I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

Report on an investigation into corruption allegations affecting Wollongong City Council

Part Three

ICAC REPORT

OCTOBER 2008

INDEPENDENT
COMMISSION
AGAINST
CORRUPTION

Report on an investigation into corruption allegations affecting Wollongong City Council

Part Three

ICAC REPORT

OCTOBER 2008

This publication is available on the Commission's website www.icac.nsw.gov.au and is available in other formats for the vision-impaired upon request. Please advise of format needed, for example large print or as an ASCII file.

ISBN 978 1 920726 17 1

© October 2008 – Copyright in this work is held by the Independent Commission Against Corruption. Division 3 of the *Copyright Act 1968* (Cwlth) recognises that limited further use of this material can occur for the purposes of "fair dealing", for example study, research or criticism, etc. However if you wish to make use of this material other than as permitted by the Copyright Act, please write to the Commission at GPO Box 500 Sydney NSW 2001.

Cover image: The Victoria Square development, Wollongong.

Independent Commission Against Corruption

ADDRESS	Level 21, 133 Castlereagh Street Sydney, New South Wales, Australia 2000
POSTAL ADDRESS	GPO Box 500, Sydney, New South Wales, Australia 2001
TELEPHONE	02 8281 5999 1800 463 909 (toll free, for callers outside metropolitan Sydney)
TTY	02 8281 5773 (for hearing-impaired callers only)
FACSIMILE	02 9264 5364
EMAIL	icac@icac.nsw.gov.au
WEBSITE	www.icac.nsw.gov.au
BUSINESS HOURS	9.00 am – 5.00 pm Monday to Friday

INDEPENDENT COMMISSION AGAINST CORRUPTION

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

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

Mr President
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present Part Three of the Commission's report on its investigation into corruption allegations affecting Wollongong City Council.

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

This third and final part of the report addresses all relevant matters arising out of the Commission's investigation that were not dealt with in the first two parts of the report, released on 4 March 2008 and 28 May 2008 respectively.

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

Yours faithfully

The Hon Jerrold Cripps QC
Commissioner

Contents

Key abbreviations and acronyms used in this report 7

Executive summary 8

Chapter 1: Introduction 12

Why the Commission investigated 12

The Commission's investigation 12

Public inquiry 13

Content of this report 13

Mr Younan's failure to appear at the public inquiry 14

Implementation of corruption prevention recommendations 15

Recommendation that this report be made public 15

Chapter 2: Background 16

Ms Morgan's positions at the Council 16

Official responsibilities and obligations 16

Overview of Ms Morgan's relationships with Mr Tabak, Mr Vellar and Michael Kollaras 18

Credibility of Ms Morgan, Mr Tabak, Michael Kollaras and Mr Vellar 19

Chapter 3: Ms Morgan's assessment and approval of DAs relating to Glen Tabak 20

Relationship between Ms Morgan and Mr Tabak in 2004 20

Modification to development consent for Wave Apartments in mid-2004 21

Assessment and determination of the Victoria Square DA in 2004 22

Modification to development consent for Victoria Square in 2005 30

Findings of fact 32

Corrupt conduct 34

Section 74A(2) statements 34

Chapter 4: Ms Morgan's assessment and approval of DAs relating to Michael Kollaras 36

Relationship between Ms Morgan and Michael Kollaras 36

14 Harbour Street 37

91–95 Montague Street 41

Knowledge and involvement of Michael Kollaras in conduct of Ms Morgan 41

Findings of fact 42

Corrupt conduct 42

Section 74A(2) statements 42

Chapter 5: Ms Morgan's assessment and approval of DAs and other applications relating to Frank Vellar 44

Relationship between Ms Morgan and Mr Vellar 44

Gifts and benefits from Mr Vellar to Ms Morgan 45

False statements by Ms Morgan and Mr Vellar 46

Lot 3, Phillips Avenue 47

22 Harbour Street 49

North Beach Bathers' Pavilion 49

Provision of information by Ms Morgan to Mr Vellar relating to other matters 52

Findings of fact 54

Corrupt conduct 56

Section 74A(2) statements 57

© ICAC

Chapter 6: Conduct of John Gilbert 58

Mr Gilbert's official responsibilities and obligations 58

Mr Gilbert as a witness 58

Mr Gilbert's relationship with Mr Vellar 58

Mr Gilbert's knowledge of Ms Morgan's relationship with Mr Vellar 59

Mr Gilbert's handling of complaints about Ms Morgan and Mr Vellar 60

Mr Gilbert's role in relation to the Quattro DA 62

Findings of fact 67

Corrupt conduct 68

Section 74A(2) statement 68

Chapter 7: Conduct of Rod Oxley 69

Mr Oxley's official responsibilities and obligations 69

Mr Oxley as a witness 69

Mr Oxley's relationship with Mr Vellar 69

Mr Oxley's role in relation to the Quattro DA 71

Mr Oxley's awareness of the Morgan and Vellar relationship 78

Findings of fact 79

Corrupt conduct 79

Other conduct 79

Section 74A(2) statement 81

Chapter 8: Conduct of Joe Scimone 82

Mr Scimone's official responsibilities and obligations 82

Mr Scimone as a witness 82

Mr Scimone's relationship with Messrs Vellar and Tabak 82

Mr Scimone's relationship with Ms Morgan 83

Mr Scimone's knowledge of Ms Morgan's relationships with developers 83

Mr Scimone's failure to report Ms Morgan 84

Modification to the Victoria Square section 94 contributions 84

Findings of fact 85

Corrupt conduct 86

Section 74A(2) statements 87

Chapter 9: Dealings between Val Zanotto and Frank Vellar 88

Mr Zanotto's official obligations 88

Mr Zanotto's relationship and dealings with Mr Vellar 89

False or misleading responses to the Commission by Messrs Vellar and Zanotto 90

Mr Zanotto's conduct in relation to the Pavilion DA 90

Mr Vellar's 'tip-off' about the proposed rezoning of the Hills Trucks Sales site 91

