2001 to 2004 Ms Kelly was employed as a manager who received a salary that included a manager's allowance covering all incidents of employment, including any overtime to which she might otherwise have been entitled. From 2004 onwards, Ms Kelly was a senior maritime officer (SMO) that was expected to work an average of 35

hours per week or 140 hours per four-week period. Subject to prior managerial approval, she could accrue additional hours, up to 21 hours per four-week period, and these could be taken as time in lieu (TIL).

This meant that she would not receive any payment for the additional hours but would be able to take additional time ("leave") out of the office without using annual leave entitlements.

Counsel Assisting the Commission also submitted that a SMO salary covered all incidents of employment possibly subject to an allowance, as provided in Clause 2.8.6(vi). This is the clause providing for the accrual of hours to be taken as TIL with prior approval. No such authorisation was ever obtained by Ms Kelly.

Ms Kelly disputed these submissions but accepted that on any basis, her claim for overtime or additional hours depended on her making a written claim. When asked how she would make a claim, if her interpretation of the agreement were correct, she gave evidence that claims for additional hours and overtime would be made on a single form. After the claim was approved, it would be sent to payroll for payment. As she conceded, Ms Kelly never made such a claim.

In her written submissions, Ms Kelly put forward a new argument in response to the submission of Senior Counsel that there is no provision for payment of additional hours to SMOs. She submitted that "there must impliedly be an entitlement to be paid" for the hours that could be carried forward if they could not be taken as TIL due to workload, as otherwise the enterprise agreement would be an unfair contract under section 106 of the *Industrial Relations Act 1996*.

On 30 September 2009, Mr Dunn asked all managers to review work practices relating to overtime and additional hours to confirm whether or not they were in accordance with the enterprise agreement. In a memorandum dated 9 October 2009 to Patrick Low, General Manager Policy of NSW Maritime, Ms Kelly set out the situation for categories of staff relating to additional hours, overtime and TIL. In relation to her own position she stated "The General Counsel is a Senior Officer and subject to Clause 2.8.6 (vi) of the Enterprise Agreement. Senior Officers are entitled to take TIL and hours can be carried forward". Ms Kelly made no reference in the memorandum to the possibility of overtime or additional hours being available to her. The Commission infers that she had no belief that they were, and accepted that state of affairs at the time. Accordingly, the Commission does not accept Ms Kelly's argument on this position in her submissions.

The Commission accepts the submission of Counsel Assisting that the question of whether or not there is

some provision in the enterprise agreement for a claim for additional hours is not important.

The proposition that expenditure of public monies for private purposes could be offset against unpaid and unclaimed hours is novel and alien to the requirements for transparency and accountability in relation to public expenditure. NSW Maritime is a statutory body for the purposes of the *Public Finance and Audit Act 1983*, and subject to audit and inspection by the auditor general. It is also bound by the Treasurer's Directions, which set out the principles, practices and procedures to be observed in the administration of the financial affairs of the state. Detailed records are required of all transactions.

No suggestion was made by Ms Kelly that records existed of "offset transactions" or that there was a request for any such records to be kept. No procedure existed for the grant of approval to work additional hours on a basis that the person concerned would receive additional remuneration outside the enterprise agreement or on any basis. There was no evidence that any authorised person approved Ms Kelly to work additional hours on the basis that she claimed in the public inquiry. She worked additional hours entirely of her own accord and at her own discretion. Nothing in the contractual arrangements between NSW Maritime and Ms Kelly entitled her to additional remuneration for such additional work.

As to Ms Kelly's argument that no one told her that the concept of offsetting her personal use of NSW Maritime's resources and the Legalco/Espreon account against unpaid hours was inappropriate, no one knew that she would later claim that she was entitled to such an offset. Ms Kelly would not have been told that she could not do this unless she had first disclosed the extent of her work and use of resources. She did not do so on any of the three occasions referred to in her submissions.

Not only was Ms Kelly by law not entitled to overtime as she alleged, the Commission does not accept that she held the belief that she could offset the costs of the Legalco/Espreon searches against unpaid hours. Apart from the implausibility of her argument that she had received the tacit approval of a senior accountant, her selective use of her own Legalco/Espreon account for searches that might trigger an inquiry shows that she knew that she was not entitled to use NSW Maritime's Legalco/Espreon account for her private work.

Corrupt conduct discussed in this chapter

Ms Kelly acted corruptly in using the online search facility paid for by NSW Maritime for her personal benefit and in authorising the payment of invoices, including invoices that consisted of charges relating to searches for her private

conveyancing work. Ms Kelly's selective pattern of use of Maritime's Legalco/Espreon account referred to previously shows that she knew that her conduct was unacceptable.

This is because her conduct in these respects:

- involved the dishonest exercise of official functions and, therefore, comes within section 8(1)(b) of the ICAC Act
- adversely affected, either directly or indirectly, the exercise of official functions by those persons responsible for the payment of the invoices, and could involve official misconduct, fraud or theft and, therefore, comes within section 8(2)(a), section 8(2)(e) and section 8(2)(f) of the ICAC Act.

Such conduct could also, for the purposes of section 9(1)(a) of the ICAC Act constitute or involve the common law offence of misconduct in public office. It could also constitute or involve reasonable grounds for Ms Kelly's dismissal within section 9(1)(c) of the ICAC Act.

Ms Kelly acted corruptly in preparing the memorandum dated 20 March 2003. Her conduct in that respect constituted or involved the dishonest exercise of her public functions within section 8(1)(b) of the ICAC Act, and adversely affected or could have adversely affected the exercise of official functions by Mr Dunn, to whom it was sent, and could involve official misconduct and forgery. This conduct, therefore comes within section 8(2)(a) and section 8(2)(u) of the ICAC Act.

For the purposes of section 9(1)(a) of the ICAC Act such conduct could constitute or involve the criminal offence of making a false instrument contrary to section 300(1) of the *Crimes Act 1900* ("the Crimes Act").⁸ It could also constitute or involve a disciplinary offence within section 9(1)(b) and reasonable grounds for dismissal within section 9(1)(c) of the ICAC Act.

Ms Kelly also acted corruptly in preparing the "Hi" document, for the same reasons as those recorded above in relation to the memorandum dated 20 March 2003.

Section 74A(2) statements

Since Ms Kelly gave evidence under objection, her evidence cannot be used against her. However, there is admissible evidence available from other witnesses, the documents seized from her home, and the records of NSW Maritime and Legalco/Espreon.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect

⁸ The document was prepared before section 300(1) was repealed, with effect from 22 February 2010.

to the prosecution of Ms Kelly for the common law offence of misconduct in public office in relation to the misuse of NSW Maritime resources, including Legalco/Espreon, for her private conveyancing business.

The Commission considers that misconduct in public office is an appropriate offence for the misuse by Ms Kelly of the Legalco/Espreon account over the period from 2003 to 2009. This offence more properly reflects the seriousness of Ms Kelly's conduct than charging her with multiple offences in relation to the hundreds of Legalco/Espreon searches conducted by her on the NSW Maritime account, costing an average of \$12.50 each.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Kelly for the offence of making a false instrument under section 300(1) of the Crimes Act in relation to the memorandum dated 20 March 2003.

