INDEPENDENT COMMISSION AGAINST CORRUPTION

REPORT ON AN INVESTIGATION INTO CORRUPTION ALLEGATIONS AFFECTING WOLLONGONG CITY COUNCIL:

PART 2

May 2008

ICAC
INDEPENDENT COMMISSION AGAINST CORRUPTION

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Mr President
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* (the ICAC Act) I am pleased to present Part 2 of the Commission's report on its investigation into corruption allegations affecting Wollongong City Council ("the Council"). Part 3 of the report will be provided later in the year.

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

Part 2 of the report contains a recommendation under section 74C(3B) of the ICAC Act that consideration be given to the suspension of the development consent granted by the Council on 18 August 2005 for a proposed $100 million development known as "Quattro" with a view to its revocation because of serious corrupt conduct by Ms Beth Morgan, a former member of staff of the Council, and Mr Franco Vellar, who controls the company proposing the development, in connection with the grant of the consent.

I draw your attention to the recommendation that the report be made public forthwith pursuant to section 78(2) of the ICAC Act.

Yours faithfully

The Hon Jerrold Cripps QC

Commissioner

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Executive summary

This is the second part of a three-part report by the Independent Commission Against Corruption ("the Commission") in relation to its investigation of alleged corrupt conduct associated with Wollongong City Council ("the Council"). As part of this investigation the Commission held a public inquiry from 18 February to 4 March 2008.

Part 1 of the Commission's report was issued on 4 March 2008. It contained a statement that the Commission was of the opinion that "systemic corruption" existed within the Council and a recommendation under s.74C(1) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") that consideration be given to the making of a proclamation under the *Local Government Act 1993* that all civic offices of the Council be declared vacant. The Governor of New South Wales subsequently made such a proclamation.

The purpose of this second part of the Commission's report is to make a recommendation under s.74C(3B) of the ICAC Act that consideration be given to the suspension of a development consent granted by the Council on 18 August 2005 for a proposed $100 million development known as "Quattro" with a view to its revocation. The development was proposed by Sebvell Pty Ltd, a company controlled by Frank Vellar, and the application for consent was assessed and approved by Beth Morgan, who was a senior Council officer at the time and had an undisclosed sexual relationship with Mr Vellar.

The Commission's recommendation is based upon findings that both Ms Morgan and Mr Vellar engaged in "serious corrupt conduct" in connection with the grant of development consent for Quattro. The Commission has made its recommendation at this time because it believes that prompt action is required in the public interest.

All other matters to be reported on in relation to the Commission's investigation will be included in the third and final part of its report to be released later this year.

1. Introduction

This is the second part of a three-part report by the Independent Commission Against Corruption ("the Commission") in relation to its investigation of allegations that persons may have engaged in corrupt conduct in connection with:

- the assessment by Beth Morgan, a former member of staff of Wollongong City Council ("the Council"), and other current or former Council staff and councillors of development applications submitted by Franco ("Frank") Vellar, Bulent ("Glen") Tabak and Michael Kollaras or their companies;
- the provision by Ms Morgan to Mr Vellar of information from the Council;
- other dealings between Mr Vellar, Mr Tabak or Mr Kollaras and current or former Council staff and councillors;
- the activities of Ray Younan, Gerald Carroll and persons dealing with them involving the impersonation of Commission officers, fraud, solicitation and payment of corrupt inducements and the provision of false or misleading information to the Commission; and
- any other associated matters.

As part of this investigation the Commission held a public inquiry from 18 February to 4 March 2008 at which 14 witnesses, including Ms Morgan and Mr Vellar, testified and around 1,000 documents were tendered. The Hon. Jerrold Cripps QC, Commissioner, presided at the inquiry and Noel Hemmings QC acted as Counsel Assisting.

After the public inquiry the Commission received written submissions from Mr Hemmings, which were provided to all "affected persons", as defined in s.74A(3) of the ICAC Act, as well as the Council and Sebvell Pty Ltd ("Sebvell"), a company controlled and part-owned by Mr Vellar. Most of those persons, including Ms Morgan and Mr Vellar, provided written submissions in reply to the Commission. A number of supplementary submissions were also requested and received. The Commission has taken all such submissions into account in determining what findings and recommendations to make in relation to this investigation.

Subject to an exception that is not relevant in the present circumstances, s.74(3) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") provides that the Commission shall prepare a report in relation to a matter as to which the Commission has conducted a public inquiry.

Division 1 of Part 8 of the ICAC Act sets out what may and must be included in any report made under s.74. The first part of the Commission's report relating to this investigation, issued on 4 March 2008, included one such matter, namely, a recommendation under s.74C(1) that consideration be given to the making of a proclamation under the *Local Government Act 1993* that all civic offices in relation to the Council be declared vacant. The Governor of New South Wales subsequently made such a proclamation and appointed three Administrators of the Council.

The purpose of this second part of the Commission's report is to make a recommendation under s.74C(3B) of the ICAC Act, and any necessary or associated findings, in respect of a development consent granted by the Council on 18 August 2005 for a proposed $100 million development by Sebvell known as "Quattro". Section 74C(3B) provides that:

> *The Commission is authorised to include in a report under section 74 a recommendation that consideration be given to the suspension of a development consent granted by a consent authority under the Environmental Planning and Assessment Act 1979, or of a modification of such a consent, with a view to its revocation because of serious corrupt conduct by the consent authority or by a councillor or other officer or member of staff of the consent authority in connection with the grant of the consent or modification.*

The term "serious corrupt conduct" is defined in s.124A of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") and s.440A of the *Local Government Act 1993* to mean "corrupt conduct (within the meaning of the *Independent Commission Against Corruption Act 1988*) that may constitute a serious indictable offence". The term "serious indictable offence" is defined in s.21(1) of the *Interpretation Act 1987* and s.4(1) of the *Crimes Act 1900* to mean "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more".

The Commission cannot make a recommendation under s.74C(3B) unless it is of the opinion that "prompt action is required in the public interest": s.74C(4) of the ICAC Act.

Pursuant to s.124A of the EPA Act, if the Commission has made a recommendation under s.74C(3B) of the ICAC Act, the Minister of Planning may, without prior notice or inquiry, suspend the decision of a consent authority to grant a development consent pending the institution and determination of proceedings in the Land and Environment Court to revoke the consent. In such proceedings the Court has a discretion to revoke the consent if it is satisfied that the decision to grant it is tainted by corrupt conduct and that the revocation will not significantly disadvantage any person affected by the decision who was not a party to the corrupt conduct. The Court cannot revoke a consent if the work or other matters authorised by the consent have already been "substantially commenced".

For the reasons outlined in this second part of its report, some of which will be set out in greater detail in the third part of the report, the Commission has made a recommendation under s.74C(3B) of the ICAC Act that consideration be given to the suspension of the development consent granted by the Council for Quattro with a view to its revocation because of serious corrupt conduct by Ms Morgan in connection with the grant of the consent. The Commission has also found that Mr Vellar engaged in serious corrupt conduct in connection with the grant of the consent and was a knowing party to Ms Morgan's corrupt conduct.

All other matters to be reported on by the Commission in relation to this investigation will be included in the third and final part of its report, to be released later this year. In particular, Part 3 will contain additional findings and statements relating to Ms Morgan, Mr Vellar and all other affected persons, including findings as to whether any other persons engaged in corrupt conduct in connection with the assessment and determination of the development application for Quattro or in relation to any other relevant matter.

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 immediately. This recommendation allows either Presiding Officer of the Houses of Parliament to make the report public, whether or not Parliament is in session.

2. Background & general circumstances

Before examining the specific facts relating to the assessment and determination of the development application for Quattro it is necessary to have regard to some relevant background matters and general circumstances.

Ms Morgan's employment with the Council

Ms Morgan is a town planner by qualification. She holds a Bachelor of Science (with honours) in Geography and a Graduate Diploma in Urban and Regional Planning.

In May 2000 the Council employed Ms Morgan as a town planner in the position of Development Project Officer. She held that position until September 2002, at which time she was promoted to Senior Development Project Officer ("SDPO"), the highest level of town planner at the Council. This was her substantive position up until June 2007, when her employment was terminated for "serious misconduct" (discovered by the Council as a result of the Commission's investigation), although for an extended period in 2006 she also acted in the higher role of Assistant Manager, Legal and Administration. All of the positions held by her were within the Development Assessment and Compliance division.

The Job Description for the SDPO position held by Ms Morgan identified one of her main responsibilities as "assessment and determination of complex and/or controversial development applications … in a manner which is consistent with statutory requirements, adopted codes/policies and sound development control principles and practices". The written instruments delegating authority to Ms Morgan to exercise these functions on behalf of the Council also stipulated that her authority was "subject to any policies and procedures that may be determined from time to time" and limited in other significant respects.

The Job Description for the SDPO position further identified the following "essential" requirements (among others): "[a]n understanding and/or demonstrated competence in the assessment of complex and/or controversial development … applications"; "[e]xpert knowledge of the provisions of the Environmental Planning and Assessment Act 1979 and Regulation"; and "[d]emonstrated ability to … take appropriate action to ensure compliance with relevant statutory requirements". Ms Morgan testified that when she held the position of SDPO she regarded herself as competent and having a relatively high level of knowledge and understanding relating to her position. The Commission finds that at all relevant times Ms Morgan was a knowledgeable and competent town planner who was capable of performing the requirements of the SDPO position.

Mr Vellar and an overview of Quattro

Mr Vellar is a major developer in Wollongong, who owns and/or controls a number of companies through which he engages in development. One such company is Sebvell. At all relevant times Mr Vellar was the sole secretary, a director and a major shareholder of Sebvell and his home address was the company's principal place of business.

In late 2002 Mr Vellar and other representatives of Sebvell presented Council officers with a proposal for a large development on a 10,422m^2 parcel of land bounded by Flinders, Campbell and Keira Streets in Wollongong, which is often referred to as "the former Ron Bratton site" ("the Site"). Over the next two years there were further formal or informal meetings, presentations and other communications relating to the proposed development involving Sebvell representatives (particularly Mr Vellar) and Council officers. By late 2003 the proposed development was named "Quattro".

On 22 September 2004 Sebvell lodged with the Council a development application ("DA") for Quattro (No. 2004/1755), which was signed solely by Mr Vellar. It is apparent from all of the evidence received by the Commission that Mr Vellar was the directing or controlling mind of Sebvell in relation to the proposed development, particularly in relation to dealings with the Council and its officers.

The Quattro DA proposes the demolition of existing structures on the Site and construction of a mixed use development comprised of four buildings containing 281 residential units, two commercial suites, 18 rental premises, five home offices and 803 parking spaces. The DA stipulates that the cost of development is $100 million.

The development controls that were ordinarily applicable to the Site at the relevant time prohibited the erection of a building with a floor space ratio ("FSR") of more than 1.5:1 or height exceeding 11 metres. Quattro has an FSR of 4.25:1 and a maximum height of around 48 metres. In relevant documents the height is inconsistently referred to as either 15 or 17 storeys because of uncertainty arising from the fact that the Site has a significant slope.

At the time the DA was lodged and at the time it was determined Quattro was by far the largest proposed high density residential development in Wollongong. From information provided to the Commission by the Council it appears to be around three times larger than any existing comparable residential development in Wollongong.