Assessment of the evidence 94

Findings of fact 94

Corrupt conduct 94

Section 74A(2) statement 95

Chapter 10: Conduct of Kiril Jonovski, Zeki Esen and Frank Gigliotti 96

Background to the meeting with Mr Vellar on 18 October 2006 96

Mr Vellar's bribery allegation 96

The Councillors' responses to Mr Vellar's allegation 97

Resolution of the competing claims 98

Was any payment made? 99

Non-disclosure of directorships in pecuniary interest returns 99

Findings of fact 101

Corrupt conduct 101

Section 74A(2) statements 101

Chapter 11: Conduct involving Ray Younan and Gerald Carroll 103

Background and credibility of Messrs Younan and Carroll 103

Dealings with Mr Vellar 103

Dealings with Ms Morgan 107

Dealings with Mr Zanotto 108

Dealings with Mr Tabak 110

Dealings with Michael Kollaras 110

Dealings with Messrs Gigliotti, Scimone and Tasich 111

Sources of information known to Messrs Younan and Carroll 113

Findings of fact 113

Section 74A(2) statement 114

Chapter 12: Mr Gigliotti's statutory declaration of 11 July 2008 116

How the allegation came to the Commission's attention 116

The meeting 116

The alleged disclosure to a Commission officer 117

Findings 119

Section 74A(2) statement 119

Chapter 13: Corruption prevention issues 120

Context 120

Planning systems at Wollongong City Council 121

Misuse of information 131

Systemic weaknesses conducive to corrupt conduct 133

Afterword: What Wollongong City Council has done to address corruption 139

Appendix 1: The role of the Commission 141

Appendix 2: Corrupt conduct defined and the relevant standard of proof 142

© ICAC

Key abbreviations and acronyms used in this report

CC	Construction Certificate
Crimes Act	*Crimes Act 1900* (NSW)
CWPC	Central Wollongong Planning Committee
DA	development application
DAC	Development Assessment and Compliance Division
DCP	Development Control Plan
DIPNR	(former) Department of Infrastructure, Planning and Natural Resources
Draft WCCS Plan	*Draft Wollongong City Centre Structure Plan (A Strategy for the Revitalisation of the Wollongong City Centre)*
DRP	Design Review Panel
EPA Act	*Environmental Planning and Assessment Act 1979* (NSW)
EPD	Environment and Planning Directorate
FSR	floor space ratio
IHAP	Independent Hearing and Assessment Panel
IPC	Informal Planning Conference
IREP 1	*Illawarra Regional Environmental Plan No. 1*
LEP	Local Environmental Plan
LG Act	*Local Government Act 1993* (NSW)
OC	Occupation Certificate
PAU	Preliminary Assessment Unit
SEE	Statement of Environmental Effects
SEPP 1	*State Environmental Planning Policy No. 1 – Development Standards*
UDAS	Urban Design Advisory Service
UDS	Urban Design Study
WCC	Wollongong City Council
WCCLEP 2007	*Wollongong City Centre Local Environmental Plan 2007*
WLEP 1990	*Wollongong Local Environmental Plan 1990*

© ICAC

Executive summary

This is the third part of a three-part report by the Independent Commission Against Corruption ("the Commission") in relation to its investigation of serious and systemic corruption associated with Wollongong City Council ("the Council").

This investigation

The Commission's investigation in this matter resulted from an anonymous complaint received in 2006 that Beth Morgan, a senior Wollongong City Council planning officer, had given favourable treatment to a developer named Frank Vellar from whom she had improperly accepted gifts and other benefits. The Commission determined that it was in the public interest to conduct an investigation for the purpose of determining whether any corrupt conduct had occurred.

As part of its investigation the Commission held a public inquiry from 18 February to 4 March 2008 at which 14 persons testified and around 1,000 documents were tendered. The Hon Jerrold Cripps QC, Commissioner, presided at the inquiry and Noel Hemmings QC was Counsel Assisting the Commission.

This report

This third and final part of the report addresses all relevant matters arising out of the Commission's investigation that were not dealt with in the first two parts of the report, released on 4 March 2008 and 28 May 2008 respectively.

Beth Morgan

As a result of its investigation, the Commission found that Ms Morgan actively pursued close personal relationships with Mr Vellar, Bulent ("Glen") Tabak and Michael Kollaras, in order to ingratiate herself with them and to try to secure them as future clients for a proposed consulting business she wanted to establish.

During the periods of these relationships with Messrs Tabak, Vellar and Kollaras, Ms Morgan was responsible for assessing and determining a number of development applications lodged with the Council on behalf of companies owned or controlled by them and she assessed or determined each one in a way favourable to their interests.

Mr Tabak's Victoria Square and Mr Vellar's Quattro were two of the largest developments examined by the Commission. Ms Morgan was responsible for assessing and approving both development applications. There was unchallenged expert evidence, which was accepted by the Commission, that the decisions to grant approval were unlawful. The evidence established that, *inter alia*:

- the requirements of the Council's Informal Planning Conferences Policy were not followed;
- the applications under *State Environmental Planning Policy No. 1* (SEPP 1) to vary the maximum floor space ratios were not well-founded and any reasonable person having regard to the relevant criteria for assessment of a SEPP 1 application would have determined that they were not well-founded; and
- there was no justification on planning grounds to grant concurrence to the height of the developments under clause 139(2) of the *Illawarra Regional Environmental Plan No. 1* and no reasonable person having regard to relevant matters would have concluded that there was such justification.

Council management

In terms of the contribution of the conduct of Council management to the corrupt conduct that the ICAC has found occurred, the investigation examined three main areas.

In respect of the conduct of John Gilbert, the Manager of Development Assessment and Compliance (DAC) from October 2003 until November 2007, the Commission is satisfied that by the end of 2004 (at which time Ms Morgan was the responsible officer for both the Quattro and Pavilion DAs) Mr Gilbert knew that Ms Morgan and Mr Vellar had a friendship involving "dinner dates" and by mid-2005 he knew that they had an intimate relationship as a couple, even if he had no actual knowledge of the sexual nature of their relationship. Not only did Mr Gilbert take no effective

action to deal with Ms Morgan's conflict of interest, but he also failed to appropriately deal with complaints he received about Ms Morgan's relationship with Mr Vellar.

In respect of the conduct of Joe Scimone, the Manager Engineering Services from 1992 to 2006 and the Group Manager Sustainability from 2006 to 2007, the Commission is satisfied that he:

- was aware of possible corrupt conduct and maladministration by Ms Morgan and suspected breaches of the Council's Code of Conduct by her relating to her relationships and dealings with Messrs Tabak and Vellar;
- was aware that he was under a positive obligation to report his knowledge and suspicions relating to Ms Morgan's relationships and dealings with Messrs Tabak and Vellar to the Council but deliberately failed to do so because of his personal affection for her and his friendship with Messrs Tabak and Vellar;
- accepted a watch costing $10,000 as an inducement to ensure that an imminent application to the Council on behalf of Perform Developments Pty Ltd, a company controlled and half-owned by Mr Tabak, for the reduction of section 94 contributions payable in respect of Victoria Square was approved;
- overruled planning staff who opposed Mr Tabak's application and directed that a report be prepared recommending that the application be approved, when he did not have a genuine belief that it should have been approved.