The Commission is also of the opinion that consideration should be given to the taking of action against Ms Kelly in relation to the conduct described in this chapter, with a view to dismissing her. NSW Maritime has advised the Commission that disciplinary proceedings have been commenced against Ms Kelly in relation to this conduct. The Commission endorses that action.

Chapter 4: Related matters

Professional indemnity insurance

Solicitors practising in NSW are generally required to obtain professional indemnity insurance (PII) from LawCover, an insurance company owned by the NSW Law Society. There are exemptions for those who work exclusively as government lawyers or who are employed by corporations. If a solicitor holding a government practising certificate wishes to engage in private practice as well, the solicitor must obtain PII and obtain a private practice practising certificate.

Every year, LawCover asks solicitors to submit information about their actual and estimated gross fee income for the current and future years. It uses that information to calculate the premium that must be paid before the solicitor renews his/her practising certificate. Gross fee income includes the total amount of fees received for the nominated period, including internal costs such as photocopying that are charged to the client. It does not include payments forwarded to third parties.

During a Budget Estimates Committee meeting in September 2009, Mr Dunn was asked about the payment of PII by NSW Maritime on behalf of Ms Kelly. After leaving Parliament, Mr Dunn undertook some inquiries about that matter and established that NSW Maritime did indeed pay for Ms Kelly's PII, and had done so since October 1999. The invoices for PII were processed by Mr Loughman or other legal clerks, and approved for payment by Ms Kelly.

Mr Dunn sought advice from the Crown Solicitor's Office. He was advised that it was not necessary for public sector solicitors to hold their own insurance for work done on behalf of a public agency. Since 1989, the NSW Government has operated the Treasury Managed Fund (TMF), an indemnity scheme covering all the insurable risks of the participating government agencies. NSW Maritime is a member of the scheme.

Mr Dunn asked Ms Kelly for an explanation. Ms Kelly told him that she had been advised in 1999 to obtain PII in

relation to the establishment of the Rozelle Bay Superyacht Marina. The Superyacht Marina was built by NSW Maritime in the lead up to the Sydney Olympic Games, and has been owned and operated by NSW Maritime since then. Ms Kelly said that she had sought advice from the Law Society and from the TMF at the time. In the public inquiry, Ms Kelly referred to a document prepared in 1999 that dealt with the issue but said that she did not know where it was. NSW Maritime was unable to find any such document when asked to produce it, and no such document was on Ms Kelly's personnel file.

Ms Kelly told Mr Dunn that the reason she needed to have PII was because the Superyacht Marina was a separate business and not part of NSW Maritime's core business; a rationale that she pursued in the public inquiry. After finding out that the single PII policy held by Ms Kelly covered her secondary employment earnings, Mr Dunn reported the matter to the Commission pursuant to section 11 of the ICAC Act.

The Commission made inquiries to the Law Society and LawCover. The secretary of the Law Society confirmed that solicitors holding a government practising certificate are not required to hold PII while practising in the course of employment by the NSW or commonwealth governments or a prescribed corporation.

Mr Robinson was the General Manager Business Services at the time the Superyacht Marina commenced operation, and Ms Kelly's supervisor. He was not aware of any requirement for any Waterways Authority solicitor to hold PII in relation to the Superyacht Marina, nor was Mr Taylor, the then Chief Executive.

No records could be located of any discussions between Waterways Authority officers and the TMF concerning the Superyacht Marina. At the time, the Government Insurance Office (GIO) managed TMF insurance. The GIO could not find any such records. Ms Kelly could not produce the document she said she prepared in 1999.

Ken Bywater had been the Finance and Corporate Services Manager at NSW Maritime when the Superyacht Marina was being set up. His duties included responsibility for risk management, including insurance. At the request of Mr Robinson, he informed the TMF about the proposal to set up the Superyacht Marina. He said that the TMF was not concerned about it, and no changes were required to the insurance arrangements involving the Superyacht Marina. This is contrary to Ms Kelly's evidence. In particular, the TMF did not inform Mr Bywater that NSW Maritime lawyers required PII for work relating to the Superyacht Marina.

Ms Kelly could not identify the person at the Law Society to whom she spoke nor could she produce any records of her contact with the TMF. Any advice she received from the Law Society would have been based on the information that Ms Kelly provided. No documentary records of any such advice have been produced.

In submissions, Ms Kelly again raised the argument that she was required to hold PII for her work on the Superyacht Marina. She referred to section 41 of the *Ports and Maritime Administration Act 1995* in which the functions of NSW Maritime are set out. She quoted the section as it read in 1999 when she first obtained PII, overlooking that it has been amended. While it is arguable that the management of the business of the Superyacht Marina was not part of the core functions at that time and Ms Kelly may have required PII to work on the Superyacht Marina, it has been clear since 29 June 2000 that she was not required to have PII to work on the marina. The reason is that, since that date, section 41(3) has made specific reference to the carrying on of an activity or business relating to the authority's assets in connection with the exercise of its functions. At all relevant times the Superyacht Marina was an asset of NSW Maritime.

On 27 July 2010 (three months after the conclusion of the public inquiry), Ms Kelly forwarded to the Commission a letter apparently written by the Law Society to her, dated 16 April 1999. The letter enclosed a form by which she could

seek exemption from PII as the holder of an 'A' condition practising certificate solely employed by a government department/instrumentality. This condition enabled her to be the solicitor on the record for NSW Maritime.

In her covering letter to the Commission she said:

On Friday, 23 July 2010, I found in my mailbox the original of the attached document from the Law Society.

This is the document that triggered my phone call to the Law Society in 1999 to query my need for professional indemnity insurance as the document required me to sign an Undertaking that I was only doing work for the Waterways Authority in accordance with a contract of service that I had with the Waterways Authority.

She submitted that, in addition to the fact that the Superyacht Marina undertook functions different from those applicable to the Waterways Authority, she was not employed by the Waterways Authority to do any property or development work and was therefore acting outside of her contract of employment. According to Ms Kelly, she was concerned that she might have no insurance for the work done on the Superyacht Marina. She also submitted that there must be additional documents at NSW Maritime, and that someone who had access to the 1999 file had provided the attached document to her. NSW Maritime has not been able to locate any relevant documents.

There was no evidence of the provenance and authenticity of the letter dated 16 April 1999. In response to questions by her own counsel during the public inquiry, Ms Kelly had said that she had contacted the Law Society after reading something on its website. No reference was made by Ms Kelly to any letter from the Law Society.

The Commission decided to make inquiries of the NSW Law Society. The Law Society produced documents relating to the issue of Ms Kelly's practising certificates for the year 1999–2000 in response to a statutory notice. These documents demonstrated that two practising certificates had been issued to Ms Kelly in that period.

On 10 June 1999, Ms Kelly completed an application for exemption from the requirements to hold PII and to contribute to the Solicitors Mutual Indemnity Fund. She gave an undertaking not to practise as a solicitor, other than in the course of her employment with the Waterways Authority. The Law Society renewed her government practising certificate with the 'A' condition from 1 July 1999.