Prior to lodgment of the DA Mr Vellar spoke to Rod Oxley, the then General Manager of the Council, and John Gilbert, the then Manager of Development Assessment and Compliance, and specifically requested that Ms Morgan be assigned to assess the DA. This request was granted. When the DA was subsequently lodged Ms Morgan was appointed as the "responsible officer", which meant that she was responsible for assessing it in accordance with relevant legislative and Council requirements.

On 18 August 2005 a Notice of Determination was issued by the Council to Sebvell informing it that consent had been granted for the proposed Quattro development, subject to various conditions, which were set out in the Notice.

Ms Morgan testified that prior to 18 August 2005 she believed that she had authority to approve the DA herself and contemplated that the Notice would be issued under her own name, but that on or shortly before that date she requested of Mr Gilbert that the Notice be issued under his name because she wanted to "distance" herself from the final decision to grant consent. Mr Gilbert acceded to her request. He permitted Ms Morgan to draft the terms of the Notice, log on to a computer under his name and generate the Notice in his name and bearing his electronic signature. Prior to this Ms Morgan did not provide Mr Gilbert with any document containing an assessment of the DA or recommendation that it be approved, although Mr Gilbert was generally familiar with the proposed development.

In a written statement dated 30 October 2007 Mr Gilbert informed the Commission that he "had only a supervisory role in the determination of the DA", that in agreeing to the consent being granted he "relied upon the assessment and decisions made by Ms Morgan as the assessing officer" and that he "did not assess the merits or substance of the decision making" himself. He generally gave similar, but not entirely consistent, evidence in relation to these matters at the public inquiry.

Notwithstanding that the Notice was issued under Mr Gilbert's name and he agreed to it being issued, the Commission is satisfied that the decisions to grant the consent and determine the conditions attached to it were effectively made by Ms Morgan and that Mr Gilbert did not personally assess the details of the DA or satisfy himself that the approval and associated conditions were appropriate.

As detailed subsequently in this report, unchallenged expert opinion evidence was tendered at the inquiry to the effect that not only should development consent for Quattro have been refused but that any reasonable town planner with relevant knowledge would have realised that it should have been refused.

Relationship between Ms Morgan & Mr Vellar

Ms Morgan first met Mr Vellar at around the time she commenced employment with the Council in mid-2000. Since that time she has personally assessed and/or determined numerous DAs submitted by companies he owns and/or controls.

Ms Morgan (nee Mooney) was married to Adam Morgan from April 2002 to August 2007. In October 2003 they had a child and Ms Morgan went on maternity leave for around five months, returning to work at the Council on 1 March 2004.

Before, during and after the period of her maternity leave Ms Morgan contemplated leaving the Council and setting up a private business as a town planning consultant. In February 2004 she obtained an Australian Business Number for such a business.

In or around March 2004 Ms Morgan began fraternising with a group of developers and businessmen who regularly met early in the morning for coffee at a café in Wollongong called North Beach Kebab. This group called itself "The Table of Knowledge". In early 2004 its members included Mr Vellar, another developer named Bulent ("Glen") Tabak, a businessman and part-time developer named Michael Kollaras and his brother and partner, Tass Kollaras. Adam Morgan informed the Commission that Ms Morgan told him that she started attending the Table of Knowledge "in order to make contacts within the building industry" and Ms Morgan acknowledged during her testimony that she hoped to secure Messrs Vellar, Tabak and Kollaras as "a client base" for her proposed business.

An occasional member of the Table of Knowledge in 2004 was Joe Scimone, who was then the Manager of Engineering Services at the Council and a confidant of Ms Morgan. On 15 June 2004 Ms Morgan sent an email to Mr Scimone, with whom she often lunched at the time, in which she wrote (original emphasis):

> *... when I leave Council my livelihood and that of my family will* ***DEPEND*** *on the likes for* [sic] *Frank, Glenn* [sic], *Michael, Tas* [sic] *etc ....*
>
> *don't think for one second that I am not going to do what I need to do to ensure their survival .... lunches are secondary to ensuring that I earn a living.*

During her testimony Ms Morgan acknowledged that in this email she was referring to members of the Table of Knowledge (namely Mr Vellar, Mr Tabak, Michael Kollaras and Tass Kollaras) and the need to secure them as clients in order to ensure the success of her proposed future consultancy business.

In May 2004 Ms Morgan and Mr Vellar commenced a sexual relationship, which continued until February 2008. During this period, in addition to assessing and approving the Quattro DA, Ms Morgan assessed applications lodged with the Council on behalf of companies controlled by Mr Vellar for two other major developments in Wollongong: an application for the redevelopment of the North Beach Bathers' Pavilion and an application to modify the conditions of consent for a large development on Phillips Avenue. Ms Morgan appointed herself as the "responsible officer" for both of these applications.

Mr Vellar claimed that there was a significant pause in his sexual relationship with Ms Morgan between June or July 2004 and February or March 2005 (during which period the DAs for Quattro and the proposed redevelopment of the North Beach Bathers' Pavilion were lodged and allocated to Ms Morgan for assessment), but the Commission rejects this claim. Email records tendered in evidence convincingly demonstrate that their sexual relationship was on foot in October 2004. In addition, Ms Morgan testified that she and Mr Vellar went away on a holiday together in January 2005. The Commission is satisfied that any pauses in their sexual relationship were relatively brief and that during any such periods they, as acknowledged by Mr Vellar, still "remained close friends".

From March 2005 onwards Mr Vellar and Ms Morgan frequently declared their love for each other in emails and it is evident that by this point in time Ms Morgan was planning, or at least hoping for, a long-term future with Mr Vellar. In April 2005 Ms Morgan separated from her husband and told him about her relationship with Mr Vellar. Mr Vellar remained with his wife and did not tell her the truth about his relationship with Ms Morgan until around the time it ended in February 2008.

In April 2004, a month before commencing her sexual relationship with Mr Vellar, Ms Morgan commenced a sexual relationship with Mr Tabak, which lasted until June 2004. In August 2004 she (according to her own testimony) also commenced a sexual relationship with Michael Kollaras, which lasted until January 2005. Mr Kollaras has denied this claim and asserted that they merely had a "very close" and "flirtatious" friendship. During or near the periods of these relationships with Messrs Tabak and Kollaras Ms Morgan was responsible for assessing a number of DAs submitted to the Council by companies owned or controlled by them and she approved each one. These matters, which will be thoroughly addressed in Part 3 of the Commission's report, are mentioned in this part because they are potentially relevant considerations to have regard to in determining what findings to make about Ms Morgan's conduct in connection with the assessment and determination of the Quattro DA, particularly to the extent that they may shed light on her state of mind in respect of relevant matters.

Gifts and benefits from Mr Vellar to Ms Morgan

Throughout their relationship Mr Vellar provided Ms Morgan with numerous gifts and benefits, at least some of which were solicited by her. In addition to regularly paying for lunches and dinners, giving her perfume and flowers, and taking her on holidays to his farm in Oberon (on about 20 occasions from January 2005), Mr Vellar provided or paid for the following:

- about four handbags between around mid-2004 and mid-2005;
- timber flooring worth around $5,000 for an investment unit in mid-to-late 2004;
- a digital camera worth around $600 in October 2004;
- numerous cash payments from around April 2005 onwards, including sums of between around $1,000 and $2,000 at a time on about ten separate occasions;
- materials for home renovations (including a bench top, lights and architraves) in early-to-mid 2005;
- all of the costs associated with a two-night skiing holiday for both of them in Perisher in August 2005 (the day after the Quattro DA was approved);
- all of the costs, except those for Ms Morgan's airfare, associated with a holiday for both of them in China from 5 to 11 October 2005;
- a television, DVD player and set-top box (costing $2,477 in total), and a lounge suite, in December 2005;
- a watch costing $1,200 in December 2005;
- all of the costs, including airfare and accommodation, associated with a weekend holiday for both of them in Melbourne in February 2006;
- all of the costs associated with a day-trip for both of them to the Hunter Valley for lunch and wine-tasting, including travel by helicopter, on 31 August 2006 (at least $2,100 in total); and
- all of the costs associated with a five-night holiday for both of them, and Ms Morgan's child, in Fiji in October 2006 (at least $4,816 in total).

It is significant that in 2007 when the Commission first required Mr Vellar and Ms Morgan to identify gifts, benefits and payments between them they each failed to disclose the cash payments referred to above and Mr Vellar represented that the only gifts or benefits he had provided to Ms Morgan were: (i) paying for lunches and dinners they had together; and (ii) buying Christmas and birthday gifts for her and her child. The Commission is satisfied that these omissions were wilful.

During his testimony Mr Vellar denied that he gave any of the abovementioned gifts or benefits to Ms Morgan as bribes or inducements to influence her in the performance of her

Council duties in assessing his DAs. He claimed that he made the cash payments to her because she was destitute after separating from her husband and provided the other gifts and benefits to show his affection for her. He stated:

> *I fell in love with the woman and I commenced a relationship with Beth and I deem it a normal course of a relationship* [to give gifts and benefits] … *I merely gave as I would in a normal relationship.*

This claim does not sit comfortably with the fact that while Mr Vellar was in his sexual relationship with Ms Morgan he engaged in relatively lengthy sexual relationships with two other women (one from October 2004 to February 2006 and the other from November 2005 to August 2007), and not long before commencing his sexual relationship with Ms Morgan he had been in lengthy sexual relationships with two further women, and he agreed that he did not give any of these women "anywhere near the number or value of the gifts" he gave Ms Morgan. In addition, during a (lawfully intercepted) telephone call in September 2006 Mr Vellar admitted to his wife that he had "helped out" Ms Morgan and when his wife asked "Why would you even bother helping her out?", he replied:

> *Because … there are times that you have to agree to certain conditions and then she can insert other conditions, which suit us. So it's give and take.*

When Mr Vellar was asked about what he said during this telephone conversation he unconvincingly claimed that he did not know why he said what he said and did not know what he meant when he said it, but he conceded that when he said that he had "helped out" Ms Morgan he "could have" meant by giving her gifts and money. The Commission is satisfied that during this telephone conversation Mr Vellar was admitting that he gave gifts and benefits to Ms Morgan as inducements or rewards for her to provide favourable treatment when assessing his DAs.

Ms Morgan denied that she regarded the gifts and benefits given to her by Mr Vellar as bribes or inducements in relation to the performance of her Council duties. She stated:

> *The gifts I received from Mr Vellar … were given to me not for my position at Council but because of the relationship we had at the time … He didn't give me gifts … as a bribe or inducement to do anything for him, he gave me those gifts because he either wanted to look after me, support me, or give me a gift.*

In assessing this claim it is necessary to have regard to the totality of the circumstances under which the gifts and benefits were given and received, including (but not limited to) the matters referred to in other sections of this report and evidence relating to Ms Morgan having received significant cash payments from Mr Tabak at around the time she was

assessing a DA for a major proposed development by one of his companies in 2004 (Victoria Square). This evidence will be detailed in Part 3 of the Commission's report.

Council's Code of Conduct & the *Local Government Act 1993*

As a public official, Ms Morgan was under a duty to act honestly and impartially in performing her official functions. This fundamental duty was reinforced by successive Codes of Conduct adopted by the Council throughout the period of her employment. Ms Morgan admitted that as soon as she commenced her employment she became aware of the Code and read "parts of it", but said that she "probably" never read it "from cover to cover in one go".

Each successive Code issued by the Council from 1999 onwards required (among other things) staff to avoid, or at least fully disclose, any actual, potential or perceived conflict of interest, including one arising because of a non-pecuniary interest such as a friendship.