Finally, in respect of Mr Oxley, the Council's General Manager from 1988 to 2007, the Commission found that:

- some of his conduct had the direct effect of interfering with or overriding established governance mechanisms (such as Council's Contributions Plans, the objects of SEPP 1, the receipt of expert planning advice and the decisions and oversight of Council) and the Code of Conduct;
- his behaviour, both in terms of specific conduct and his more general pro-development beliefs, created obvious behavioural cues that could have adversely influenced the approach that planning staff adopted when assessing DAs;
- his pro-development enthusiasm was well-understood within Council's DAC Division, and much of his conduct examined in the report was known to Ms Morgan and others in the Division and not only had the potential to adversely affect their exercise of official functions but, in the case of Ms Morgan, did so;
- his failure to take action in response to information brought to his attention that Ms Morgan had a conflict of interest clearly had the effect of allowing her corrupt conduct to continue.

The Commission is satisfied that Mr Oxley's conduct increased the likelihood of corrupt conduct occurring and was conduct that was liable to "allow, encourage or cause the occurrence of corrupt conduct".

Ray Younan and Gerald Carroll

The Commission also investigated the conduct of Ray Younan and Gerald Carroll who in 2007 obtained substantial payments from a number of persons by falsely representing that they knew or actually were Commission officers and that they, or Commission officers they claimed to be corrupt, could affect the Commission's investigation in favour of those persons. They received payments of $120,000 from Mr Vellar, $50,000 from Ms Morgan, $120,000 from then Councillor Valerio ("Val") Zanotto, $30,000 from Council employee Joseph Scimone, $20,000 from another developer, Lou Tasich, and a case of whiskey from then Councillor Frank Gigliotti valued at $500. Mr Zanotto also authorised Mr Younan to collect and temporarily retain $154,000 which he claimed to be a debt from Mr Vellar. Although Mr Younan collected the $154,000 he did not repay Mr Zanotto.

Findings of corrupt conduct and section 74A(2) statements

The Commission has found that Ms Morgan and Messrs Vellar, Tabak, Gilbert, Oxley, Scimone, Zanotto, Jonovski, Gigliotti, and Esen engaged in various forms of corrupt conduct between 2004 and 2007. The Commission did not find that Mr Kollaras engaged in corrupt conduct.

Pursuant to section 74A(2)(a) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of :

© ICAC

- Ms Morgan for various offences, including offences under section 249B(1) of the *Crimes Act 1900* (NSW) ("the Crimes Act") of corruptly receiving benefits from Mr Tabak in relation to her assessment and determination of his Victoria Square DA and from Mr Vellar in relation to her giving favourable treatment to a number of his DAs and improperly providing him with Council information; the common law offence of misconduct in public office in relation to her assessment and determination of the Victoria Square DA, favourable assistance provided to Mr Kollaras, her assessment and determination of Mr Vellar's Quattro DA and her conduct in relation to other developments for which Mr Vellar was responsible; and various offences under section 80(c) of the ICAC Act of wilfully making a false statement to or misleading the Commission;

- Mr Vellar for various offences, including offences under section 249B(2) of the Crimes Act of corruptly giving benefits to Ms Morgan in return for her giving favourable treatment to a number of his DAs and improperly providing him with Council information; and various offences under section 80(c) of the ICAC Act of wilfully making a false statement to or misleading the Commission;

- Mr Tabak for various offences, including offences under section 249B(2) of the Crimes Act of corruptly giving benefits to Ms Morgan in relation to her assessment and determination of his Victoria Square DA and Mr Scimone in relation to the assessment of an application relating to contributions payable to Council for the Victoria Square development; and offences under section 80(c) of the ICAC Act of wilfully making a false statement to or misleading a Commission officer;

- Mr Scimone for an offence under section 249B(1) of the Crimes Act of corruptly receiving a benefit from Mr Tabak in relation to his assessment of an application relating to contributions payable to Council for the Victoria Square development;

- Mr Zanotto for the common law offence of misconduct in public office in relation to his release of confidential Council information to Mr Vellar, and an offence under section 80(c) of the ICAC Act of wilfully making a false statement to or misleading the Commission;

- Messrs Jonovski, Gigliotti, and Esen for offences under section 249B(1) of the Crimes Act of corruptly soliciting a benefit from Mr Vellar in return for favouring Mr Vellar's proposal for redevelopment of the North Beach Bathers' Pavilion, offences under section 80(c) of the ICAC Act of wilfully making a false statement to or misleading the Commission, and, in the case of Mr Gigliotti, an offence under section 11 of the *Statutory Declarations Act 1959* in relation to making false statements in a statutory declaration;

- Messrs Younan and Carroll for various offences relating to the obtaining of substantial payments by falsely representing that they knew or actually were Commission officers and that they, or Commission officers they claimed to be corrupt, could affect the Commission's investigation in favour of those persons; and

- Mr Tasich for an offence under section 249B(2) of the Crimes Act of corruptly giving a benefit to improperly affect the Commission's investigation.

Corruption prevention

Although council planning departments are regulators of developers, planners must also work with developers in a negotiating relationship. This is the danger: planners have high levels of discretion, developers are highly motivated to maximise profit, and the two are in an extended relationship of give and take.

Numerous developers in the Wollongong local government area stood to reap substantial profits through developments relying on SEPP 1 objections. Mr Vellar, for instance, stood to gain millions of dollars from the approval of his Quattro DA. Mr Tabak's potential windfall from the Victoria Square DA was also substantial.

The strongest defences against predatory behaviour by developers are:

- To create internal and external firewalls that separate, weaken or otherwise interfere with potentially corrupt relationships between developers and public officials

- To create a transparent external oversight system that detects when corruption breaches the firewalls.

When these defences fail, corruption can spread unchecked throughout an organisation.

Failure of internal firewalls

In a functioning council, the relative independence of senior management and councillors from the planner-developer negotiations creates a firewall that is intended to stop the spread of corruption. If the developer is able to corrupt the planner, the independence of the manager and councillors as the authorising and policy-setting body should limit the effect of corruption. In Wollongong the council's internal firewalls against corrupt conduct were largely undermined or ignored by Mr Oxley, creating a straightforward opportunity for corrupt developers to influence the DA assessment process from start to finish.

Mr Oxley's dismantling of internal firewalls and the lack of external or arms' length scrutiny of the decision process through a SEPP 1 register allowed corruption to spread.