On 2 September 1999, Ms Kelly wrote to the Law Society and advised that "in addition to my role at the Waterways Authority I would like to undertake some Conveyancing work as a Sole Practitioner from Monday, 6th September 1999". In the letter, she referred to her telephone conversations that day with the Law Society and LawCover but made no mention of any discussions concerning the Superyacht Marina. In an undated letter, received by the Law Society on 10 September 1999, she confirmed that advice.

In September 1999, NSW Maritime paid the first PII premium on behalf of Ms Kelly to LawCover. Ms Kelly returned her existing government practising certificate, and was issued with a practising certificate permitting her to practise on her own account. Ms Kelly's own records indicate that her first private conveyancing client was acquired in approximately October 1999.

This material was inconsistent with the evidence given by Ms Kelly during the public inquiry. Ms Kelly was given the opportunity to make submissions in relation to a possible finding that she obtained her PII in September because she was about to engage in private practice at that time and not for any reason related to the Superyacht Marina.

Ms Kelly submitted that was not the case; however, her argument was difficult to follow. Despite what she had said in her letters to the Law Society, Ms Kelly submitted that she had no intention of undertaking conveyancing work as a business. Further, she only intended to do conveyancing for one friend and obtained PII in September 1999 to protect herself in case anything went wrong. The spreadsheets located on Ms Kelly's computer, referred to earlier, show that she did one matter in about October 1999. The next matter was undertaken in March 2000, from which time Ms Kelly undertook an increasing level of conveyancing: eight transactions in 2000 and 19 transactions in 2001.

According to Ms Kelly, she was already working on the Superyacht Marina in April 1999 when she received the letter from the Law Society that prompted her inquiries about PII. Since receiving the most recent letter from the Commission, she has submitted that she has found further information in relation to the concerns of the Law Society. She said that the Law Society was concerned that:

I was not doing work as a government Solicitor in the usual way as:

- (a) *The work I was doing for the Waterways Authority was outside its statutory functions as set out in the Ports Corporatisation and Waterways Management Act 1005 [sic]; and*
- (b) *I was undertaking work for a Consortium of private marina operators.*

In support of that submission, she attached a number of documents:

- memorandum from Ms Kelly to Mr Robinson dated 6 April 2000, concerning his request for appropriate agreements to enable the Waterways Authority to enter into a cooperative relationship with a consortium of three yacht clubs in relation to the Sydney 2000 Superyacht Regatta
- draft memorandum of understanding (MOU) dated April 2000 between the Waterways Authority and the consortium.
- draft documents titled "Berthing Licence Terms and Conditions" and "Berthing Licence". Although the former document does not specifically refer to the Waterways Authority, the licence has a footnote stating that copies of the terms and conditions are available from the Waterways Authority
- memorandum dated 21 March 2000 concerning confidentiality agreement requested by an employee of the Superyacht Marina, for signature by Berthing Licence holders, and directly related to the terms and conditions of the licence
- document bearing date of 8 September 1999 titled "Sydney Rozelle Bay Superyacht Marina Service Provider's Licence – Terms and Conditions". The licensor is the Waterways Authority (on behalf of the Superyacht Marina).

These documents do not support Ms Kelly's argument that she was doing work for the consortium, or work outside the statutory functions of the Waterways Authority, in April 1999 when she became concerned about the need for her to obtain PII. Most of them are dated in 2000, and have no bearing on the situation in April 1999. The document dated 8 September 1999 relates to an agreement between the Waterways Authority, the owner of the subject land, and licensees. Further, even if the MOU had been dated 12 months earlier, it concerns an agreement between the Waterways Authority and three other entities, which could have and probably did, seek their own legal advice. The memoranda to Mr Robinson, General Manager Business Services, show that the work she was doing in 2000 in

relation to the Superyacht Marina was in response to his requests and in the course of her duties at NSW Maritime.

Ms Kelly submitted that all of the information relating to the concerns of the Law Society was set out in a memorandum to Mr Robinson dated April or May 1999. She also stated that Mr Robinson approved the payment of the PII premiums on her behalf. As noted earlier, Mr Robinson was not aware of any need for PII for the Superyacht Marina nor was that raised by the TMF in discussions with Mr Bywater about the Superyacht Marina.

As noted earlier, on 10 June 1999, Ms Kelly signed an undertaking not to practise as a solicitor otherwise in the course of her employment with the Waterways Authority, and forwarded it to the Law Society. She submitted that she did this after two months of liaison with the Law Society and the “Waterways Authority Insurance Company”, presumably a reference to the TMF. There was nothing to support that submission, and it is not accepted. She stated that there was a note on the undertaking saying that the “insurance issue was still being considered”. The document obtained from the Law Society is the original signed document and has no such note on it. It can be inferred that when Ms Kelly signed the undertaking on 10 June 1999, she was content to work on the Superyacht Marina without PII cover, and continued to do so until September 1999.

The Commission obtained documentation from LawCover concerning the PII obtained on behalf of Ms Kelly. Each year, Ms Kelly declared an annual gross fee income ranging from \$8,000 to \$11,000, considerably less than her actual income from conveyancing. By doing this, she minimised the PII premiums payable and lessened the likelihood of questions being asked by NSW Maritime, thus assisting to conceal the extent of her secondary employment.

The Commission rejects Ms Kelly’s evidence and subsequent submissions in which she said that she needed PII in order to undertake work on the Superyacht Marina. The Commission is satisfied that Ms Kelly obtained PII to enable her to engage in private practice. Ms Kelly arranged for NSW Maritime to pay her PII premiums from 1999 until 2009, and thus improperly obtained \$12,994.63 from NSW Maritime for private purposes. It is a matter for NSW Maritime to decide whether or not to take action to recover the amounts paid.

Assistance from others

From time to time, Ms Kelly sought and obtained assistance for her private conveyancing practice from at least Ms Kirychenko and Ms Dacombe. It seems likely that Mr Loughman received faxes now and then for Ms Kelly and took these to her, obviously for her private conveyancing. It is likely that other staff members did the same at times. A number of staff members appear to have fielded private conveyancing phone calls for Ms Kelly. The true extent of the assistance given to Ms Kelly by Legal Services Branch staff members in the course of the working day is difficult to determine. However, there is sufficient evidence to demonstrate that certain staff members had some knowledge of Ms Kelly’s conveyancing work, and in the case of Ms Dacombe and Ms Kirychenko, provided active assistance.

Bonita (Bonnie) Dacombe

On several occasions, Ms Dacombe assisted Ms Kelly in her conveyancing practice when Ms Kelly was on leave. She took telephone calls and sent and received faxes. Ms Dacombe also conducted some searches using Ms Kelly’s Legalco/Espreon account and said she was not aware that Ms Kelly sometimes used the NSW Maritime account for private purposes. She recalled receiving an amount of \$500 from Ms Kelly as remuneration for her work on one occasion, and estimated that she had been paid up to \$800 in any one year. Ms Kelly also took her out occasionally as a thank you for assisting her with the practice.