Ms Morgan admitted that at the time of the assessment and determination of the Quattro DA she recognised that "[t]here could be a perceived conflict of interest" because of her sexual relationship with Mr Vellar, but she claimed that she did not believe that there was an actual conflict of interest. She further maintained that at the time she did not believe that she had a duty to disclose her sexual relationship with Mr Vellar to the Council, although she conceded that she recognised at the time that she should have ascertained what her obligations were under the Code. She claimed that she did not check the Code and when asked why she said "I don't know, I just didn't".

Ms Morgan admitted that she did not disclose her relationships with Messrs Tabak and Kollaras to the Council. She also conceded that she did not expressly disclose her sexual relationship with Mr Vellar to the Council, but she claimed that she verbally disclosed some aspects of that relationship to Mr Gilbert and that he should have been aware from those disclosures that they were in a sexual relationship. Mr Gilbert denied being aware of their sexual relationship and Ms Morgan eventually conceded that the disclosures she made to him were inadequate. She further admitted that when her direct manager specifically asked her in 2005 whether she was in a sexual relationship with Mr Vellar she lied and said "no".

The relationships Ms Morgan had with Messrs Vellar, Tabak and Kollaras while assessing DAs in which they had substantial interests gave rise to obvious and extreme conflicts of interest. The Commission is satisfied that at all relevant times Ms Morgan recognised these conflicts and was aware that she was obliged to avoid, or at least disclose, them and

she wilfully failed to do so. In September and October 2005 she even emailed Mr Vellar specific provisions of the Code of Conduct she was breaching during the course of her relationship with him, which indicates that he would have been aware of her breaches of the Code as well.

Each successive Code issued by the Council from 1999 onwards also required staff to reject, or at least disclose, non-token gifts or benefits and record them in the Council's Gifts Register. There is no doubt that Ms Morgan was aware of these obligations from an early stage because in December 2001 she recorded in the Gifts Register that she was offered a "bunch of flowers" by Mr Vellar and one of his business partners. She did not disclose to the Council any of the other gifts or benefits she subsequently received from Mr Vellar (or Mr Tabak), including any of the large cash payments.

In addition, after becoming a "senior" member of staff in September 2002 Ms Morgan became obliged, under the *Local Government Act 1993* and its regulations, to complete an annual return (generally referred to as a "Pecuniary Interest Return") containing disclosures of "gifts" valued at more than $500 and "contributions to travel" valued at more than $250 received during the previous financial year. Ms Morgan completed such returns in 2003, 2004, 2005 and 2006 and in each one she failed to disclose any gifts or contributions to travel from Mr Vellar, Mr Tabak or any other person.

The Commission is satisfied that Ms Morgan should have rejected, or at least fully disclosed, all of the gifts and benefits she received from Mr Vellar referred to in the previous sub-section of this report (and any cash payments she received from Mr Tabak) and that at all relevant times she was aware of her obligations and wilfully ignored them.

The Commission is further satisfied that Ms Morgan concealed from the Council her sexual relationship with Mr Vellar, and her receipt of gifts and benefits from him, because she knew that if she disclosed them she would not be permitted to assess any DAs in which he had an interest and would be required to reject or return the gifts and benefits. Her non-disclosures were motivated by a desire to improperly advance her own and Mr Vellar's personal interests in ways identified in subsequent sections of this report.

3. Assessment & determination of the Quattro DA

This section of the report refers to matters relating to the assessment and determination of the Quattro DA that are most relevant for present purposes. Some of these matters, and additional matters relating to Quattro, will be addressed in greater detail in the third and final part of the Commission's report.

The first part of this section presents a brief overview of some of the most significant development controls and constraints that applied to Quattro at the time of its assessment and determination. The second part identifies important matters that occurred prior to the lodgment of the DA on 22 September 2004, while the third part addresses the most relevant post-lodgment events. The fourth part of this section provides a summary of the unchallenged opinions and conclusions of a planning expert, Neil Kennan of Nexus Environmental Planning Pty Ltd, who was engaged by the Council in late 2007 to review the assessment and determination of the Quattro DA.

Overview of significant development controls and constraints

Pursuant to s.76A of the EPA Act, the proposed Quattro development can be carried out only with the consent of the Council. In determining whether to grant consent the Council was required to take into consideration the matters specified in s.79C of the EPA Act. One such matter was the *Wollongong Local Environmental Plan 1990* ("WLEP 1990").

Under WLEP 1990 the vast majority of the Quattro Site was zoned *3(a) (General Business Zone)* and had a maximum permissible floor space ratio ("FSR") of 1.5:1. The FSR of Quattro is almost three times this control at 4.25:1. In light of this exceedence there were only two possible means by which consent for the development could be lawfully granted:

- ***rezoning the land*** – this would have involved a public process under Part III of the EPA Act with the decision to rezone or not being ultimately made by the then Minister for Infrastructure and Planning, acting on advice of the then Department of Infrastructure, Planning and Natural Resources ("DIPNR"); or

- ***varying the FSR development standard*** – this would have required a determination by the Council under *State Environmental Planning Policy No.1 – Development Standards* ("SEPP 1") that the existing FSR development standard is "unreasonable or unnecessary in the circumstances of the case". Such a determination could properly be made only in accordance with well-established principles laid down by the Land and Environment Court of NSW.

Unless and until a relevant rezoning or SEPP 1 determination was made, the Council could not lawfully approve the Quattro DA. At the time of the assessment and determination of this DA Mr Gilbert, but not Ms Morgan, had delegated authority to make determinations under SEPP 1.

Another very relevant environmental planning instrument in relation to Quattro is the *Illawarra Regional Environmental Plan No.1* ("IREP 1"). Pursuant to cl.139(2) of IREP 1 the Council was precluded from granting consent to the erection of a building on the Quattro Site with a height of more than 11 metres without the concurrence of the Director-General of DIPNR or his/her delegate. The height of the tallest part of the proposed Quattro development is more than four times this control at 48 metres (15 or 17 storeys).

In deciding whether to grant concurrence under cl.139(2) of IREP 1 the Director-General or his/her delegate is required to take into consideration a range of matters specified in cl.139(3) of IREP 1. It appears that at the time of the assessment and determination of the Quattro DA both Mr Gilbert and Ms Morgan had delegated authority to grant concurrence under cl.139(2) of IREP 1 on behalf of the Director-General, although the position is not entirely clear.

In mid-to-late 2003 the Council adopted a number of draft planning documents as part of a proposed City Centre Revitalisation Strategy intended to set the future direction of development in Wollongong. Two such documents were *Draft Development Control Plan No.56: City Centre Development* ("draft DCP 56") and *Draft Wollongong City Centre Structure Plan (A Strategy for the Revitalisation of the Wollongong City Centre)* ("draft WCCS Plan"). These documents did not override the provisions of existing environmental planning instruments, such as WLEP 1990 and IREP 1.

Draft DCP 56 proposed maximum heights and FSRs above the then existing development controls, namely heights of six to nine levels (19 to 28 metres) and an FSR of 3:1. However, it only applied to less than half of the Quattro site and Quattro still greatly exceeded these proposed new controls. In addition, at all relevant times in relation to the assessment and determination of Quattro, draft DCP 56 was incapable of being legally implemented by the Council because it did not conform to the provisions of the Local Environmental Plan.

The draft WCCS Plan proposed the creation of a high density "City Core" in Wollongong surrounded by a medium density "City Frame" serving as a transitory zone between the Core and low density areas. However, it too only applied to less than half of the Quattro Site and that part of the Site it covered was within the City Frame, which had proposed

maximum heights of only six to nine levels (19 to 28 metres) and a maximum FSR of 1.5:1. Not only did Quattro greatly exceed these proposed controls, but it also exceeded those for the proposed higher-density City Core, which had a maximum FSR of 3.5:1.

From this selection of planning instruments and documents it is evident that Quattro not only vastly exceeded existing development controls but also substantially exceeded proposed controls in, and was materially inconsistent with, the City Centre Revitalisation Strategy, which was intended to set the future direction of development in Wollongong.

At the time the DA was lodged and determined Quattro was by far the largest proposed high density residential development in Wollongong. From information provided to the Commission by the Council it appears to be around three times larger than any existing comparable residential development in that city.

A further constraint in relation to the assessment and determination of the Quattro DA was that the written instruments delegating authority to Mr Gilbert and Ms Morgan to exercise these functions on behalf of the Council stipulated that their authority was subject to Council "policies and procedures", some of which are referred to later in this report.

Pre-lodgment of the DA

In February 2003 Mr Vellar and other representatives of Sebvell participated in a workshop with Council planning officers to discuss the proposed Quattro development. The minutes indicate that at this stage the height proposed by Sebvell was 12 storeys, whereas Council officers were "inclined toward" eight storeys.

In April 2003 Mr Vellar and other Sebvell representatives met with Rod Oxley, the then General Manager of the Council, and Alex Darling, the then Lord Mayor of Wollongong. The minutes indicate that at this stage the height proposed by Sebvell was still around 12 storeys and that Mr Oxley agreed with that height, while Mr Darling expressed qualified support for it. Neither Mr Oxley nor Mr Darling has planning qualifications and the minutes do not record any discussion or awareness of the existing or proposed development controls applicable to the Site.

On 18 June 2003 Sebvell's own planning adviser, David Laing, sent an email to Mr Vellar in which he expressed serious concerns about a proposal to increase the maximum height of Quattro to 14.5 storeys. He stated that:

- Quattro would be significantly taller than, and tower over, any other building in the CBD; be completely out of context with other buildings in its locality; and be nearly double the maximum height supported by Council planning officers;
- the increased FSR might be inappropriate and unreasonable;
- he could think of no justification, other than economic ones, "as to why the building has to be so big";
- DIPNR did not support the scale of the development and that extensive "lobbying" of the Council would not achieve anything if DIPNR did not support it; and
- the building should be "reduced by two floors and a more reasonable FSR and unit yield delivered".

In an email sent on 21 August 2003 Mr Laing further advised Mr Vellar that the Council's City Centre Revitalisation Strategy "does not help us as you know" because Quattro significantly exceeded the proposed controls within it. He also informed Mr Vellar that Council planning officers were refusing to support any development exceeding those proposed controls ("officers quote ad nauseum the draft rule book") and he recommended that they seek to ensure that the support they have from Messrs Darling and Oxley "floats down to the Council Planners who will then see our proposal as a special site and one [that] therefore deserves special attention". By this stage, the proposed size of Quattro had increased to what essentially became its final form, namely a maximum height of 15 or 17 storeys (around 48 metres) and an FSR of 4.25:1.