Weaknesses in the external firewalls and detection

External oversight is a key line of defence in preventing and detecting corruption within an organisation. When corruption is widespread and affects the highest levels of management, external bodies are often the only realistic hope for limiting its effect. In hindsight, it is possible the Department of Planning could have played such a role particularly through its entitlement to withhold concurrence for SEPP 1 dispensations.

The Department also could have been more active in obliging council to record and report its SEPP 1 decisions, which was an extant but unenforced requirement. The completion of such records and their scrutiny by the Department may have given an earlier indication of the abuse of SEPP 1 in approvals granted by the council.

Major recommendations

A total of 27 corruption prevention recommendations are made in this report. A number of these recommendations will have broader relevance and the Commission encourages all NSW local councils to consider their applicability. The Commission's major recommendations include:

- That Wollongong City Council publish a register of DA determinations that rely on SEPP 1 and that the NSW Department of Planning monitor and enforce the requirements for all consent authorities to keep records of their assessment of development applications seeking a variation to development standards.
- That the NSW Minister for Planning consider expanding the classes of development for which Joint Regional Planning Panels will be the consent Authority to include certain categories of development relying on SEPP 1 objections.
- That the NSW Minister for Planning consider ways in which Joint Regional Planning Panels can be made resistant to improper influence, such as:
  - Regularly rotating panel members across different panels
  - Limiting the tenure of panel members
  - Drawing panel members on a random basis, or at least in a manner which makes their appointment difficult to predict.
- That Wollongong City Council establish an Independent Hearing and Assessment Panel; re-establish the position of Internal Ombudsman; train and appoint additional protected disclosure officers; and reconstitute its Audit and Governance Committee with an independent chairperson.
- That Wollongong City Council rewrite the position descriptions, contracts and performance agreements of the General Manager and relevant senior managers so that the desired anti-corruption behaviour is recognised and rewarded.

Implementation of corruption prevention recommendations

As part of the performance of its statutory functions the Commission will monitor the implementation of these recommendations.

The recommendations will be communicated to the Council, the Department of Planning and the Minister for Planning, with a request that implementation plans for the recommendations be provided to the Commission within three months of publication of this report. The Commission will also request progress reports on the implementation of recommendations at intervals of 12 and 24 months after the publication of this report.

These reports will be posted on the Commission's website at www.icac.nsw.gov.au for public viewing.

© ICAC

Chapter 1: Introduction

This is the third part of a three-part report by the Independent Commission Against Corruption ("the Commission") in relation to its investigation of serious and systemic corruption associated with Wollongong City Council ("the Council").

The main subjects of the investigation were:

- Beth Morgan, a former Senior Development Project Officer at the Council;
- Property developers Bulent ("Glen") Tabak, Michael Kollaras, Franco ("Frank") Vellar and Lou Tasich;
- John Gilbert, Manager Development Assessment and Compliance at the Council from October 2003 to November 2007;
- Rod Oxley, General Manager of the Council from 1988 to May 2007;
- Joseph ("Joe") Scimone, who held a range of positions with the Council from 1984 to February 2007;
- Valerio ("Val") Zanotto, Kiril Jonovski, Frank Gigliotti and Zeki Esen, each of whom was a Wollongong City Councillor from March 2004 to March 2008; and
- Raymond ("Ray") Younan and Gerald Carroll, who falsely represented that they were Commission officers.

Why the Commission investigated

One of the principal functions of the Commission, as specified in section 13(1)(a) of the ICAC Act, is to investigate any allegation or complaint, or any circumstances which in the Commission's opinion imply, that "corrupt conduct" may have occurred. In exercising this and all of its other functions the Commission is required, pursuant to section 12A of the ICAC Act, to, as far as practicable, "direct its attention to serious and systemic corrupt conduct". The role of the Commission is explained in more detail in Appendix 1. The definition of "corrupt conduct" is set out in Appendix 2.

The Commission's investigation in this matter resulted from an anonymous complaint in 2006. The complainant alleged that Ms Morgan had given favourable treatment to Mr Vellar from whom she had improperly accepted gifts and other benefits. The Commission determined that it was in the public interest to conduct an investigation for the purpose of determining whether any corrupt conduct had occurred.

The Commission's investigation

The Commission's investigation ultimately involved an examination of four matters:

1. the assessment by Ms Morgan, and other Council officers (including Messrs Gilbert, Oxley and Scimone) or Councillors, of development applications or applications to modify the conditions of consent for approved development[1] submitted to the Council by or on behalf of companies owned or controlled by Mr Vellar, Mr Tabak and Michael Kollaras;
2. the improper provision of Council information by Ms Morgan to Mr Vellar;
3. other dealings between Messrs Vellar, Tabak or Kollaras and Council officers or Councillors (including Messrs Zanotto, Jonovski, Gigliotti and Esen); and
4. allegations about the involvement of Mr Younan and Mr Carroll in the impersonation of Commission officers, the solicitation and obtaining of payments of almost $500,000 from various persons under investigation by the Commission and the provision of false or misleading information to the Commission.

The Commission questioned over 50 witnesses, issued 90 notices under section 22 of the ICAC Act requiring recipients to produce documents and records, issued 24 notices under section 21 of the ICAC Act requiring recipients to provide statements of information,

1 Section 96 of the EPA Act sets out the circumstances and conditions by which applicants may seek approval for modifications to a development for which consent has been granted. This requires the submission of a new DA that specifies the modifications or changes to development consent conditions being sought.

© ICAC

executed 10 search warrants, reviewed hundreds of thousands of documents and electronic records, lawfully intercepted a number of telephone conversations and conducted 14 compulsory examinations.

Public inquiry

After considering the matters set out in section 31(2) of the ICAC Act and determining that it was in the public interest to do so, the Commission held a public inquiry over 12 days from 18 February to 4 March 2008. The Hon Jerrold Cripps QC, Commissioner, presided at the inquiry and Noel Hemmings QC acted as Counsel Assisting the Commission. Fourteen witnesses testified at the inquiry and around 1,000 documents were tendered.

In accordance with the usual practice of the Commission and the requirements of procedural fairness, submissions on possible findings were made by Counsel Assisting and an opportunity to respond given to those who may be the subject of adverse findings. Where appropriate, additional material and supplementary submissions were also provided. All submissions received in response were considered in preparing this report.

Content of this report

This third and final part of the Commission's report addresses all relevant matters arising out of the investigation that were not dealt with in the first two parts of the report.

Part One of the Commission's report was released on 4 March 2008. It contained a statement that the Commission was of the opinion that "systemic corruption" existed within the Council because of the conduct of then-Councillors Zanotto, Jonovski, Gigliotti and Esen, who comprised a majority of the seven-member ALP caucus which effectively controlled or had the potential to control the 13-member Council. It also contained a recommendation under section 74C(1) of the ICAC Act that consideration be given to the making of a proclamation under the *Local Government Act 1993* ("the LG Act") that all civic offices of the Council be declared vacant. On 4 March 2008 the Governor of New South Wales made such a proclamation and appointed three persons as Administrators of the Council.