Ms Dacombe also admitted doing some conveyancing for family and friends, although she did not carry the PII that is a pre-requisite for engaging in private practice. She held only a government practising certificate. Given that she was paid by Ms Kelly and also did some conveyancing work for her, Ms Dacombe should have applied to the chief executive for approval to engage in secondary employment. Ms Kelly had told her several years earlier that she, Ms Kelly, had such an approval, although Ms Dacombe had not seen the document before 2009.

During forensic examination of the hard drive from a computer seized from Ms Kelly’s home, two files were located named “Bonnie 2006” and “Bonnie 2009”. They appeared to be instructions to persons assisting Ms Kelly for progressing conveyancing matters. Although the file names refer to “Bonnie”, the Commission accepts that the instructions were not solely directed to Ms Dacombe and included matters in which she had no involvement.

Louise Kirychenko

Ms Kirychenko covered for Ms Kelly for her conveyancing business over approximately 10 days in July 2009, while Ms Kelly was on leave. This was the only period during which Ms Kirychenko did private work for Ms Kelly. She estimated that the work, done in her own time, took only an hour a day. Ms Kirychenko described the work as “minor”, such as sending faxes already prepared by Ms Kelly, acting as the phone contact for her clients, and dealing with emails. She was not paid, and so, under the NSW Maritime policy, she was not required to apply for secondary employment approval.

Ms Kirychenko had seen some sort of approval document but had not read it closely. She did recall that nominal use of telephone and facsimile facilities was permitted but did not otherwise know of any limits on the volume of work done. During the examination of Ms Kelly’s files, evidence was found of a number of activities carried out by Ms Kirychenko during July 2009. These included several fax exchanges between Ms Kelly and Ms Kirychenko.

Although Ms Kirychenko assisted Ms Kelly in her conveyancing practice, there is no evidence that she was paid or received any other benefit, and accordingly her work did not constitute secondary employment. There is no evidence that Ms Kirychenko acted corruptly, and no finding that she did is made against her.

Nicholai Dacombe

In a compulsory examination, Mr Dacombe gave evidence that he had started a conveyancing course at TAFE but had no legal background prior to commencing work at NSW Maritime. He also said that the only time he had done any conveyancing work for Ms Kelly was during a four-week period in January 2010 after he had left NSW Maritime. He said that he had attended one settlement for her, and had replied to some emails and faxes. He added, “I have very little knowledge of conveyancing”.

This account changed when Mr Dacombe was called to give evidence in the public inquiry. He then stated that he had worked for Ms Kelly over a period of three years. He explained the inconsistency with his previous evidence by saying that he had not been employed but rather had assisted on a volunteer basis. He agreed that his evidence on the first occasion must have been false.

By the beginning of 2009, Mr Dacombe had decided that he wished to commence a study of law in the course conducted by the Legal Profession Admission Board (LPAB). The LPAB is a statutory corporation that administers various functions associated with the admission of lawyers in NSW. In order to gain registration as a student-at-law, Mr Dacombe needed to satisfy the entry requirements. As he could not satisfy the academic

requirements, he sought to rely on employment “as a paralegal or a legal secretary”, having “undertaken actual legal work for at least three years under supervision” (this being an entry requirement).

He claimed to have worked for Ms Kelly for more than three years. In support of his application, he attached references from Ms Kelly and Ms Kirychenko. The reference from Ms Kelly, on “Tonette Kelly Solicitor” letterhead, and signed by her stated that Mr Dacombe, “was engaged by this office as a Para-Legal on a part-time basis from 24 March 2005 to 18 September 2008, to assist primarily with conveyancing work, settlements, document registration, filing and accounts”.

There was a long list of work undertaken designed to give the impression that he had done most of the tasks associated with a conveyancing practice. It was put to Mr Dacombe that he had done none of those things between 2005 and 2008. Mr Dacombe responded, “Oh, well yes I did but probably not all of them in detail”. He conceded that he had not done some tasks at all. For example, he had not done item (g) on the list: “ensuring discharge authorities are completed and lodged at the lender’s for sale matters”. Mr Dacombe also said that his experience amounted to three or four hours one day a week, on the weekend, and occasionally an hour or two in the evening during the week.

During the public inquiry, Ms Kelly produced a draft of the reference annotated with handwritten comments. The first paragraph read:

I am writing to confirm that Nicholai Dacombe of (address) was an employee of Tonette Kelly Conveyancing on a part-time basis from November 2005 to 19 September 2008.

The word “part-time” had been underlined and Ms Kelly had written in the margin, “You should check if part-time means a certain no. of hrs as you did not do many”. Mr Dacombe had earlier claimed that he had contacted the LPAB at the suggestion of Ms Kelly, and had been told that there were no minimum hours for part-time work. The letter then set out a list of dot points indicating the duties for which he had been responsible. Ms Kelly had written, “was there anything else?” in the margin. The final reference sent to the LPAB referred to a number of additional types of work said to have been done by Mr Dacombe.

Ms Dacombe did not know whether Ms Kelly provided a reference for the LPAB for her brother. She said she had no knowledge of the draft reference found on a computer used primarily by Ms Dacombe at NSW Maritime.

There are a number of matters that lead to the compelling inference that Mr Dacombe did not do conveyancing work

for Tonette Kelly, as claimed in the reference. They are:

- Mr Dacombe did not refer to the conveyancing work done in the resume submitted when he applied to NSW Maritime for a position as a legal clerk; this would have been his only relevant experience
- Ms Dacombe agreed that there was “no prior association between her brother and the law apart from a part conveyancing course” before his employment with NSW Maritime. When asked if her brother was ever employed by Ms Kelly from 2005 to 2008 she said, “Not that I’m aware, no”. Ms Dacombe is a friend and work colleague of Ms Kelly and is close to her brother. It is highly unlikely that she would not have known if Mr Dacombe had been working for Ms Kelly
- there is no direct evidence from the files that Mr Dacombe did any conveyancing work for Ms Kelly at any time
- There were discrepancies between the evidence of Mr Dacombe and Ms Kelly as to the amount of work done and when it was done
- neither Mr Dacombe nor Ms Kelly assert that he continued to assist Ms Kelly in her private conveyancing activities after joining the Legal Services Branch at NSW Maritime.

The reference provided to the LPAB was significantly false and misleading as to the breadth and amount of experience that Mr Dacombe had had. As noted earlier, Mr Dacombe conceded that he had not done all of the work listed. There was no statement as to the number of hours a week that Mr Dacombe had done.

The Commission is satisfied that when Ms Kelly signed the reference, and when Mr Dacombe presented it to the LPAB, both were aware that the LPAB would rely on the letter and the truth of the letter in deciding to register Mr Dacombe as a student-at-law. Both were aware that a falsehood in the reference was likely to have the effect of misleading the LPAB, a public authority.

ICAC Act matters

Ms Kirychenko, Ms Dacombe and Mr Dacombe were called to give evidence in compulsory examinations before the Commission. The presiding commissioner made directions pursuant to section 112 of the ICAC Act, prohibiting the publication of the evidence given at the hearing and the fact that any person had given evidence.