Between August and October 2003 the proposed development was examined under the Council's Urban Design Assessment Policy, which seeks to provide a process whereby design issues pertaining to significant developments likely to exceed development controls can be agreed upon between the developer and the Council at an early stage. However, no agreement was reached. As part of this process the Council's Heritage Advisor raised a number of heritage concerns about Quattro and DIPNR provided the following comments:

> *The Department does not support the applicant's proposed development controls for the site. The height, bulk and scale of the resulting development would be excessive for this site.*

On 2 December 2003 Sebvell representatives made a presentation on Quattro to the Council's Central Wollongong Planning Committee and the Committee was requested to choose from among a number of options, one of which was to endorse the development controls proposed by Sebvell for the Site and another was to reject those and maintain the current controls. The Committee essentially endorsed the second option, resolving that:

1. *The presentation be received.*

2. *This Committee recommends to Council that development applications received for the City Centre which have substantial variations from the Illawarra Regional Environmental Plan, Local Environmental Plan 1990 and Draft Developmental Control Plan No 56, be refused by Council, with the qualification that each development application be submitted to this Committee for reaffirmation of that position.*

This resolution was presented to the full Council on 15 December 2003 and it made the following somewhat different resolution:

1. *The presentation be received.*

2. *Council note the Central Wollongong Planning Committee's support for draft Developmental Control Plan No 56 and intent that the Draft Plan be used as a guide to inform Council of development applications within the Central Business District that vary from Local Environment Plan 1990 and the Illawarra Regional Environmental Plan.*

3. *Should a development application be submitted which exceeds the development standard either in Council's planning instruments and development control plans, including Draft Developmental Control Plan No 56, then the application must be accompanied by a detailed report which provides a rationale for any variation in the abovementioned standards.*

While this resolution did not constitute an outright rejection of the proposed Quattro development, it provided a clear indication to Mr Vellar (who was at the meeting) that the Council itself did not support his proposal and a clear direction that any subsequent DA "must be accompanied by a detailed report which provides a rationale" for the proposed exceedence of both the Council's existing development controls and those proposed in draft DCP 56. This resolution (No. 529) remained in force throughout the period of assessment and determination of the Quattro DA.

Mr Vellar has admitted that his interpretation of resolution No. 529 at that time was that the Council had "in effect, closed the door on [his] application". Nevertheless, he decided to proceed with his proposed development at "very large expense".

In March 2004 Ms Morgan, who had no involvement with the Quattro proposal before then, returned to work at the Council following her maternity leave. At this time she began fraternising with members of the Table of Knowledge, including Mr Vellar. In May 2004 she began her sexual relationship with him and he started providing her with the gifts and benefits previously referred to. Records relating to mobile telephones used by Mr Vellar and Ms Morgan show over 350 calls or messages between them from May to July 2004.

In July 2004 Mr Vellar spoke to Messrs Oxley and Gilbert and specifically requested that Ms Morgan be assigned to assess the forthcoming Quattro DA. This request was granted. In an email sent by Mr Gilbert to an employee of Sebvell on 19 July 2004 he stated that initially he was going to use an external consultant to assess the Quattro DA but Mr Vellar "said he was not all that happy with this approach", so he decided to use Ms Morgan because he felt that "the applicant has to be comfortable with" whomever is used.

During his testimony Mr Vellar conceded that he did not think it was "proper" for him to nominate who should be assigned to assess the DA, but claimed that the only reason he nominated Ms Morgan was because he wanted someone "competent enough" to assess it.

When he requested Messrs Oxley and Gilbert to assign Ms Morgan to assess the Quattro DA Mr Vellar did not disclose to either of them that he was in a sexual relationship with her or had given her any gifts or benefits. At no subsequent time did he make any such disclosures to the Council nor did he take any steps to avoid an obvious conflict of interest for Ms Morgan by requesting that she not be involved in the assessment of DAs in which he had an interest. Mr Vellar claimed that it was only "in hindsight" that he realised that "there is anything wrong in having an undisclosed sexual relationship with a public official who is determining a matter related to [him] involving $100 million or more".

In light of the opinions expressed by Mr Vellar's own planning advisor, Mr Laing, his belief that Council had "closed the door" on the proposed development and the project's substantial departure from the relevant development standards, the Commission regards it as highly significant that Mr Vellar requested that Ms Morgan be assigned to assess the DA. The Commission is satisfied that he did so in the knowledge that, because of the nature of their relationship, she would conduct the assessment in a way favourable to his interests.

In August and September 2004 Mr Vellar and Ms Morgan sent flirtatious emails to each other containing sexual innuendo, some of which referred to the proposed lodgement of the Quattro DA. On 22 September 2004 the DA was lodged and Ms Morgan immediately assumed the role of "responsible officer", which meant she was responsible for assessing it in accordance with all relevant legislative and Council requirements. The DA was not accompanied by a detailed report providing a rationale for the proposed exceedence of existing development controls and those proposed in draft DCP 56, as required by Council resolution No. 529, or an application under SEPP 1 to vary the existing FSR control (although a purported SEPP 1 application was subsequently submitted to the Council).

Post-lodgement of the DA

The Quattro DA was placed on public exhibition in October 2004 and during the exhibition period the Council received ten submissions, most of which objected to the vast scale of the proposed development. Ms Morgan directly emailed many of the submissions to Mr Vellar, who replied by email with comments such as "TELL THEM TO GO AND GET F….. !!!!!!" and "WHAT A DICK HEAD !!!". These illustrate the lack of formality and objectivity associated with the assessment of the DA from an early stage.

On 20 October 2004 Ms Morgan, in accordance with normal practice, referred the Quattro DA to DIPNR. It responded by letter dated 16 November 2004, which contained the following comments about the proposed FSR of the development and the appropriateness of seeking to vary the existing FSR development standard pursuant to SEPP 1:

> *The site is zoned 3(a) General Business under* [WLEP 1990]. *A floor space ratio of 1.5:1 applies to the site. This is significantly less than the 4.25:1 proposed by the applicant which is almost three times the permitted FSR.*
>
> *The proposal also exceeds the maximum permissible floor space of 3:1 allowed within the core of the City Centre on land zoned 3(c) Regional Business Zone. The proposed development has much greater bulk and scale than any building envisaged under the current controls applying to the site, and those that apply to the core area.*
>
> *It is not considered appropriate to use SEPP 1 in this instance due to the extent of the proposed variation. Council must be careful not to set an undesirable precedent, particularly at this time when the planning controls for the City Centre are under review.*
>
> *The building would be out of context with surrounding development and would dominate the streetscape due to its height, bulk and scale.*

DIPNR's letter also contained the following comments about the proposed height of the development and the appropriateness of seeking to exceed the height limit contained in IREP 1 (although the letter incorrectly represented that the applicable height limit was 20 metres, when it was only 11 metres):

> *Clause 139(2) of* [IREP 1] *sets a 20* [sic] *metre building height limit within the Wollongong City Centre which may only be varied with the concurrence of the Director. Council has delegation on behalf of the Director in this instance.*
>
> *The Clause applies to this application which proposes a maximum building height of fifteen stories* [sic] *or approximately 50 metres, which is two and a half* [sic] *times the prescribed building height. The majority of the development exceeds 20* [sic] *metres in height.*

The 20 [sic] *metre height standard can only be varied following consideration of the matters listed in Clause 139(3) of IREP No.1. These matters include:*

(a) the height, scale, bulk and density of the proposed building;
(c) the relationship of the proposed building to the streetscape or landscape;
(d) the effect of the proposed building on public amenity, including pedestrian amenity;
(f) the effect of the proposed building on overshadowing of public places;
(h) the effect of the proposed building on any item of environmental heritage in the vicinity;

There is a mixture of building heights in the vicinity of the site. There are several one and two storey buildings, and the tallest building in the vicinity would be approximately 5 stories [sic] *in height. The height, scale, bulk and density of the proposed development is out of context with the surrounding development. The development would dominate and therefore have an unsatisfactory relationship with streetscapes on its three frontages.*

The development would reduce the amenity of public places and pedestrian amenity by overshadowing the footpaths of Flinders, Keira and Campbell Streets. Pedestrian amenity in Campbell Street would also be reduced. There could be conflicts with vehicle movements associated with the proposed exit from the 800 vehicle basement carpark.

There are several environmental heritage items of local and regional significance in the vicinity of the site on Campbell, Keira and Flinders Streets. These are generally one or two stories [sic] *in height. The significant height, scale and bulk of the development may detract from the heritage significance of these items.*

As you are aware the City Centre Revitalisation Strategy process is underway and Council has exhibited a package of planning documents relating to the Revitalisation Strategy, including draft [DCP 56]. *This strategy proposes to set the future direction for the City Centre.*

The exhibited version of draft DCP No. 56 applies only to the southern half of the site. It proposes a building height of 6 levels rising to 9 levels at the corner of Keira and Flinders Streets. The proposed development, at up to 15 levels in height, is more than one and a half times the height in the draft DCP and would completely dominate existing development and be out of context with the future urban form identified in these draft controls.

An increase in building height at the corner of Keira and Flinders Streets to mark an entry to the City Centre as proposed in the draft DCP may be reasonable, however the proposed building height is considered to be excessive.

The draft DCP is being revised, however it would not be good planning practice to set a precedent with respect to building height at this time.

The Commission notes that the Council and its officers had previously recognised that the correct height limit applicable to the Quattro Site under IREP 1 was 11 (not 20) metres.

In November 2004 Ms Morgan organised a Design Review Panel ("DRP") meeting for consideration of the Quattro DA and, as Panel Co-ordinator, she personally prepared a "DRP Brief" for members of the Panel. The Brief specifically identified her as a member of the Panel and provided, among other things, that each member of the Panel was required to sign a Conflict of Interest declaration in the following terms:

> *I declare that to the best of my knowledge I do not have a conflict of interest in this matter including:*
>
> *2.1 any financial interest in the project being reviewed;*
>
> *2.2 any immediate relatives or close friends with a financial interest in the project being reviewed;*
>
> *2.3 any personal obligation, allegiance, bias or inclination which would in any way affect my deliberations in relation to the project being reviewed, or the proponents of the project being reviewed;*

Not only did Ms Morgan prepare the DRP Brief herself, but she distributed it to the other panel members and was responsible for ensuring that they signed their Conflict of Interest declarations and returned them to her. As a member of the Panel, Ms Morgan should have signed such a declaration herself, but the Council has no record of her having done so. If there ever was any doubt in Ms Morgan's mind that her relationship with Mr Vellar gave rise to a conflict of interest which she should have avoided, or at least disclosed to the Council, that doubt must have been extinguished when she prepared the DRP Brief.

The Design Review Panel for Quattro was comprised of Ms Morgan, her immediate supervisor, Ron Zwicker (who chaired the Panel), and three independent experts (an urban designer, an architect and a landscape architect). The Panel met on 22 November 2004 and the experts' comments were extremely critical of Quattro. On 22 November 2004 Mr Zwicker sent an email in which he summarised the experts' concerns in relation to six significant matters. His summary in respect of the first matter was worded as follows:

> *The density, scale, height and external appearance of the proposed development is not considered consistent / appropriate for the locality – the panel members generally concurred that the 14 storey height of the corner element was too high – the panel recommended a maximum 10 storey height for the corner element & generally a 6 storey height limit for the remainder of the building.*

Ms Morgan received Mr Zwicker's email, printed it out and wrote the following message on it: *"This was that email I was referring to earlier re Quattro. I have not sent this to anybody and seeing it was so scathing I have not added it to the file or told the applicant"*. The identity of the intended recipient of the message is not apparent. Ms Morgan admitted

that she did not add this email to the Council's file for the Quattro DA because it could hinder "getting the DA … approved" and she conceded that her conduct was improper.