Part Two of the Commission's report was released on 28 May 2008. It contained 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" in connection with the grant of the consent by Ms Morgan, who assessed and effectively approved the DA for the development, and Mr Vellar, who controls the company proposing the development. The Land and Environment Court is currently considering an application from the Council to revoke the consent granted for that development.

This third and final part of the Commission's report addresses the following matters:

- the assessment and determination by Ms Morgan of DAs submitted to the Council by or on behalf of a company owned and controlled by Mr Tabak, including a DA for a $31 million development known as "Victoria Square" (Chapter 3);
- the assessment and determination by Ms Morgan of DAs submitted to the Council by or on behalf of companies owned and controlled by Michael Kollaras (Chapter 4);
- the assessment and determination by Ms Morgan of DAs (relating to developments other than Quattro) submitted to the Council by or on behalf of companies owned and controlled by Mr Vellar, including a DA for the North Beach Bathers' Pavilion in Wollongong, and the provision of Council information by Ms Morgan to Mr Vellar in relation to miscellaneous matters (Chapter 5);
- the conduct of Mr Gilbert relating to Ms Morgan, Mr Vellar and the Quattro DA (Chapter 6);
- the conduct of Mr Oxley relating to Ms Morgan, Mr Vellar and the Quattro DA (Chapter 7);
- the conduct of Mr Scimone relating to Ms Morgan, Mr Tabak and an application in 2006 to modify the conditions of consent for Victoria Square (Chapter 8);
- dealings between Mr Zanotto and Mr Vellar involving an undisclosed conflict of interest and the improper release of Council information (Chapter 9);
- the alleged solicitation of a bribe, in the form of a political donation, from Mr Vellar by Messrs Jonovski, Gigliotti and Esen and other relevant conduct of these three former Councillors (Chapter 10);

- the activities of Messrs Younan and Carroll and persons dealing with them, including Ms Morgan and Messrs Vellar, Zanotto, Tabak, Kollaras, Gigliotti, Scimone and Tasich (Chapter 11);
- circumstances relating to a statutory declaration sworn by Mr Gigliotti on 11 July 2008 containing a complaint about the Commission's investigation (Chapter 12); and
- issues and recommendations relating to corruption prevention (Chapter 13).

Findings are made in this third part of the report that Ms Morgan and Messrs Vellar, Tabak, Gilbert, Oxley, Scimone, Zanotto, Jonovski, Gigliotti and Esen engaged in various forms of corrupt conduct. A finding is also made that other conduct of Mr Oxley was liable to allow, encourage or cause the occurrence of corrupt conduct.

Statements are made pursuant to section 74A(2)(a) of the ICAC Act that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Ms Morgan and Messrs Vellar, Tabak, Scimone, Zanotto, Jonovski, Gigliotti, Esen, Younan and Tasich for various criminal offences.

Mr Younan's failure to appear at the public inquiry

Prior to the public inquiry Mr Younan was examined by the Commission in private on two occasions and on each occasion he was represented by a barrister, Timothy Murphy. As detailed in Chapter 11 of this part of the report, Mr Younan gave false evidence at each of the examinations and he also produced a fabricated document.

On 14 January 2008 Mr Younan was served with a summons requiring him to appear at the public inquiry on 18 February 2008 to give evidence. On 22 January 2008 he travelled overseas and he has not returned since. Mr Murphy appeared at the public inquiry and applied for leave to represent Mr Younan. Leave was granted and Mr Murphy was afforded the opportunity of representing Mr Younan's interests throughout the inquiry. Mr Murphy informed the Commission that Mr Younan had told him that he was too ill to return to Australia for the public inquiry and Mr Murphy produced documents purporting to support Mr Younan's claim. On 21 February 2008 the Commissioner issued a warrant for Mr Younan's arrest under section 36 of the ICAC Act.

During the course of the public inquiry serious allegations were made against Mr Younan by numerous witnesses. Mr Murphy did not seek to challenge their evidence through cross-examination. Transcripts of the testimony of those witnesses were promptly placed on the Commission's public website, which can be accessed from overseas. In addition, most of the allegations had been directly or indirectly raised with Mr Younan himself on the two occasions he was examined prior to the public inquiry.

After the public inquiry a copy of the written submissions from Counsel Assisting, which contained recommendations that findings of corrupt conduct be made against Mr Younan and that advice be obtained from the Director of Public Prosecutions with respect to the prosecution of him for serious criminal offences, was provided to Mr Murphy. He was invited to provide a response on behalf of Mr Younan, with whom he was in regular contact via telephone and facsimile. Mr Murphy subsequently informed the Commission that he would not provide any response because Mr Younan had declined to accept a copy of Counsel Assisting's submissions from him and had not given him adequate instructions. The Commission has not received any submissions from or on behalf of Mr Younan responding to the allegations against him, but Mr Murphy and another barrister continued to represent Mr Younan in relation to other communications with the Commission.

On 5 July 2008 the *Sydney Morning Herald* published an article entitled "Conman in Valley of the Saints" in which it reported that the newspaper had made contact with Mr Younan overseas. The article included the following text:

> *Younan said* [the Commission's] *inquiry was compromised from the start, with sensitive information about what its investigators had dug up leaked to him before the scandal was made public.*
>
> *"A detailed report, with all the names and all the details, was hung on my door before this came out in public. Hung on my front door for everyone to read it! How did that happen? Why would anyone do that?*
>
> *"They were trying to turn everyone against each other."*
>
> *Younan claims that, through the inquiry, he was being kept abreast of most things going on behind the scenes. "I have a source, sources, who were tipping me off about everything the whole way through. It's ICAC that has the problems, not me."*

It is noted that the reference to a "detailed report" having been hung on Mr Younan's front door appears to relate to a formal notice issued to Mr Younan by the Commission under section 22 of the ICAC Act

requiring him to provide to the Commission the documents identified in the notice. The notice was left at the front door of Mr Younan's home premises (with his knowledge) in accordance with the provisions for service of such documents in section 108 of the ICAC Act.

The document was not a "detailed report", did not contain "sensitive information about what [ICAC] investigators had dug up" and was not "leaked" to him. The notice was specifically intended for Mr Younan and his receipt of it did not compromise the Commission's investigation in any respect.