Ms Kirychenko and Ms Dacombe both later admitted that they had informed Ms Kelly of the existence of the summons, and the fact that they had given evidence. Both

denied discussing the evidence that had been given. The disclosure of the fact that evidence had been given was a breach of section 112 of the ICAC Act. However, these actions occurred after Ms Kelly had been made aware of the investigation and the principal subject matter of the Commission, and there is no evidence that the investigation was prejudiced. In those circumstances the Commission does not consider any further action should be taken in respect of these matters.

Corrupt conduct discussed in this chapter

Tonette Kelly

Ms Kelly acted corruptly in relation to her actions in arranging for PII to be paid by NSW Maritime on her behalf when there was no reason for NSW Maritime to do so. The documents obtained from the Law Society show that she obtained PII to enable her to engage in private practice, and not for any reason associated with NSW Maritime. In those circumstances, she must have known that it was wrong to arrange for NSW Maritime to pay the PII premiums. Even if her argument was valid that her work on the Superyacht Marina was outside the functions of NSW Maritime, Ms Kelly knew after the legislation was amended that there was no need for her to hold PII in relation to work done for NSW Maritime, and that it was wrong to arrange for NSW Maritime to pay the PII premiums on her behalf.

Ms Kelly’s conduct adversely affected, either directly or indirectly, the exercise of official functions by those persons responsible for the payment of the invoices and could involve official misconduct, fraud or theft and therefore comes within section 8(2)(a), section 8(2)(e) and section 8(2)(f) of the ICAC Act.

Such conduct could also, for the purposes of section 9(1)(a) of the ICAC Act, constitute or involve the common law offence of misconduct in public office and offences of larceny as a public servant contrary to section 159 of the *Crimes Act 1900*. It could also constitute or involve a disciplinary offence within section 9(1)(b) and reasonable grounds for dismissal within section 9(1)(c) of the ICAC Act.

Ms Kelly also acted corruptly in providing and signing a false and misleading reference for Mr Dacombe. This conduct adversely affected or could have adversely affected, directly or indirectly, the exercise of official functions by the LPAB, and involved fraud, and therefore comes within section 8 of the ICAC Act. For the purposes of section 9(1)(b), it could also involve a disciplinary offence by Mr Dacombe.

Bonita (Bonnie) Dacombe

Ms Dacombe acted corruptly by engaging in secondary employment without approval. Such conduct could have constituted or involved a breach of public trust, and comes within section 8(1)(c) of the ICAC Act. It is also conduct that adversely affected, or could have adversely affected, the exercise of official functions by herself, and involved official misconduct, and therefore comes within section 8(2) of the ICAC Act. It could also constitute a disciplinary offence for the purposes of section 9(1)(b) of the ICAC Act.

Nicholai Dacombe

Mr Dacombe acted corruptly in providing false and misleading information to the LPAB in his application to become a student-at-law because it adversely affected or could have adversely affected the exercise of the Board's official functions and could involve fraud. It therefore comes within section 8(2)(e) of the ICAC Act. Such conduct could also constitute or involve a disciplinary offence of misconduct for the purposes of rules 87 and 88 of the Legal Profession Admissions Rules. It therefore comes within section 9(1)(b) of the ICAC Act.

Section 74A(2) statements

This chapter contains section 74A(2) statements in respect of each of the “affected persons” in relation to the conduct described within it. The Commission is satisfied that in respect to the matters canvassed in this chapter, Ms Kelly, Ms Dacombe, Ms Kirychenko and Mr Dacombe are “affected persons”.

Tonette Kelly

As noted earlier, Ms Kelly's evidence was given under objection and cannot be used against her.

There is admissible evidence available from the records of NSW Maritime as to the payments made on her behalf for PII. The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Kelly for the common law offence of misconduct in public office, in relation to arranging the payment of PII on her behalf by NSW Maritime.

The Commission is also of the opinion that consideration should be given to the taking of action against Ms Kelly in relation to her conduct in arranging for NSW Maritime to pay PII premiums on her behalf with a view to her dismissal.

The Commission is of the opinion that certain aspects of her conduct, including the preparation of a false reference for Mr Dacombe, and the false statements of gross fee

income for the purposes of PII, should be referred to the Legal Services Commissioner.

Bonita (Bonnie) Dacombe

Ms Dacombe also gave her evidence following a declaration pursuant to section 38 of the ICAC Act, and her evidence cannot be used against her other than for proceedings under the ICAC Act. Other evidence is available in relation to her secondary employment.

The Commission is not of the opinion that the advice of the DPP should be sought in relation to the prosecution of Ms Dacombe for any offence.

The Commission is of the opinion that consideration should be given to the taking of disciplinary action against Ms Dacombe in relation to her engagement in secondary employment without approval contrary to the relevant Code of Conduct and Ethics.

Louise Kirychenko

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Kirychenko.

The Commission is not of the opinion that consideration should be given to the taking of action against her for a specified disciplinary offence or taking action with a view to her dismissal or termination.

Nicholai Dacombe

Mr Dacombe gave his evidence following a declaration pursuant to section 38 of the ICAC Act. However, his evidence can be used against him in a prosecution for an offence under the ICAC Act. Mr Dacombe gave evidence in the public inquiry about his conveyancing experience that conflicted with that given in his earlier compulsory examination. In a prosecution for giving false evidence to the Commission, it is not necessary to prove which of two irreconcilably conflicting statements is true if the decision-maker is satisfied that one of the statements was made by the accused knowing it to be false or not believing it to be true.

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 Dacombe for an offence of giving false evidence under section 87(1) of the ICAC Act, in relation to conveyancing work done for Ms Kelly.

Mr Dacombe is no longer employed by NSW Maritime and the issue of disciplinary action or dismissal by that organisation does not arise.

The Commission is also of the opinion that consideration should be given to the taking of disciplinary action against

Mr Dacombe by the LPAB in relation to the false and misleading statements contained in his application to be a student-at-law. Although the LPAB could not take into consideration the evidence given by Mr Dacombe, it could consider the evidence given by Ms Dacombe and Ms Kelly before the Commission, and documentary exhibits in making its decision as to whether or not to initiate disciplinary action.

Chapter 5: Corruption prevention aspects

In this report, the Commission makes findings that Ms Kelly, NSW Maritime's Acting General Counsel, engaged in corrupt conduct in relation to her secondary employment and misuse of resources. The Commission has found that she conducted a private business at work, and used the resources of NSW Maritime to do so.

The evidence presented during this investigation shows that Ms Kelly deliberately engaged in deceptive conduct to cover up the extent of her private legal practice and the use of public resources. She engaged in a relatively low level of misuse of resources that was difficult to detect.

However, the fact that Ms Kelly's behaviour continued over a long period of time, virtually unchecked, is of concern. This suggests the possibility of systemic and/or cultural flaws within NSW Maritime during this period of time. The Commission is of the view that had NSW Maritime taken effective action in a number of key corruption control areas, the combination of effective scrutiny may have caused Ms Kelly's actions to come to light at an earlier stage. These corruption control areas are:

- secondary employment
- personal use of public resources
- recruitment processes
- authorisation of expenditure
- management oversight and protected disclosures.