On 10 December 2004 an Informal Planning Conference ("IPC") relating to the Quattro DA was held and attended by Councillors, Council staff (including Ms Morgan and Mr Gilbert), Sebvell representatives (including Mr Vellar) and members of the community. At the IPC, the purpose of which is to provide a framework for the resolution of contentious development applications, a number of substantive issues relating to the Quattro DA were raised but not resolved, including major issues relating to the proposed height and FSR. The terms of the Council's Policy on IPCs provided that under such circumstances the DA should be reported to the Council for determination subject to the following exception:

> *The Lord Mayor, by agreement with the Ward Councillors and in consultation with the Manager Development Assessment and Compliance, being of the opinion that all substantive issues have been resolved, may direct that the application need not be reported to Council but be determined under delegated authority.*

It is common ground that no such direction was ever made and that the Quattro DA should have been reported to the Council itself rather than determined by staff under delegated authority. However, Ms Morgan orchestrated an approval under delegated authority without any consultation with the Lord Mayor or Ward Councillors. Ms Morgan conceded that in relation to this matter she was a party to a deliberate breach of the Council's Policy on IPCs. While other Council officers may have also been complicit in this breach, the Commission does not regard their conduct as exculpating Ms Morgan.

In December 2004 and January 2005 Ms Morgan drafted emails to Mr Vellar in which she declared her undivided loyalty to him and expressed her hope that they would "end… up together". In each of these months there were over 200 telephone calls or text messages between them and in January 2005 she also went on her first holiday with him to his farm.

On 17 January 2005 Ms Morgan wrote a memo to David Broyd, Director of Environment and Planning, containing a cursory assessment of some aspects of the Quattro DA that was highly favourable to Mr Vellar. For example, she concluded that "the application could be supported" with its proposed height of 15 storeys (48 metres), or a slightly reduced height, without identifying that the existing height control was 11 metres or examining the considerations needed to be taken into account under cl.139 of IREP 1 in order to exceed that control. On 18 January 2005 Ms Morgan met with Messrs Broyd and Zwicker to discuss her memo and they both disagreed with her assessment. The file note of the meeting records that they considered Quattro "excessive" and regarded six storeys as a more appropriate height. Ms Morgan provided copies of her memo and the file note, both of which were internal Council documents, to Mr Vellar. She claimed that she thought he

was entitled to them because "he had a right to know what was going on with [his] application". The Commission considers her claim disingenuous.

In late January 2005 Mr Oxley, over strong opposition from Mr Broyd and without reference to the Council, endorsed the preparation of a draft Local Environmental Plan and new draft Development Control Plan in which the Quattro Site was (for no legitimate reason apparent to the Commission) singled out as having a permissible maximum height of 14+ storeys while other land in its immediate vicinity was restricted to heights of four to six storeys. However, neither of these draft plans was placed on public exhibition (for which consent from DIPNR was required) prior to the determination of the Quattro DA and they did not override the existing development controls in WLEP 1990 or IREP 1 (or obviate the need for a rezoning or SEPP 1 determination to be made as a precondition for approval of that DA).

In early February 2005 Mr Broyd was told that Ms Morgan socialised with Mr Vellar and he asked Mr Gilbert to ascertain whether she should be removed as the responsible officer for the Quattro DA because of a conflict of interest. Mr Gilbert discussed the matter with Ms Morgan and she admitted having a friendship with Mr Vellar, but did not disclose that it was a sexual relationship or that he had given her gifts or benefits. Based on what Ms Morgan told him, Mr Gilbert concluded "that there wasn't a conflict … that would influence her decision making" and decided to let her remain working on the DA. Ms Morgan admitted that at the time she recognised that her relationship with Mr Vellar gave rise to a perceived (but not actual) conflict of interest and conceded that Mr Gilbert's decision was not made on an informed basis because she withheld material facts from him. After their discussion Ms Morgan sent Mr Gilbert an email in which she expressed her "strong … disappointment" that Mr Broyd "wants to pull me off the job" and stated that "Frank [Vellar] will not be happy" if the Quattro DA is reallocated to someone else.

Ms Morgan also admitted that sometime in 2005 Mr Zwicker directly asked her whether she was in a sexual relationship with Mr Vellar and she falsely denied that she was.

On 10 February 2005 Council officers (Ms Morgan and Messrs Zwicker, Gilbert & Broyd) met with Sebvell representatives (including Mr Vellar) and agreed, among other things, that the building heights proposed in the Quattro DA (48 metres) would be accepted and that Sebvell would submit an application under SEPP 1 to vary the FSR standard in WLEP 1990 (rather than seek a rezoning). The minutes of the meeting do not record any consideration having been given to the requirements of cl.139 of IREP 1 for approval of a height over 11 metres or the criteria needed to be satisfied for approval of an application under SEPP 1. The minutes also record that it was agreed that there needed to

be a meeting with Councillors "prior to DA approval", an apparent reference to the requirements of the (previously referred to) Council Policy on IPCs.

From mid-February 2005 onwards Ms Morgan often informed Mr Vellar that she wanted to leave the Council and he offered her office space in one of his buildings to use in setting up her proposed private consulting business (in April 2005 she even prepared business cards and letterheads for the business containing the address of that building). Mr Vellar claimed that he intended to charge Ms Morgan rent and that "figures were discussed". Ms Morgan stated that no payment was discussed, but that "she always assumed [she] was going to be paying for it". Adam Morgan gave evidence to the effect that Ms Morgan informed him that "[t]he office was to be rent free for six months". The Commission considers it more likely than not that Mr Vellar offered the office to Ms Morgan on a rent-free basis, at least for a limited period.

Despite Ms Morgan's urgent desire to leave the Council (eg. in emails she wrote "I must leave Council for my own sanity", "I hate this place! I can't wait to leave" and "I just want to get up and walk out of here now … never to come back!"), she told Mr Vellar that she would stay "until I get a couple of DAs out" and in May 2005 she told Mr Zwicker that she might leave "in the next 2-3 months". Her reference to "a couple of DAs" most likely relates to the DAs linked to Mr Vellar she was assessing at the time, of which there were two (the Quattro DA and the DA for the proposed redevelopment of the North Beach Bathers' Pavilion), and the timeframe she gave Mr Zwicker most likely reflects her estimate of how long she thought it would take to get those DAs approved for Mr Vellar.

From March 2005 onwards Mr Vellar and Ms Morgan frequently declared their love for each other in emails and it is evident that by this point in time Ms Morgan was planning, or at least hoping for, a long-term future with him. In April 2005 she separated from her husband and thereafter Mr Vellar gave her a series of significant cash payments, including sums of up to $2,000 at a time. The applicable Code of Conduct provided that Council staff "must never accept an offer of money, regardless of the amount", but Ms Morgan readily accepted Mr Vellar's payments and never disclosed them to the Council.

Between March and August 2005 phone calls and text messages between Mr Vellar and Ms Morgan averaged around 200 a month and, in addition to cash payments, he gave her at least one handbag and materials for home renovations.

On 13 July 2005, shortly after Mr Broyd resigned from the Council because of a "clash of values" with Mr Oxley, Ms Morgan informed Mr Vellar by email that she and Mr Gilbert were "going to work on a delegated approval for Quattro". Mr Vellar replied as follows: "thank f..… for that bub XXXXXXXXXXXXXXXXX". As previously mentioned, no

direction by the Lord Mayor was ever made, or even requested, permitting the Quattro DA to be determined under delegated authority in accordance with the Council Policy on IPCs.

On 4 August 2005 Ms Morgan sent Mr Vellar an email in which she informed him that the contributions payable to the Council under s.94 of the EPA Act ("s.94 contributions") were almost $850,000, but that she would try to get Mr Gilbert "to agree" to the amounts being payable prior to the release of occupation certificates (OC), rather than construction certificates (CC). It is unclear whether Mr Gilbert agreed or not, but Ms Morgan subsequently did defer the due dates to the OC stage. At the public inquiry she admitted that at the time she knew that this was wrong because it was contrary to relevant Contribution Plans, but she claimed that she only did it "because it had been done before" in other cases at the direction of Mr Oxley.

On 10 August 2005 Ms Morgan emailed Mr Vellar a draft list of conditions for a proposed grant of development consent for Quattro, the first page of which had the following words at the top in big bold letters: "**For Office Use Only – Do Not Mail**". Over the next week there were many further emails between them in which they declared their love for each other. During this period they also organised a two-night skiing holiday (entirely paid for by Mr Vellar) at Perisher starting on Friday, 19 August 2005.

At 12:22 pm on 18 August 2005 Ms Morgan sent an email to Mr Vellar in which she wrote "I am SOOOOOO excited about tomorrow …… LOVE YOU XXXXXXXX". At 3:36 pm that day she sent him another email in which she wrote "I just saved you $84,807.94 in [s.94 contributions] …. It may just be your lucky day after all … (it's the 10% reduction for urban consolidation)". The Council had a policy providing for a 10% reduction in s.94 contributions for urban consolidation but it only applied if a number of specified criteria (some of which Quattro did not meet) were satisfied. At the public inquiry Ms Morgan admitted that she wrongly applied this reduction to Quattro without checking the relevant contributions plans to ascertain if it did apply and without making any record of her reasons for doing so, but she claimed that at the time she genuinely believed it did apply. In light of the overall circumstances relating to this matter, including the content of her emails to Mr Vellar, the Commission does not accept this claim. It is more likely that Ms Morgan applied this reduction when she knew it did not apply as a personal favour to Mr Vellar.

At 4:06 pm on 18 August 2005 a Notice of Determination under Mr Gilbert's name was issued providing that development consent had been granted for Quattro subject to the conditions set out in the Notice. The condition relating to s.94 contributions reflected the 10% reduction referred to above and provided for payment at the OC (not CC) stage.

Telephone records show that there were numerous calls between Mr Vellar and both Ms Morgan and Mr Gilbert on 18 August 2005 before and after the Notice was issued.

Ms Morgan testified that prior to 18 August 2005 she believed that she had authority to approve the DA herself and contemplated that the Notice would be issued under her own name, but that on or shortly before that date (after having a discussion with Mr Vellar about the matter) she requested of Mr Gilbert that the Notice be issued under his name because she wanted to "distance" herself from the final decision to grant consent. Mr Gilbert acceded to her request. He permitted Ms Morgan to draft the terms of the Notice, log on to a computer under his name and generate the Notice in his name and bearing his electronic signature.

In a written statement dated 30 October 2007 Mr Gilbert informed the Commission that he "had only a supervisory role in the determination of the DA", that in agreeing to the consent being granted he "relied upon the assessment and decisions made by Ms Morgan as the assessing officer" and that he "did not assess the merits or substance of the decision making" himself. He generally gave similar, but not entirely consistent, evidence in relation to these matters at the subsequent public inquiry.

Notwithstanding that the Notice was issued under Mr Gilbert's name and he agreed to it being issued, the Commission is satisfied that the ultimate decisions to grant the consent and determine the conditions attached to it were effectively made by Ms Morgan and that Mr Gilbert did not personally assess the details of the DA or satisfy himself that the approval and associated conditions were appropriate.

The evidence received by the Commission in relation to the actual determination of the Quattro DA may be summarised as follows:

- Neither Ms Morgan nor Mr Gilbert assessed or determined the SEPP 1 application for a variation of the FSR control of 1.5:1 under WLEP 1990 when they knew that the acceptance of such an application was a precondition to approval of the DA.

- Neither Ms Morgan nor Mr Gilbert granted concurrence to the exceedence of the height control of 11 metres pursuant to cl.139(2) of IREP 1. Mr Gilbert's evidence in relation to his this matter was succinctly set out in his written statement of 30 October 2007 (i.e. "I … had no specific role in determining the development proposal to a height above … 11 metres pursuant to clause 139(2) of [IREP]"), but at the public inquiry he suggested that he could be regarded as having granted concurrence by virtue of the fact that he had delegated authority to do so and was the person who "signed off on" the DA. The Commission is satisfied that Mr

Gilbert did not actually grant concurrence in the sense of specifically turning his mind to each of the considerations in cl.139(3) and then making a conscious decision to exercise his authority to grant concurrence under cl.139(2).