While it was reported in the newspaper article that Mr Younan claimed to have "sources, who were tipping [him] off", it was not reported that he had claimed that those sources were ICAC officers and, as was readily apparent from the evidence given by numerous witnesses at the public inquiry, it was other persons under investigation by the Commission who provided Mr Younan with information about the Commission's investigation. It was further apparent to the Commission, from lawfully intercepted telephone calls and covert surveillance, that Mr Younan was unaware that he was under investigation until the Commission executed search warrants at his home in late October 2007.

Mr Younan has been invited by the Commission, through communications with each of his barristers, to return to Australia or send any relevant information he might have in writing, but he has done neither.

Implementation of corruption prevention recommendations

A total of 27 corruption prevention recommendations are made in this report. As part of the performance of its statutory functions the Commission will monitor the implementation of these recommendations.

The recommendations will be communicated to the Council, the Department of Planning and the Minister for Planning, with a request that implementation plans for the recommendations be provided to the Commission within three months of publication of this report. The Commission will also request progress reports on the implementation of recommendations at intervals of 12 and 24 months after the publication of this report.

These reports will be posted on the Commission's website at www.icac.nsw.gov.au for public viewing.

Recommendation that this report be made public

Pursuant to section 78(2) of the ICAC Act, the Commission recommends that this report be made public immediately. This recommendation allows either presiding officer of the Houses of Parliament to make the report public, whether or not Parliament is in session.

© ICAC

Chapter 2: Background

This chapter outlines relevant background information and general matters relating to Ms Morgan and Messrs Tabak, Kollaras and Vellar, whose conduct is the central focus of Chapters 3 to 5 of this part of the report.

Ms Morgan's positions at the Council

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

In May 2000 Ms Morgan was employed by the Council as a town planner in the position of Development Project Officer. In September 2002 she was promoted to the position of Senior Development Project Officer (SDPO), the highest level of town planner at the Council. From January 2006 to October 2006 she acted in the higher position of Development Manager, Administration (which may have had a different title at times). During this period she continued to perform some of the functions of her substantive SDPO position. On 23 October 2006 she was appointed as Development Manager, Administration on a substantive basis and she held that position until June 2007, when her employment was terminated for "serious misconduct" (discovered by the Council as a result of the Commission's investigation). All of the positions held by Ms Morgan were within the Council's Development Assessment and Compliance (DAC) division.

From late 2002 until the end of 2005 Ms Morgan's immediate supervisor was Ron Zwicker, whose position during most of that period was Assistant Manager of the East Planning Team within the DAC Division. During this period and up until November 2007 Mr Zwicker's immediate supervisor was John Gilbert, Manager, Development Assessment and Compliance. When Ms Morgan occupied the position of Development Manager, Administration from January 2006 to June 2007 she reported directly to Mr Gilbert.

From November 2003 until the end of June 2005 Mr Gilbert's immediate supervisor was David Broyd, Director, Environment and Planning. On 1 July 2005 Mr Broyd resigned and his responsibilities, including directorship of the DAC Division, were taken over for a period of around seven months by Rod Oxley, General Manager of the Council from 1988 until May 2007.

In February 2006 a new position of Group Manager Sustainability, which included overall responsibility for the DAC Division, was created and Joe Scimone, who had been the Manager, Engineering Services at the Council for the previous 14 years, was appointed to act in it until February 2007, when his employment with the Council ceased.

Official responsibilities and obligations

The Position 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 indicated that her authority was "subject to any policies and procedures that may be determined from time to time".

The Position 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* ['EPA Act']"; and "[d]emonstrated ability to … take appropriate action to ensure compliance with relevant statutory requirements". The EPA Act, among other things, specifically identifies matters that must be taken into consideration in determining applications for development or applications to modify conditions of consent for development. The nature of these two types of applications is different, but in this report each is generally referred to as a development application (or "DA") for convenience.

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.

Ms Morgan was under a number of obligations arising from the public nature of the positions held by her, the provisions of the *Local Government Act 1993* ("the LG Act") and the terms of the Council's successive Codes of Conduct[2] and other Council policies.

During the period of her employment with the Council Ms Morgan (and other Council officers and Councillors referred to in this report) was, apart from her obligations to not commit any criminal offence, under six basic obligations that are particularly pertinent in relation to the Commission's investigation.

First and foremost, as a public official, Ms Morgan was obliged to act honestly and impartially in performing her official functions. This fundamental duty was acknowledged by section 439 of the LG Act and referred to in each relevant Code of Conduct.

Second, Ms Morgan was obliged to follow Council policies even if she did not agree with or approve of them.

Third, Ms Morgan was obliged to avoid, or at least disclose, any actual, potential or reasonably perceived conflict between the impartial performance of her official functions and her personal interests, including any conflict arising because of a non-pecuniary interest such as a friendship. The applicable Codes from 1 January 2005 onwards provided that disclosures must be made "promptly, fully and in writing".

Fourth, Ms Morgan was obliged to reject, or at least disclose, offers of non-token gifts or benefits and record them in the Council's Gifts Register. It is apparent that she was aware of this obligation from an early stage of her employment with the Council because in December 2001 she recorded in the Gifts Register that she had been offered flowers by Mr Vellar and one of his business partners. This is the only gift or benefit she ever recorded in the Register.

Additional obligations in relation to the receipt of gifts or benefits were imposed on Ms Morgan under Part 2 of Chapter 14 of the LG Act after she became a "senior" member of staff in September 2002, which resulted in her being under a statutory duty 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 (including "accommodation incidental to a journey") received during the previous financial year. Ms Morgan completed such returns in each of the four years from 2003 to 2006 (inclusive) and in none of them did she disclose having received a gift or contribution to travel from any person or entity.

Fifth, while Ms Morgan had delegated authority to "[r]elease on behalf of Council information regarding the business of the Council and records of Council kept on any medium", that authority was "subject to compliance with Council's policy." Relevant Council policies contained numerous restrictions and prohibitions. For example, since 19 November 2002 the Council has had a policy on Computer Systems Acceptable Usage, containing the following provision (at para 3.4):

> *Unless expressly authorised to do so, staff are prohibited from sending, transmitting, or otherwise distributing, propriety information, data, or other confidential information belonging to Council.*

The Council's Code of Conduct placed further obligations and restrictions on Ms Morgan in relation to the use of Council information, including (but not limited to) confidential information.