This chapter examines the above areas and identifies the key factors that allowed, encouraged or caused Ms Kelly's conduct to continue over a long period of time. The Commission makes seven corruption prevention recommendations in relation to identified deficiencies in the above areas.

The Commission is aware that NSW Maritime is already taking steps to address many of the issues raised in this chapter. The proposed recommendations are intended to support and complement these activities.

NSW Maritime has advised the Commission that since the allegations against Ms Kelly became known, it has implemented the following reforms:

- the NSW Maritime Code of Conduct and Ethics was updated in August 2009 to include the following provision in relation to the misuse of resources:

For staff engaging in secondary employment or volunteer work, the use of NSW Maritime resources is strictly prohibited. Staff engaging in such work are not permitted to use NSW Maritime resources, including telephones, stationary [sic], fax, mobile phone or computer equipment or services.

- on 30 September 2009, the chief executive issued a memo to managers to advise that arrangements such as secondary employment were to be reviewed and updated
- all secondary employment approvals ceased unless reapplied for prior to 31 October 2009
- secondary employment approvals now require annual review. The Code of Conduct and Ethics was updated to include a requirement to submit annual requests for approval with regard to secondary employment. It provides that:

Requests for secondary employment must be submitted annually (by 1 July) to the Chief Executive for approval in the required format. Existing approvals are considered to have lapsed where requests for continued secondary employment are not submitted by the required date.

- a central register has been created within the Human Resources Branch to track secondary employment approvals, and to advise staff and managers where re-applications are required

- the creation of a new position of executive director, governance and risk, with responsibility for the development of an effective corporate governance framework.

The Commission makes no recommendations in the above areas but will monitor the implementation of these changes.

Control of secondary employment

The control of secondary employment within a public sector organisation is important, and is a key corruption prevention strategy. Lack of controls can put an organisation at risk of corruption, particularly with regard to the misuse of resources and information.

The evidence presented during this inquiry shows that secondary employment within NSW Maritime has not been well controlled in the past. As noted earlier, action has been taken to rectify deficiencies in controls. One area that was canvassed during the public inquiry related to issues concerning conflicts of interest.

Managing internal conflicts of interest

In her 2003 application for secondary employment, Ms Kelly makes mention of the need to manage possible conflicts of interest associated with carrying out secondary employment. She states in Figure 1:

I note that I do not believe that there is any conflict of interest between the conveyancing work and my Waterways Authority work as the conveyancing work is totally unrelated to it and in no way makes use of any knowledge that I obtain as the Legal Services Manager.

This statement is a narrow assessment of the possible conflicts of interest that can arise when a public official undertakes secondary employment.

Much of the evidence in this inquiry centres on Ms Kelly's failure to manage the obvious conflicts of interest in relation to her use of NSW Maritime resources, including

the use of NSW Maritime staff to help her conduct her private conveyancing work. However, there is another area of conflict of interest that both she and NSW Maritime failed to recognise and manage. This concerns the conflict of interests that can arise within an organisation when a staff member does paid, private work for other staff members.

The evidence shows that many NSW Maritime staff members, including senior managers, engaged Ms Kelly to undertake private conveyancing and other legal work. The fact that this activity appears to have been commonplace, and was accepted as appropriate practice, demonstrates a failure on the part of senior staff within NSW Maritime to identify the potential risks and to recognise the complexity of managing such a situation.

This type of private relationship between staff members can create unhealthy workplace relationships. Conflicts of interests can develop through the creation of personal obligations that may cause proper, professional working relationships to be compromised.

This issue was raised at the public inquiry with Mr Dunn:

Q *Would you agree or you've no doubt heard evidence that Ms Kelly was doing conveyances for large numbers, well numbers of people with whom she worked.*

A *I've heard that evidence, yes.*

Q *Yes. You've heard that evidence. Do you agree with and accept the proposition that if an officer were for example to provide a conveyance service particularly if it were discounted in some way or cheaper than market, that that would create a relationship between the person doing the conveyancing and the other person in the workplace which may interfere with the objectivity of each?*

A *Yes.*

The Commission notes that NSW Maritime has included in its planned new, standard secondary employment application form an assurance that secondary employment activity would not involve any resource or person in the workplace.

Personal use of public resources

In line with provisions common throughout the NSW public sector, NSW Maritime's Code of Conduct and Ethics restricts the use of NSW Maritime public resources for private purposes, but does allow some personal use in certain circumstances. This is in recognition that most public officers will at some stage make personal use of a public resource; for example, to make personal telephone calls or send personal emails.

The evidence presented during the investigation calls into question how well NSW Maritime's controls around the private use of public resources work in practice. In particular, how well NSW Maritime staff understand their obligations and responsibilities when making personal use of organisational resources.

Mr Robinson, former General Manager Business Services, and Mr Taylor, former NSW Maritime Chief Executive, told the Commission that they were happy to approve Ms Kelly's application for secondary employment. They believed that she was undertaking only a very small number of conveyances per year, requiring only very minor use of NSW Maritime public resources, and that this use was consistent with that allowed by the *Waterways Policy and Procedures for Code of Ethics and Standard of Conduct* (2000). Based on what they were told by Ms Kelly, it is understandable that Mr Robinson and Mr Taylor believed that the approval for secondary employment, and the very minor use of NSW Maritime resources, was in line with NSW Maritime policy.

This approval entitled Ms Kelly to make minimum use of agency resources for an activity in which she was being financially rewarded. As such, there was a strong financial incentive and motivation for her to make far greater use of those resources, where possible. Due to these potential risks, Ms Kelly's use of resources needed to be well managed and closely monitored. This did not occur. Both Mr Robinson and Mr Taylor told the Commission that they did not think it necessary as they trusted Ms Kelly, and thought she was fully aware of her obligations. Mr Oxenbould told the Commission that he also did not think it necessary to monitor Ms Kelly's use of Maritime resources.

This lack of monitoring controls on the use of her resources allowed Ms Kelly to exploit the secondary employment approval over many years by undertaking a large amount of private legal work during the business day, and using

significant NSW Maritime time and resources to do so. It is likely that other staff members, particularly certain staff within the Legal Services Branch, had some knowledge of Ms Kelly's activities and accepted her significant use of NSW Maritime resources to support her private conveyancing work.

In addition, as previously discussed, a significant number of NSW Maritime staff members, including senior managers and regional staff, engaged Ms Kelly to undertake their private legal work. In the case of internal staff, it is likely that much of the discussion about the work to be undertaken, and the activity associated with the private work, took place during business hours. This suggests a failure by staff, including senior staff, to appreciate that significant private activity was being undertaken during business hours, and that this should not have been allowed.

An example of this type of activity occurred in February 2006, when a NSW Maritime general manager engaged Ms Kelly to undertake private legal work on his behalf. This involved the lodgement of an enduring guardianship in respect to one of the general manager's relatives. A NSW Maritime legal clerk told the Commission that Ms Kelly asked her to do this work during business hours, and also authorised the payment of the associated cab fare from the Legal Services Branch's petty cash.