- Ms Morgan did not provide Mr Gilbert with any report containing an assessment of the DA or recommendation that it be approved or justification of the proposed conditions of consent. She conceded that "normally" she would have completed such a report and claimed that she did not know why she did not do so in relation to this DA, particularly given that it was the largest DA she ever assessed. At some point she commenced preparing a purported assessment report, but it was never completed and it was saved on her personal disk drive (not accessible to other Council officers) and not placed on the Council's file for the DA. The Commission is satisfied that Ms Morgan knew that she should have completed an assessment report and she deliberately chose not to. The creation of such a report was required by cl.4.5 of the Council's Code of Conduct and its Corporate Records Management Policy. Ms Morgan attended "Records Management Training" sessions at the Council on 16 December 2002 and 9 August 2004.

- Ms Morgan conceded that in proceeding with the assessment and determination of the DA pursuant to delegated authority she was a party to a deliberate breach of the Council's Policy on IPCs.

- Ms Morgan conceded that in assessing the DA she ignored the Council's resolution (No. 529) of 15 December 2003 and wilfully ignored the conclusions of the Design Review Panel.

Notwithstanding the many admissions and concessions she made at the public inquiry and other matters referred to above, Ms Morgan unconvincingly maintained that her conduct in relation to the assessment and determination of the Quattro DA was not influenced by either her sexual relationship with Mr Vellar or her receipt of gifts and benefits from him. The Commission does not accept this aspect of her testimony.

Mr Vellar denied that he attempted to improperly influence Ms Morgan in relation to the assessment and determination of the DA. The Commission rejects this aspect of his testimony. The Commission generally found Mr Vellar to be a very unconvincing witness who was prepared to say whatever he thought would best serve his own interests.

Expert opinion

Prior to the Commission's public inquiry the Council engaged an experienced planning expert, Neil Kennan of Nexus Environmental Planning Pty Ltd, to review the assessment and determination of the Quattro DA. Mr Kennan subsequently produced a report that was tendered at the public inquiry. The content of the report was not challenged and appears to have been generally accepted as accurate by all relevant affected persons, including Ms Morgan and Mr Vellar. The conclusions and opinions in Mr Kennan's report that are relevant for present purposes may be summarised as follows:

- The determination of the DA by Council staff pursuant to delegated authority was contrary to the terms of the Council's Policy on Informal Planning Conferences, which required that the DA be reported to the Council.

- The application under SEPP 1 to vary the maximum FSR of 1.5:1 that applied to the Site to permit the proposed FSR of 4.25:1 was not well founded and any reasonable person having regard to the relevant criteria for assessment of a SEPP 1 application would have determined that it was not well founded.

- There was no justification on planning grounds to grant concurrence under cl.139(2) of IREP 1 to a development with a height of approximately 48 metres on the Site and no reasonable person having regard to relevant matters would have concluded that there was such justification.

- The proposed development was not eligible for a 10% reduction in the amount of s.94 contributions payable.

- The s.94 contributions should have been payable prior to the release of the Construction Certificate. There was no provision in the applicable Contributions Plans to defer payment to the Occupation Certificate stage of the development process.

The Commission accepts each of these conclusions or opinions.

4. Findings of fact

Based on the evidence obtained throughout its investigation, the Commission is satisfied that the following facts have been established:

(1) Ms Morgan was employed by the Council from May 2000 until June 2007. It was her duty to act honestly and impartially in performing her official functions. At all relevant times she was also obliged, and knew she was obliged, to: (a) avoid, or at least fully disclose, any actual, potential or reasonably perceived conflict of interest, including conflicts arising because of non-pecuniary interests such as personal relationships; and (b) reject, or at least fully disclose, non-token gifts and benefits.

(2) Mr Vellar is a major developer who part-owns and controls Sebvell Pty Ltd. In 2003 he presented to the Council a proposal for a large development by the company named "Quattro", but it was effectively rejected.

(3) In May 2004 Mr Vellar and Ms Morgan commenced a sexual relationship which lasted until February 2008. Any pauses in their sexual relationship were relatively brief and during such periods they remained close friends. Before and during the period of their relationship Ms Morgan planned to establish her own town planning consultancy business and she intended to secure future work from Mr Vellar.

(4) In July 2004 Mr Vellar, who was aware that his proposed Quattro project grossly exceeded applicable development controls, approached the Council and specifically requested that Ms Morgan be appointed to assess the forthcoming DA for the project with the intention that she would conduct the assessment in a way that was favourable to his interests. His request was granted and Ms Morgan was nominated as the "responsible officer", which required her to assess the DA in accordance with relevant legislative and Council requirements.

(5) From mid-2004 to December 2005 Mr Vellar provided the following gifts and benefits to Ms Morgan as inducements or rewards for favourable treatment in relation to (inter alia) the assessment of the Quattro DA and Ms Morgan accepted them knowing they were intended as such:

- about four handbags between around mid-2004 and mid-2005;
- timber flooring worth around $5,000 in mid-to-late 2004;

- a digital camera worth around $600 in October 2004;
- numerous cash payments from around April 2005 onwards, including sums of between around $1,000 and $2,000 at a time on about ten separate occasions;
- materials for home renovations (including a bench top, lights and architraves) in early-to-mid 2005;
- all of the costs associated with a two-night skiing holiday for both of them in Perisher in August 2005;
- all of the costs, except those for Ms Morgan's airfare, associated with a holiday for both of them in China from 5 to 11 October 2005;
- a television, DVD player and set-top box (costing $2,477 in total), and a lounge suite, in December 2005; and
- a watch costing $1,200 in December 2005.

(6) The DA for Quattro was lodged on 22 September 2004. It proposed a $100 million development with a floor space ratio almost three times, and a height more than four times, the applicable controls.

(7) The Quattro DA was approved on 18 August 2005. The Notice of Determination granting consent for the development bore the electronic signature of John Gilbert, Council's Manager of Development Assessment and Compliance, but he did not personally assess the details of the DA or satisfy himself that the approval and associated conditions were appropriate. The Notice was prepared by Ms Morgan and it was she who effectively made the decisions to grant consent and determine the associated conditions.

(8) In assessing and determining the Quattro DA Ms Morgan acted dishonestly and partially by:

(a) knowingly arranging for the DA to be determined by Mr Gilbert (and herself) contrary to the terms the Council's Policy on Informal Planning Conferences, which required that it be reported to the Council for determination;

(b) deliberately failing to undertake any genuine assessment of the DA against the applicable development standards and controls because she knew that Quattro grossly exceeded them and should not have been approved;

(c) wrongly and dishonestly permitting a 10% (around $85,000) reduction in the amount of s.94 contributions payable and deferring the due date for payment of those contributions until the release of occupation certificates;

(d) deliberately failing to include on Council's Quattro DA file, so as not to hinder the approval process, Mr Zwicker's email of 22 November 2004 summarising the Design Review Panel's expert advice;

(e) wilfully failing to avoid, and dishonestly failing to disclose, the extreme conflict of interest arising as a result of her personal relationship with Mr Vellar; and

(f) wilfully failing to reject, and dishonestly failing to disclose, the gifts and benefits provided to her by Mr Vellar referred to in paragraph (5) above.

(9) Ms Morgan engaged in the conduct set out in paragraph (8) above with the intention of improperly favouring Mr Vellar:

(a) in return for the ongoing receipt of gifts and benefits from Mr Vellar;

(b) with the expectation that she would gain future work from Mr Vellar in relation to her proposed town planning consultancy business; and

(c) in order to financially benefit Mr Vellar, with whom she was in a sexual relationship and hoped to share a long-term future.

(10) Ms Morgan's conduct, as set out in paragraphs (8) and (9) above, involved a serious departure from the important responsibilities of her position and amounted to a wilful abuse of her position.

(11) Ms Morgan engaged in the conduct set out in paragraphs (8) to (10) above as part of a concerted plan with Mr Vellar, who initially procured her appointment as the responsible officer for the Quattro DA and then knowingly encouraged her to improperly advance his interests by wilfully ignoring her responsibilities and abusing her position.

Further findings in relation to Ms Morgan and Mr Vellar, and other persons directly or indirectly involved in the assessment and determination of the Quattro DA, will be included in the third and final part of the Commission's report.

5. Serious corrupt conduct

In determining the findings referred to in this section the Commission has applied the principles set out in Appendices 1 and 2 to this report.

Beth Morgan

The Commission finds that Ms Morgan engaged in "serious corrupt conduct" in connection with the grant of the consent for the Quattro DA on the basis that:

(a) her conduct set out in paragraphs (5), (8), (9) and (10) of the Findings of Fact:

  (i) involved the dishonest and partial exercise of her official functions within the meaning of s.8(1)(b) of the ICAC Act;

  (ii) constituted a breach of public trust within the meaning of s.8(2) of the ICAC Act;

  (iii) adversely affected the exercise of official functions by the Council, and also involved "official misconduct" and matters of a similar nature to "bribery", within the meaning of s.8(2)(a),(b) and (x) of the ICAC Act;

(b) her conduct "could constitute", within the meaning of s.9(1) of the ICAC Act, the following criminal offences:

  (i) the common law offence misconduct in public office;

  (ii) conspiring to commit the common law offence of misconduct in public office;

  (iii) corruptly receiving benefits contrary to s.249B(1) of the Crimes Act; and

(c) each of those offences is a "serious indictable offence" because it is an indictable offence punishable by imprisonment for a term of more than five years.

Franco Vellar

The Commission finds that Mr Vellar engaged in "serious corrupt conduct" in connection with the grant of the consent for the Quattro DA on the basis that:

(a) his conduct set out in paragraphs (4), (5) and (11) of the Findings of Fact:

(i) adversely affected the honest and impartial exercise of official functions by Ms Morgan within the meaning of s.8(1)(a) of the ICAC Act;

(ii) adversely affected the exercise of official functions by the Council, and also involved a conspiracy to commit "official misconduct" and matters of a similar nature to "bribery", within the meaning of s.8(2)(a),(b), (x) and (y) of the ICAC Act;

(b) his conduct "could constitute", within the meaning of s.9(1) of the ICAC Act, the following criminal offences:

(i) aiding and abetting the common law offence misconduct in public office;

(ii) conspiring to commit the common law offence of misconduct in public office;

(ii) corruptly giving benefits contrary to s.249B(2) of the Crimes Act; and

(c) each of those offences is a "serious indictable offence" because it is an indictable offence punishable by imprisonment for a term of more than five years.

6. Recommendation under s.74C(3B) of the ICAC Act

Section 74C(3B) of the ICAC Act provides that:

> *The Commission is authorised to include in a report under section 74 a recommendation that consideration be given to the suspension of a development consent granted by a consent authority under the Environmental Planning and Assessment Act 1979, or of a modification of such a consent, with a view to its revocation because of serious corrupt conduct by the consent authority or by a councillor or other officer or member of staff of the consent authority in connection with the grant of the consent or modification.*

The Commission cannot make a recommendation under s.74C(3B) unless it is of the opinion that "prompt action is required in the public interest": s.74C(4) of the ICAC Act.