For example, both the Model Code of Conduct and the 2005 Code of Conduct included the following provisions:

> 9.7 *You must:*
>
> - *protect confidential information;*
> - *only access information needed for council business;*
> - *not use confidential information for any non-official purpose;*
> - *only release confidential information if you have authority to do so; …*
> - *only release other information in accordance with established council policies and procedures and in compliance with relevant legislation;*
> - *not use council information for personal purposes*
>
> …

2 Relevant Codes of Conduct were adopted by the Council in September 1999 (the "1999 Code of Conduct"), June 2004 (the "2004 Code of Conduct") and February 2005 (the "2005 Code of Conduct"). The latter Code was essentially an adoption of the Model Code of Conduct issued by the Department of Local Government on 23 December 2004 (the "Model Code of Conduct"). Pursuant to section 440(5)(b) of the LG Act, Ms Morgan (and all other Council officers and Councillors) was under a statutory duty to comply with the Model Code of Conduct from 1 January 2005 until 28 February 2005 when she was required to comply with the virtually identical 2005 Code of Conduct. Each Code stipulates that breaches may give rise to disciplinary action.

© ICAC

> *9.9 You must not use confidential information gained through your official position for the purpose of securing a private benefit for yourself or any other person.*
>
> *9.10 You must not seek or obtain, either directly or indirectly, any financial benefit or other improper advantage for yourself, or any other person or body, from any information to which you had access in the exercise of your official functions or duties by virtue of your office or position.*

Furthermore, on 29 November 2005 a new Council policy clarifying restrictions on the disclosure of land ownership records was emailed to relevant staff, including Ms Morgan.

Sixth, at all relevant times Ms Morgan was obliged to create and retain documentary records relating to the exercise of her official functions, particularly when making decisions under delegated authority. For example, the 2004 Code of Conduct provided (at para 4.2) that:

> *When making decisions or taking actions under a delegated authority we have a duty to ensure that: … The decision and the evidence upon which it is based are properly documented.*

In addition, the Model Code of Conduct and the 2005 Code of Conduct each contained the following provision (at para 4.5):

> *You are accountable to the public for your decisions and actions and must consider issues on their merits, taking into account the views of others. This means recording reasons for decisions; submitting to scrutiny; keeping proper records; establishing audit trails.*

The obligation to adequately record reasons for decisions is particularly important in relation to the determination of DAs in light of the fact that sections 79C and 96 of the EPA Act identify a range of specific matters that must be taken into consideration in making such determinations.

The Commission is satisfied that at all relevant times Ms Morgan was aware of the basic obligations outlined above.

Overview of Ms Morgan's relationships with Mr Tabak, Mr Vellar and Michael Kollaras

Ms Morgan was married to Adam Morgan from April 2002 to August 2007. In October 2003 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 Bulent ("Glen") Tabak, Franco ("Frank") Vellar, Michael Kollaras and his brother and business 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".

The evidence establishes that Ms Morgan actively pursued personal relationships with Mr Vellar, Mr Tabak and Michael Kollaras in order to ingratiate herself with them and seek to secure them as future clients for her proposed private planning and development consulting business.

In April 2004 Ms Morgan commenced a sexual relationship with Mr Tabak, which lasted until June or July 2004. According to her own testimony, she received a cash payment of $2,200 from him in July 2004 and another cash payment of $3,300 from him in September 2004. Mr Tabak (belatedly) admitted the sexual relationship with Ms Morgan, but denied making either of the alleged payments.

In May 2004 Ms Morgan commenced a sexual relationship with Mr Vellar, which continued until at least February 2008, and from mid-2004 onwards she received a series of expensive gifts (including large cash payments and contributions to travel) from him.

Ms Morgan testified that in or around August 2004 she also commenced a sexual relationship with Michael Kollaras, which lasted until January 2005. However, Michael Kollaras has denied this claim and asserted that they merely had an "extremely close" and "very flirtatious" friendship.

During the periods of her personal relationships with Mr Tabak, Mr Vellar and Michael Kollaras, Ms Morgan was responsible for assessing and determining a number of DAs lodged with the Council on behalf of companies owned or controlled by them and she assessed or determined each one in a way favourable to their interests.

The personal relationships Ms Morgan had with Mr Tabak, Mr Vellar and Michael Kollaras while assessing DAs in which they had substantial interests gave rise

© ICAC

to obvious and extreme conflicts of interest, but at no stage did she disclose the details of those relationships to the Council in accordance with her obligations.

The Commission is satisfied that at all relevant times Ms Morgan:

(i) recognised that her relationships with Mr Tabak, Mr Vellar and Michael Kollaras gave rise to serious conflicts of interest;

(ii) was fully aware that she was obliged to avoid, or at least disclose, such conflicts; and

(iii) deliberately failed to do so.

Ms Morgan did not disclose to the Council any of the gifts she received from Mr Vellar or Mr Tabak and she also lodged pecuniary interest returns in 2004, 2005 and 2006 in which she falsely represented that she did not receive any gifts from any person. The Commission is satisfied that at all relevant times Ms Morgan was aware that she was obliged to reject, or at least disclose, such gifts and she deliberately failed to do so.

The Commission is further satisfied that Ms Morgan attempted to conceal from the Council her relationships with Mr Tabak, Mr Vellar and Michael Kollaras, and her receipt of relevant gifts, because she knew that if she disclosed them she might not be permitted to assess any DAs in which they had an interest. Her non-disclosures were motivated by a desire to improperly advance her own and their personal interests in ways identified in subsequent chapters of this report.

Credibility of Ms Morgan, Mr Tabak, Michael Kollaras and Mr Vellar

The Commission did not regard Ms Morgan, Mr Tabak, Michael Kollaras or Mr Vellar as satisfactory witnesses. In particular, as detailed in subsequent chapters of this report, Ms Morgan and Messrs Tabak and Vellar each provided false information to the Commission prior to the public inquiry. In addition, in relation to their testimony at both the public inquiry and previous compulsory examinations, the Commission generally found Messrs Tabak and Vellar to be unconvincing and uncooperative witnesses who were prepared to disregard the truth and would say whatever they thought would best serve their own interests.

Ms Morgan, although providing false information prior to the public inquiry, later became more cooperative and made a number of substantial admissions and concessions.

The Commission generally found Ms Morgan to be a more credible and convincing witness than Mr Tabak, Michael Kollaras or Mr Vellar in relation to matters where there were inconsistencies or outright conflicts between their evidence. However, the Commission did not regard Ms Morgan as an entirely candid and truthful witness. In particular, while she made a number of substantial admissions, she also often sought to minimise her culpability by, for example, unconvincingly claiming that she did not know why she had engaged in various forms of improper conduct. In addition, the Commission regarded evidence provided by Ms Morgan's former husband, Adam Morgan, and his mother, Barbara Morgan, as more believable than evidence given by Ms Morgan in relation to some matters referred to in following chapters of this report.