In formal advice to the Commission, NSW Maritime has advised that it does have some concerns about existing controls for the private use by staff of NSW Maritime public resources. Previously, NSW Maritime assets could be held at home by staff, and were not subject to annual review. In addition, approvals to take assets home were not subject to an annual audit program.

In response to these concerns, NSW Maritime has advised that:

- the Code of Conduct and Ethics does restrict the personal use of NSW Maritime resources
- on 30 September 2009, the chief executive issued a memo to all managers to advise that all special arrangements, such as working from home and holding assets at home, were to be reviewed
- all special arrangements ceased on 31 October 2009, unless reapplied for prior to that date
- an annual stocktake was undertaken in April/May 2010. Officers who held NSW Maritime assets at home or offsite were required to complete a separate declaration, and return the stocktake certificate, signed by their manager
- an audit of selected cost centres will be conducted to check the accuracy and completeness of the stocktake conducted

- a risk assessment will be undertaken for use of resources, including the write-off of items from the asset register
- a review will be undertaken of the approval processes for approving the use of assets
- an internal audit of administrative activities, such as petty cash and cab charge, are to be considered as part of the internal audit annual program.

Impartial recruitment processes

The principle that positions are filled on the basis of merit is fundamental to the recruitment and selection of employees in the public sector. An organisation's recruitment process should be beyond reproach. It is often the first contact many people have with an organisation and it sets the ethical tone. It is essential that favouritism, nepotism and other conflicts of interest do not influence recruitment and selection processes.

During the public inquiry the Commission examined two recruitment matters that suggested partiality by Ms Kelly to favour her friends and associates.

In 2008, Ms Dacombe applied for an internal promotion. Ms Kelly was part of the selection panel for that position. She admitted to the Commission that on 14 April 2008 she made a misleading declaration on the internal Selection Committee Member Declaration associated with that selection panel. In that form she stated that:

I am the direct supervisor of Bonnie Dacombe and Lousie Kirchenkyo and having worked with Bonnie for almost eight years, know her well. I am intent on securing the best person for this position and can fulfil my role on the committee appropriately.

Ms Kelly admitted that the declaration did not disclose her relationship with Ms Dacombe, and that it was misleading. At the time of filling in the declaration, Ms Kelly and Ms Dacombe had a long-standing friendship that had commenced prior to Ms Dacombe's employment with NSW Maritime. There had been business, financial and other relationships between them, all of which should have been disclosed and were not.

Having a conflict of interest declaration form to sign is a sound corruption prevention strategy. However, the strategy will fail if it is not well implemented or if there is deliberate concealment or collusion. The declarations need to be checked at the time of the selection panel and staff should be held accountable for their statements. All members on a selection panel should be well trained in recruitment and selection procedures, and have the knowledge and confidence to question the declarations and decisions made by other panel members. It is important that an organisation gives thought to the composition of

selection panels to ensure that one person is not allowed to dominate decision-making, and that selection panel members understand their responsibilities to question and raise concerns where appropriate. In addition, staff members need to be very clear about what a conflict of interest looks like in relation to recruitment actions, when a professional relationship crosses the line into friendship, and at what point a conflict of interest should be declared.

The Commission also examined the recruitment of Mr Dacombe, brother of Ms Dacombe, to a temporary position within the Legal Services Branch of NSW Maritime. In evidence to the Commission, Ms Ohanian, Manager Human Resources of NSW Maritime confirmed that she had concerns about the recruitment action. Her concerns were that the process had been undertaken without any input from the Human Resources Branch, and that the private recruitment agency used by the Legal Services Branch claimed that Mr Dacombe had been introduced to the agency.

This situation demonstrates the importance of ensuring consistent and accountable recruitment practices across an agency, including the identification and management of conflicts of interest. This is particularly the case in any recruitment action that involves relatives of an existing staff member. It needs to be acknowledged that the recruitment of relatives within an agency poses a corruption risk that needs to be closely managed. In any such situation, the perception of favouritism can be difficult to defend.

In formal advice to the Commission dated 24 May 2010, NSW Maritime confirmed that the Legal Services Branch created its own category of temporary contractors, which was outside the usual recruitment processes undertaken by the Human Resources Branch. This situation has been reviewed and the practice has now ceased. NSW Maritime has advised the Commission that Legal Services Branch contractors are now recruited through the standard human resources process, and are employed under NSW Maritime standard employment conditions.

In addition, NSW Maritime plans to review and finalise its current recruitment policy and procedures.

Recommendation 1

That all employees of NSW Maritime in a supervisory role undertake training (and refresher training) in the operation of the policies on:

- **secondary employment, including guidance on the identification and management of possible conflicts of interest that can occur within secondary employment**
- **use of public resources, including how to identify and manage possible conflicts of**

interest that can occur when using public resources for personal purposes

- recruitment processes, including their obligations under the personnel policies of NSW Maritime and applicable circulars and ministerial memoranda issued by the Department of Premier and Cabinet. Particular attention is to be given to the requirements of merit selection, disclosure of conflicts of interest, and impartial decision-making in the recruitment of staff.

Recommendation 2

That all employees of NSW Maritime in a supervisory role ensure their staff understand their responsibilities in relation to the policies referred to in the previous recommendation.

Authorisation of expenditure

NSW Maritime provides its staff with access to an online legal search facility called Espreon (formally known as Legalco). This is a facility that allowed NSW Maritime staff to undertake a range of property searches. Providing staff with access to this type of facility presents an organisation with a number of corruption risks that need to be controlled, not only on the misuse of the facility for personal gain, but also in relation to inappropriate access to confidential information. The evidence shows that NSW Maritime failed to put in place appropriate controls to manage possible corruption risks. Over a period of many years, Ms Kelly was able to misuse NSW Maritime's online legal search facility. She was able to undertake and authorise payment for her own online title searches. NSW Maritime's internal financial controls failed to detect that she was self-approving invoices.

In discussion with the Commission, NSW Maritime has confirmed that there were a number of failings as to how the Legalco/Espreon online search facility was implemented and managed:

- there were no policies or procedures put in place for the administration of the system or to guide staff in using the system. Staff members were not required to fill in fields that would have identified who they were and what file or matter to which the search was linked. This meant that searches were undertaken without reference numbers or requestor details
- the account was accessed via a single sign-on and password
- the invoices received by NSW Maritime did not include identifying details. This allowed the invoices to be approved for payment by Ms Kelly, even though she may have undertaken or approved the undertaking of the search
- the Finance Branch of NSW Maritime failed to recognise the potential risks in the payment of invoices that did not contain sufficient identifying details. The lack of detail on the invoices did not allow the Finance Branch to confirm proper segregation of duties in the undertaking, authorising and approval of expenditure
- there was no random auditing of the use of the system. NSW Maritime has advised the Commission that it does have an audit program based on organisation-wide risk assessments, but that this auditing has not traditionally covered low-level use of resources
- the Legalco/Espreon contract for the provision of online search facilities was not subject to review to ensure that NSW Maritime was getting the most up-to-date service and the best value for money. Had the contract been subject to review, say every three or five years, it is likely that use of the service would have been assessed, and that Ms Kelly's misuse would have been identified.