On 14 April 2008 the Council provided detailed written submissions to the Commission, which (among other things) included a submission that the Commission should promptly make a recommendation under s.74C(3B) of the ICAC Act in relation to the consent granted for Quattro. The Commission provided copies of these submissions to Sebvell, Mr Vellar and Ms Morgan and sought submissions in reply. None were received.

On 20 March 2008 the Council commenced proceedings in the Land and Environment Court against Sebvell seeking relief to the following effect:

(a) a declaration that the Quattro consent is void and of no effect;

(b) an order pursuant to s.124A(6) of the *Environmental Planning and Assessment Act 1979* ("EPA Act") revoking the decision made by the Council to grant the consent; and

(c) an order that Sebvell, whether by itself, its directors, servants, agents or contractors, be restrained from carrying out, or authorising or permitting, the carrying out of, the Quattro development.

On 25 March 2008 the Court granted interlocutory relief to the following effect:

(a) until further order, Sebvell, whether by itself, its directors, servants, agents or contractors be restrained from carrying out, or authorising or permitting the carrying out, of the Quattro development; and

(b) pursuant to s.124A(5) of the EPA Act, the decision made by the Council to grant the development consent for Quattro is suspended pending the determination of the proceedings.

Sebvell subsequently made an application to the Court to discharge the injunction granted on 25 March 2008. The Court initially listed Sebvell's application for hearing on 26 May and 2 June 2008, but on 19 May 2008 those hearing dates were set aside. The matter is next listed for mention on 18 June 2008.

The order made by the Court on 25 March 2008 suspending the Quattro consent is of an interim nature only and there is no guarantee that the Council will be successful in those proceedings or that the existing injunction will not be lifted at some future time.

Having concluded that the Quattro consent was procured by serious corrupt conduct on the part of both Ms Morgan and Mr Vellar, and having regard to the unchallenged expert evidence to the effect that that consent should never have been granted, the Commission is of the opinion that prompt action to revoke the consent is required in the public interest.

Accordingly, the Commission recommends pursuant to s.74C(3B) of the ICAC Act that consideration be given to the suspension of the development consent granted by Wollongong City Council on 18 August 2005 to Sebvell Pty Ltd in relation to a proposed development known as "Quattro" (DA-2004/1755) with a view to its revocation because of serious corrupt conduct by Beth Morgan in connection with the grant of the consent.

The making of this recommendation has a twofold effect. First, it means that, in relation to the current proceedings commenced by the Council or any future proceedings commenced by any other person, the decision to grant development consent for Quattro is "tainted by corrupt conduct", within the meaning of s.124A(1)(a) of the EPA Act. Secondly, it empowers the Minister of Planning to unilaterally suspend the decision to grant development consent for Quattro pending the institution and determination of proceedings to revoke it. This power may be necessary if the Council does not succeed in its current proceedings or the orders made by the Court on 25 March 2008 are lifted or revoked prior to the determination of those proceedings.

Statements under s.74A(2) of the ICAC Act in respect of Ms Morgan and Mr Vellar will be included in the third and final part of the Commission's report.

Appendix 1: Corrupt conduct defined & the relevant standard of proof

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

Section 8, ICAC Act

The first (section 8) defines the general nature of corrupt conduct. Section 8(1) provides that corrupt conduct is:

> *(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*
>
> *(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*
>
> *(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
>
> *(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.*

The term "conduct" is defined in s.3(1) as including "neglect, failure and inaction" and the phrase "exercise of any … official function" is defined in s.3(2) as including "performance of any duty". Accordingly, s.8(1)(b) extends to any dishonest or partial failure by a public official to perform any of his or her official duties.

The term "dishonest" encompasses (inter alia) the wilful non-disclosure of a material fact a person is under a positive duty to disclose.[1]

The meaning of "partial" was explained by Mahoney JA in *Greiner v. ICAC* as follows:

> *Partiality involves, in my opinion, the advantaging of a person for an unacceptable reason … [and] the additional element of actual or imputed appreciation that what was being done was, in the context in which it was done, done for a reason that is unacceptable.*[2]

Justice Mahoney observed that partiality could occur either in relation to a decision made by a public official or "in the process leading to" that decision:

[1] See *Peters v. The Queen* (1998) 192 CLR 493, 529; *Adams v. The Queen* [1995] 1 WLR 52; *R v. Cuerrier* [1998] 2 SCR 371, [116]; *Zamir v. Secretary of State for the Home Department* (1980) AC 930, 950.
[2] (1992) 28 NSWLR 125 at 160-162.

> *The form of advantage conferred may … vary. Thus, the advantage may be seen in the actual decision, that is, the decision to award … a benefit or the like: the advantage may lie in the award of it to one rather than another. But the advantage may lie merely in the process leading to the exercise of a power or grant of a benefit. A person may be preferred by being put in a position of advantage in the process leading to the decision …*[3]

Section 8(2) of the ICAC Act specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection and include official misconduct (also known as "misconduct in public office" – see below), bribery and perverting the course of justice.

Section 9, ICAC Act

Section 9(1) of the ICAC Act provides that, despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

> *(a) a criminal offence, or*
>
> *(b) a disciplinary offence, or*
>
> *(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*
>
> *(d) in the case of conduct of a Minister of the Crown or a Member of a House of Parliament—a substantial breach of an applicable code of conduct.*

The term "disciplinary offence" is widely defined in s.9(3) to include "any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law".

Section 9(6) further provides that: "A reference to a disciplinary offence in this section … includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the *Local Government Act 1993*, but does not include a reference to any other breach of such a requirement".

Determining whether corrupt conduct has occurred

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

[3] (1992) 28 NSWLR 125 at 161.

Section 13(3A) of the ICAC Act provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s.9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there is no right of appeal against findings of fact made by the Commission nor, excluding error of law relating to jurisdiction or procedural fairness, is there any appeal against a determination that a person has engaged in corrupt conduct. This situation highlights the need to exercise care in making findings of corrupt conduct.

Standard of proof

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

> *… reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

> *... as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

Appendix 2: Relevant criminal offences

Common law offence of misconduct in public office

The common law offence of "misconduct in public office" can be traced back to the thirteenth century.[4] The continued existence, and specific elements, of this offence have recently been confirmed by the Court of Final Appeal of Hong Kong[5] and the English Court of Appeal.[6] The leading judgments of the Hong Kong Court were delivered by Sir Anthony Mason NPJ (the former Chief Justice of Australia) and are based to a significant extent on Australian authorities or commentaries.[7] The offence continues to exist in NSW[8] and Victoria.[9]

In NSW the offence, being a common law misdemeanour, is punishable by fine and/or imprisonment and there is no fixed limit for the term of imprisonment.[10]

In *Sin Kam Wah v. HKSAR,* Mason NPJ recently formulated the elements of the offence of misconduct in public office as follows:

> *The offence is committed where:*
>
> *(1) a public official;*
>
> *(2) in the course of or in relation to his public office;*
>
> *(3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;*
>
> *(4) without reasonable excuse or justification; and*
>
> *(5) where such misconduct is serious, not trivial, 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 responsibilities.*[11]

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[4] *GJ Coles & Co Ltd v. Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 524.
[5] *Shum Kwok Sher v. HKSAR* [2002] HKCFA 30; *Sin Kam Wah v. HKSAR* [2005] HKCFA 27.
[6] *Attorney-General's Reference (No. 3 of 2003)* [2004] 2 Cr.App.R. 23. The offence was also recently acknowledged by the House of Lords in *Watkins v. Home Office* [2006] UKHL 17 (29 March 2006) at [26] and examined by the Supreme Court of Canada in *R v. Boulanger* [2006] 2 SCR 49.
[7] Such as *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417; Finn, "Public Officers: Some Personal Liabilities" (1977) 51 ALJ 313; Finn, "Official Misconduct" [1978] 2 Crim LJ 307.
[8] See, e.g., *In re Taylor* [1829] NSWSupC 25; *Ex Parte Kearney* (1917) 17 SR (NSW) 578; *GJ Coles & Co Ltd v. Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 524; *Landini v. State of NSW* [2006] NSWSC 1054 at [127]; Mahoney, "The Criminal Liability of Public Officers for the Exercise of Public Power" (1996) 3 *The Judicial Review* 17; Hall, *Investigating Corruption and Misconduct in Public Office* (2004), [1.55]-[1.80]; Ross, *Ross on Crime* (3rd ed, 2007), [3.2535]; Watson, Blackmore & Hosking, *Criminal Law (NSW)*, [3.600]; *Halsbury's Laws of Australia*, vol 9, [130-12335].
[9] See, e.g., *R v. Jones* [1946] VLR 300; *R v. Clarke* [1954] ALR 312; *DPP v. Marks* [2005] VSCA 277; *DPP v. Armstrong* [2007] VSCA 34; *R v. Bunning* [2007] VSCA 205.
[10] Watson et al, *ibid*, [3.120].
[11] [2005] HKCFA 27 at [45] & [46].

(1) A public official

As Mason NPJ has observed, the expression "public official" in the context of the offence of misconduct in public office "has a wide application".[12] The accepted definition of that expression, and the term "public officer" which is used interchangeably with that expression in the present context, is "an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public".[13]

The definition extends to both staff and councillors of local government authorities.[14]

(2) In the course of or in relation to his public office

The misconduct must have "a relevant relationship with the defendant's public office".[15] Such a relationship will exist where the defendant "has abused his official position",[16] "even if the acts complained of were not done in the discharge of the duties of his office".[17]

(3) Wilful misconduct by act or omission

The English Court of Appeal has recently defined "wilful misconduct" in the present context as "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not".[18] The Court observed that "[t]he circumstances in which the offence may be committed are broad and the conduct which may give rise to it is diverse".[19] In *Shum Kwok Sher v. HKSAR*, Mason NPJ similarly stated that the offence "is necessarily cast in general terms because it is designed to cover many forms of misconduct on the part of public officers".[20]

The offence has never been confined to fixed categories of misconduct, as is evident from early authorities.[21] In addition, the offence extends to misconduct by a public official that would only amount to a civil wrong if it were committed by a person in private employment.[22]

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[12] *Shum Kwok Sher v. HKSAR* [2002] HKCFA 30 at [99].
[13] *R v. Whitaker* [1914] 3 KB 1283 at 1296. Also see *R v. Burnell* (1698) Carth 478 at 479; *Henly v. Mayor of Lyme* (1828) 5 Bing 91, 130 ER 995; *R v. Bowden* [1996] 1 Cr.App.R. 104; Finn, "Public Officers: Some Personal Liabilities" (1977) 51 ALJ 313 at 314.
[14] See, e.g., *R v. Bowden* [1996] 1 Cr.App.R. 104; *R v. Speechley* [2004] EWCA Crim 3067.
[15] *Sin Kam Wah v. HKSAR* [2005] HKCFA 27 at [47] per Mason NPJ. Also see *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 431.
[16] Finn, PD "Public Officers: Some Personal Liabilities" (1977) 51 ALJ 313 at 315, quoted with approval by Mason NPJ in *Shum Kwok Sher v. HKSAR* [2002] HKCFA 30 at [69] & [81].
[17] Finn, PD "Official Misconduct" [1978] 2 Crim LJ 307 at 311. Also see *HKSAR v. Sin Kam Wah* [2004] HKCA 153 at [15]-[18]; *People v. Perkins* 662 N.W.2d 727 (2003).
[18] *Attorney-General's Reference (No. 3 of 2003)* [2004] 2 Cr.App.R. 23; [2005] 1 QB 73 at [28].
[19] *Attorney-General's Reference (No. 3 of 2003)* [2004] 2 Cr.App.R. 23; [2005] 1 QB 73 at [61].
[20] *Shum Kwok Sher v. HKSAR* [2002] HKCFA 30 at [92].
[21] See, e.g,. *Case 136 (Anonymous)* (1704) 6 Mod 96 at 96; 87 ER 853 at 853; *R v. Wyat* (1705) 1 Salk 380 at 381; 91 ER 331 at 332.
[22] See e.g. *R v.Bembridge* (1783) 3 Dougl 331 at 332; 93 ER 679 at 681; 22 St Tr 1 at 155; *R v. Llewellyn-Jones* (1966) 51 Cr.App.R 4 at 6; *R v.Dytham* [1979] QB 722 at 726; *Attorney-General's Reference (No. 3*

Some well-established potentially relevant examples of the offence are:

- exercising official functions dishonestly, in a partial manner or for an improper purpose,[23] such as where "*[a] town planning power is exercised not to secure the best planning result, but to benefit a friend, an organisation or a political party*";[24]

- the misuse of information obtained by a public official by virtue of his or her position;[25] and

- a wilful failure by a public official to perform a duty to which he or she is subject by virtue of his or her office or employment without reasonable excuse or justification.[26]

The last of these (non-exhaustive) examples could cover a wilful failure by a councillor or council official to comply with applicable provisions of a council's code of conduct, particularly in light of the statutory duty under s.440(5)(a) of the *Local Government Act 1993* (NSW).

(4) Without reasonable excuse or justification

This element of the offence is self-explanatory.

(5) Seriousness

This element of the offence, as enunciated by Mason NPJ in *Shum Kwok Sher v. HKSAR* and *Sin Kam Wah v. HKSAR* [27], has been approved by the English Court of Appeal in the following terms:

> *[W]e agree that the misconduct complained of must be serious misconduct. Whether it is of a sufficiently serious nature will depend on the factors stated by Sir Anthony Mason NPJ along with the seriousness of the consequences which may follow from an act or omission. An act or omission which may have as its consequence a death, viewed in terms of the need for maintenance of public standards to be marked and the public interest to be asserted, is likely to be more serious than one which would cause a trivial injury. This factor is likely to have less significance where, as in Shum Kwok Sher, the allegation is of corruption*

of 2003) [2004] 2 Cr.App.R. 23 at [62]; *R v. Boulanger* [2006] 2 S.C.R. 49, [52]; Watson, Blackmore & Hosking, *Criminal Law (NSW)*, [3.600].

[23] See, e.g., *Shum Kwok Sher v. HKSAR* [2002] HKCFA 30 & *R v. Boulanger* [2006] 2 S.C.R. 49.

[24] The Hon Mr Justice Dennis Mahoney, "The Criminal Liability of Public Officers for the Exercise of Public Power" (1996) 3 *The Judicial Review* 17, 20. Also see *Greiner v. ICAC* (1992) 28 NSWLR 125 at 160-164.

[25] See, e.g., *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417; *DPP v. Marks* [2005] VSCA 277; *R v. Bunning* [2007] VSCA 205; *R v. Hardy* [2007] EWCA Crim 760.

[26] See, e.g., *R v. Wyat* (1705) 1 Salk 380, 381; 91 ER 331, 332; *R v. Dytham* [1979] QB 722; *GJ Coles & Co Ltd v. Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503, 524 (McHugh JA). *Shum Kwok Sher v. HKSAR* [2002] HKCFA 30 at [66], [74]-[78] & [81]-[85]; *Attorney General's Reference (No. 3 of 2003)* [2005] 1 QB 73; *R v. Boulanger* [2006] 2 S.C.R. 49.

[27] *Shum Kwok Sher v. HKSAR* [2002] HKCFA 30 at [86]; *Sin Kam Wah v. HKSAR* [2005] HKCFA 27 at [45].

where the judgment upon the conduct may not vary directly in proportion to the amount of money involved …

[T]here must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder.[28]

Liability of persons who are not public officials

Persons who are not public officials may be convicted of aiding and abetting,[29] or conspiring to commit,[30] misconduct in public office.

Section 249(B) of the *Crimes Act 1900* – corrupt inducements or rewards

Section 249B of the Crimes Act reads as follows:

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

(a) as an inducement or reward for or otherwise on account of:

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

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

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

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

the agent is liable to imprisonment for 7 years.

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

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

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

[28] *Attorney-General's Reference (No. 3 of 2003)* [2004] 2 Cr.App.R. 23 at [44], [46], [56] & [59].
[29] *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 426, 436-437 & 442; *R v. Barry Rees* [2000] EWCA Crim 55.
[30] See, e.g., *Attorney General's Reference (No 5 of 2002)* [2005] 1 AC 167 at [3].

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

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

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

the firstmentioned person is liable to imprisonment for 7 years.

(3) For the purposes of subsection (1), where a benefit is received or solicited by anyone with the consent or at the request of an agent, the agent shall be deemed to have received or solicited the benefit.

Agent

The term "agent" is widely defined in s.249A to include (inter alia):

(a) any person employed by, or acting for or on behalf of, any other person (who in this case is referred to in this Part as the person's principal) in any capacity,

(b) any person purporting to be, or intending to become, an agent of any other person (who in this case is referred to in this Part as the person's principal), and

(c) any person serving under the Crown (which in this case is referred to in this Part as the person's principal), and …

(e) a councillor within the meaning of the Local Government Act 1993 (and in this case a reference in this Part to the agent's principal is a reference to the local council of which the person is a councillor)

In addition to councillors, this definition covers employees of local councils.[31]

Benefit

There is no qualitative or quantitative limitation on the term "benefit". Convictions have been obtained for the provision of benefits valued as little as $200.[32]

In relation to the affairs or business of the agent's principal

These words are "to be widely construed".[33]

[31] This is because s.249A(a) covers "any person employed by … any other person … in any capacity" and the term "person" is not limited to natural persons. Pursuant to s.4 of the Crimes Act, it includes "any society, company, or corporation". Pursuant to s.21 of the *Interpretation Act 1987 (NSW)*, it also includes "a corporation and a body corporate or politic". A local government council is a "body corporate": s.220 of the *Local Government Act 1993 (NSW)*.
[32] *R v. Giovannone* (2002) 140 A Crim R 1.
[33] *R v. Morgan* [1970] 3 All ER 1053, 1058; *R v. Gallagher* (1985) 16 A Crim R 215, 221.

Corruptly

No offence is committed under s.249B unless the defendant, in giving or receiving etc. a benefit, did so "corruptly". Some guiding principles in relation to this element are as follows:

- In the present context the word "corruptly" means acting "with some wrongful intention"[34] or "purposely doing an act which the law forbids as tending to corrupt".[35]

- It is the intention or belief of the person receiving etc. in the case of s.249B(1), or giving etc. in the case of s.249B(2), at the time of the receiving or giving etc. that is relevant in determining whether the act was done by the person "corruptly".[36]

- A benefit will be "corruptly" given or offered if it was done so with the intention of influencing the agent in relation to the affairs of his or her principal[37] and "corruptly" received if the agent "believed" that it was given with such an intention, even if the agent never intended to be and never was influenced.[38]

- Where the agent is a public official, a benefit will be "corruptly" received if the agent "believed" that the giver intended it as a reward for something the agent had previously done in the performance of his or her official functions, such as making a decision favourable to the giver, even if the agent had not done that thing or had acted properly when he or she did that thing.[39]

- A benefit will be "corruptly" given or offered if it is intended as a general "goodwill payment" or "sweetener" to encourage future acts of favouritism, without it having been given or offered as a *quid pro quo* for a specifically identified favour at the time it was given or offered, and will be "corruptly" received if the recipient believes it was offered or given for a such a purpose even if he or she did not intend to be influenced by it.[40]

- The fact that the giver or recipient etc. may not have known that it was illegal to give or receive the benefit in the relevant circumstances is no excuse.[41]

[34] *R v. Stevenson* [1907] VLR 475, 476; *R v. Gallagher* (1985) 16 A Crim R 215, 224-226.
[35] *Cooper v. Slade* (1858) 6 HLC 746, 773; 10 ER 1488, 1499; *R v. Wellburn* (1979) 69 Cr.App.R. 254; *R v. Gallagher* (1985) 16 A Crim R 215, 224-226; *Singh v. R* [2006] 1 WLR 146, [16]-[17].
[36] *R v. Gallagher* (1985) 16 A Crim R 215, 221; *R v. Jamieson* (1987) 34 A Crim R 308, 312-313.
[37] *R v. Stevenson* [1907] VR 475; *R v. Dillon & Riach* [1982] VR 434; *R v. Jamieson* (1987) 34 A Crim R 308.
[38] *R v. Dillon & Riach* [1982] VR 434; *R v. Gallagher* (1985) 16 A Crim R 215; *R v. Gallagher* (1987) 29 A Crim R 33; *R v. Jamieson* (1987) 34 A Crim R 308; *R v. Carr* (1957) 40 Cr.App.R 188; *R v. Mills* (1978) 68 Cr.App.R. 154, 158-159; *Singh v. R* [2006] 1 WLR 146, [14].
[39] *R v. Parker* (1986) 82 Cr.App.R. 69; *Singh v. R* [2006] 1 WLR 146, [14].
[40] *A-G v. Chung Fat Ming* [1978] HKLR 480, 482-487; *R v. Tsou Shing Hing* [1989] 1 HKC 93; *R v. Paul Kiang* [1989] HKCA 208; *R v. Liu Cheung Hon* [1994] HKCFI 86; *HKSAR v. Siu Man Kit* [2004] HKCFI 709. Also see *R v. Allen* (1992) 62 A Crim R 251; *Sin Kam Wah v. HKSAR* [2005] HKCFA 27, [32] & [54].
[41] *R v. Scott* [1907] 471, 473-474.

Proof

In *R v. Allen*, Gleeson CJ endorsed the following approach for ascertaining whether a person acted corruptly in relation to the provision of a gift to a public official:

> *The existence of a corrupt intent is something to be inferred from the facts of each particular case, and must depend upon many circumstances, involving, for example, the time and the place; the position respectively of the giver and the recipient; whether the gift is of a moderate or an immoderate amount; and whether it is given openly or secretly, underhandedly or clandestinely.*[42]

In that case, which involved a statutory offence corresponding to s.249B, both the giver and recipient of payments were held to have acted corruptly and convicted even though the giver "never asked [the recipient] to act in any way contrary to his duty, and never mentioned any improper request that might be made in the future".[43] In affirming the convictions, Gleeson CJ made the following statement:

> *[T]he gravamen of the offence … is the making or offering of a payment with an intent to incline a person in public office to disregard his duty. The occasion for the disregard of duty need not have arisen at the time of the offence, and it need never arise. Nor is it necessary that the particular kind of contemplated breach of duty be specified at the time of the payment or inducement. Of course, the absence of any such specification may be of powerful evidentiary significance on the issue as to whether there exists a corrupt intent, but that is a separate matter.*[44]

[42] (1992) 62 A Crim R 251, 254, quoting *S v. Deal Enterprises (Pty) Ltd* 1978 (3) SA 302, 308.
[43] (1992) 62 A Crim R 251, 255.
[44] (1992) 62 A Crim R 251, 255.