NSW Maritime has advised the Commission that it has now implemented new procedures for undertaking title searches, and has undertaken other reforms to ensure the better management of corruption risks:

- each user of the system now logs on as a unique user with a separate password that is subject to regular updating
- administration staff who undertake the searches are now required to reference identifying details including the file number and requestor details
- invoices now detail the search undertaken and the relevant reference to allow accounts to be appropriately costed
- approval of invoices is as per section 3.5 of the Code of Conduct and Ethics that provides:

As a basic principle, you must not, under any circumstances request, authorise and approve expenditure for the same item of service.
- approval of title searches is undertaken by an appropriately delegated officer.
- it is intended to review the procurement of all long-term contracts to ensure that NSW Maritime is receiving value for money.

In addition to the above reform strategies the Commission makes the following recommendations:

Recommendation 3

That NSW Maritime includes in its audit program an audit (by way of sampling) of segregation of duties to ensure there is no end-to-end control of financial approval processes.

Recommendation 4

That NSW Maritime ensures that its Finance Branch is alert to the possibility of fraud and corruption, and takes steps to identify and report irregularities to the relevant general manager.

Management oversight and performance management

Senior managers of NSW Maritime have advised the Commission that Ms Kelly was a challenging person to manage. In his statement to the Commission, Mr Oxenbould, former Chief Executive of NSW Maritime, told the Commission:

Tonette Kelly was a very challenging employee to work with but her capacity for work and dedication were exceptional.

Ms Ohanian told the Commission:

Q Was there anything about the legal branch over the period 2003 to 2009 that you found troubling?

A I think that it is fair to say that Tonette's management style in terms of being very task focused. She works very hard and has a large workload and it's well known. And she's very focused on the task. And like a lot of managers who are task focused, it's a challenge for Human Resources in any organisation to help them deal with the people management side of things...

At the same time, senior managers of NSW Maritime have also advised that Ms Kelly was a trusted employee that had a reputation for hard work and high quality output.

Part of her reputation for hard work included the fact that she worked long hours. While commitment to work and getting the job done is something that is expected from senior managers, Ms Kelly appears to have worked excessively long hours on a regular basis over a number of years. The Commission heard evidence from a number of senior staff of NSW Maritime that expressed concern about her working hours.

Mr Robinson told the Commission:

A She worked very long hours

Q Do you think that that was entirely because of her workload?

A I think it's, no, not entirely. I think it's to do with the way Tonette manages her work.

Ms Ohanian, Manager Human Resources of NSW Maritime told the Commission that she had discussed Ms Kelly's long working hours with her. She had concerns about occupational health and safety:

Q You thought that there was enough evidence to suggest that there might be something wrong if she has to work these hours or if she is working these hours?

A I don't know if I would say something wrong, something that needed to be addressed and looked at.

Q And did that occur?

A I don't recall anything occurring after that and I don't recall Tonette's reply.

Q In any event she continued working those hours?

A Yes

The problem facing senior managers of NSW Maritime was how to manage and make a difficult, but very senior, hard-working and trusted staff member, accountable. There is no question that managers need to have a level of trust in their staff, but this trust needs to occur within an appropriate accountability framework.

The answer to this problem lies in the existence of an effective performance management system. A system of performance review and assessment within an organisation is a key corruption prevention tool. A well implemented performance management system provides managers with a support mechanism to help them raise concerns with staff, and implement appropriate accountability frameworks that then can be regularly monitored and reviewed.

NSW Maritime has advised the Commission that it uses a business planning model as a framework for managing performance within the organisation. Annual business plans provide a link from the Corporate Plan to branch plans, which provide key projects and responsibilities for the team and individual. Managers are required to undertake annual performance discussions with their staff, and can use a "work planning and development" tool to support and guide performance outcomes. NSW Maritime also has a performance counselling policy that provides guidance for managers and supervisors in their management of employees.

It appears that this system has not been effectively implemented within NSW Maritime. The evidence

presented during this investigation suggests that Ms Kelly was not subject to regular and effective performance review and assessment in relation to her secondary employment activities, recruitment practices and working hours.

In relation to the regularity of annual performance feedback sessions, Ms Ohanian told the Commission:

A I don't know how rigorously that's applied across Maritime

Q Do I take it from your last answer that you think that it is not rigorous?

A It may not be consistent

Q Do you yourself as the long term HR manager think that there is room for individual performance assessments of a more formal and more regular type?

A Yes

In formal advice to the Commission dated 24 May 2010, NSW Maritime advised the Commission that staff supervision and performance management varies across the organisation, and that regular feedback sessions between staff and managers are not routinely undertaken.

Had NSW Maritime had in place effective controls that required formal management oversight and review of staff performance, Ms Kelly's activities should have come to light at an earlier stage.

Instead, it appears that the inconsistent application of the performance management system affected senior managers' oversight and management of Ms Kelly's activities. At the same time, the lack of a reliable system of review allowed Ms Kelly to effectively alienate those in a supervisory role, leading to a reduction in oversight and control. In relation to her secondary employment activities, recruitment practices and working hours, she was able to create a space in which she was free to operate without an accountability framework and outside the appropriate boundaries.

In response to these concerns about implementation of effective performance management, NSW Maritime has advised the Commission that:

- under NSW Maritime's Code of Conduct and Ethics, managers and supervisors are expected to:
 - encourage employees in performing their duties, monitor and provide appropriate guidance
 - make sure performance problems are highlighted and dealt with as they arise

- develop systems and practices to ensure that employees are held properly accountable for their conduct, performance and use of public resources

- under the enterprise agreement, NSW Maritime affirms its commitment to "performance-based culture that links employees efforts to the objectives of the Corporate Plan"
- NSW Maritime's annual training program includes Certificate IV in Frontline Management
- courses in performance management, team building and staff supervision are available to staff
- the Human Resources Branch sends annual reminders to staff and managers to undertake their annual discussions regarding their learning and development plans
- an information document is planned that will provide guidance to new managers.

In relation to working hours NSW Maritime has advised that:

- a random timesheet audit is underway
- sections of the enterprise agreement are being re-drafted to clarify the situation of entitlement to additional hours
- access needs of staff are under review and an access policy is being prepared.

In relation to management/supervision and performance management, the Commission makes the following recommendations.

Recommendation 5

That supervisors monitor staff and be held accountable for the consistent adherence by staff to the policies relating to secondary employment, personal use of resources, recruitment, and performance management.

Recommendation 6

That NSW Maritime includes each of the policies referred to in the previous recommendations in the audit program.

Recommendation 7

That NSW Maritime ensures that managers and supervisors understand their responsibilities in relation to performance management, and requires managers and supervisors to hold annual, formal

and documented performance discussions with their staff.

As part of the performance of its statutory functions, the Commission will monitor the implementation of the recommendations made in this report.

The recommendations will be communicated to NSW Maritime, with a request that an implementation plan for the recommendations be provided to the Commission. The Commission will also request progress reports and a final report on the implementation of the recommendations. These reports will be posted on the Commission's website, www.icac.nsw.gov.au, for public viewing.



Appendix: 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.



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