© ICAC

Chapter 3: Ms Morgan's assessment and approval of DAs relating to Glen Tabak

This chapter examines Ms Morgan's assessment and approval in 2004 and 2005 of three DAs relating to two major developments in Wollongong in which Mr Tabak had a substantial interest. Two of the DAs were signed by Mr Tabak himself and each development was owned and/or undertaken by Perform Developments Pty Ltd ("Perform Developments"). At relevant times Mr Tabak was a director and secretary of this company and he effectively held 50% of its shares through his ownership and control of another company, Perkay Pty Ltd, of which he was the sole secretary, director and shareholder.

The most significant development is Victoria Square. It is a 10-storey twin-tower building on Young and Belmore Streets in the Wollongong CBD containing 93 luxury residential units (including 10 penthouses and 19 terraces), 1,100 square metres of commercial space and 171 car parking spaces. It occupies an entire city block with an area of 4,207 square metres and is currently the largest high-density residential development in Wollongong. Construction was completed in late 2006 at a cost of approximately $31 million. The development has a floor space ratio (FSR) of 3.11:1 and a height of 31 metres, although the development controls that were applicable under relevant planning instruments prohibited the erection of a building on the site with a FSR of more than 1.5:1 or a height exceeding 11 metres. Ms Morgan was responsible for assessing and approving the initial DA for this development in 2004 and a subsequent application for modification of the conditions of consent in 2005. She also had some involvement in the assessment of a further application relating to the development in 2006, which is addressed in Chapter 8 of this report because the most significant integrity issues arising from that particular matter concern Joe Scimone rather than Ms Morgan.

The other relevant development is Wave Apartments. It is a nine-storey building on Church Street containing 21 residential units. Construction was completed in 2004 for a cost of approximately $8 million. Ms Morgan had no involvement in the assessment of the initial DA seeking approval for the development, which was granted in December 2002, but in June 2004 she assessed and approved an application to modify the conditions of consent for the development.

Relationship between Ms Morgan and Mr Tabak in 2004

Ms Morgan and Mr Tabak commenced a social relationship through meetings of the Table of Knowledge at around the time Ms Morgan returned to work at the Council on 1 March 2004. From 27 March to 14 April 2004 Mr Tabak was overseas and during this period Ms Morgan sent him a text message in which she requested that he buy her some duty-free perfume costing around $80. Mr Tabak bought the perfume and shortly after he returned to Australia he gave it to Ms Morgan as "a present". Ms Morgan admitted that at the time she knew that she should have disclosed this gift to the Council but did not do so. When asked at the public inquiry why she did not disclose it she said "I don't know".

Ms Morgan and Mr Tabak both (eventually) admitted that they had a sexual relationship from sometime in mid-to-late April until sometime between mid-June and mid-July 2004.

Throughout the period from mid-April 2004 (when Mr Tabak returned from overseas) to 15 July 2004 (when Mr Tabak travelled overseas again) Ms Morgan and Mr Tabak had almost-daily telephone contact, with an average of 4.5 calls or text messages per day. They also had numerous lunches together. It is apparent that even if their sexual relationship had concluded prior to 15 July 2004, they still had a very close friendship at this time. On 14 July 2004 Mr Tabak sent an email to Ms Morgan indicating that he regarded her as a valued friend and on 15 July 2004 Ms Morgan replied with the following text: "I just wanted to say you have not even left yet and I miss you already. Friends like you don't come around very often".

While Mr Tabak was overseas between 15 July and 23 August 2004 he and Ms Morgan maintained contact through emails and telephone calls or text messages. On the day Mr Tabak returned from overseas (23 August 2004) he and Ms Morgan had coffee together in the morning with other members of the Table of Knowledge. Later that day she sent him an email and there were five telephone calls or text messages between them. From 24 August 2004 until early October 2004 there continued to be regular and frequent telephone or email contact between Ms Morgan and Mr Tabak.

In addition:

- on 15 June 2004 Ms Morgan sent an email to Mr Scimone (set out in Chapter 8 of this report) in which she declared, among other things, that her future livelihood depended on persons like Mr Tabak and that she would do whatever was necessary to ensure that she earned a living;
- in June 2004 Mr Tabak arranged for significant plastering work to be undertaken at Ms Morgan's house; and
- Mr Tabak gave Ms Morgan a $2,200 cash payment in July 2004 and a $3,300 cash payment in late September 2004; he offered to sell her a unit in Victoria Square for a price below its market value in or before July 2004 and that the offer was still standing in late September 2004.

In light of all of these matters, the Commission is satisfied that throughout the period from March until early October 2004 Ms Morgan and Mr Tabak had a close personal relationship which, in relation to the impartial exercise by her of any Council functions affecting his interests, gave rise to an obvious and extreme conflict of interest.

In May 2007 the Commission issued a notice to Ms Morgan under section 21 of the ICAC Act requiring her to identify (among other things):

(i) the "precise nature of any relationship or association" she had had with Mr Tabak;

(ii) whether she had "had any kind of meeting with [him] for any purpose", other than an official Council meeting, or he had visited her house; and

(iii) whether she had received from, or been offered by, him any type of payment, gift or benefit.

Ms Morgan provided a response to the notice dated 4 June 2007 in which she addressed each of these three matters as follows:

(i) I would consider my relationship with [Mr] *Tabak to be that of an acquaintance;*

(ii) I have never had a meeting with [him] *other than an official Council meeting;*

(iii) Not that I am aware of.

During her testimony Ms Morgan admitted that each of these answers was deliberately false.

On two occasions prior to the public inquiry (in June and December 2007), Commission officers asked Mr Tabak whether he had ever had a sexual relationship with Ms Morgan and he said "no". During his testimony at the public inquiry he admitted that he had lied on each prior occasion.

Ms Morgan and Mr Tabak both offered various excuses as to why they provided false responses to the Commission. The Commission is satisfied that the overriding reason was that they both knew that truthful responses would disclose their wrongdoing and, in providing false responses, they intended to mislead the Commission in the hope that it would prevent detection of the corrupt activity they had engaged in.

Modification to development consent for Wave Apartments in mid-2004

On 9 June 2004 an application, signed by Mr Tabak, was lodged with the Council seeking to modify the previously-approved Wave Apartments development by changing a proposed three-bedroom unit on level six into a one-bedroom unit and changing the entry on level one. On 10 June 2004 the matter was allocated to Ms Morgan, as the sole "responsible officer". She approved the application on 16 June 2004. The Commission was unable to locate any records relating to the actual assessment of this application.

During the period that Ms Morgan assessed this application she was in a sexual relationship with Mr Tabak and she also sent an email to Mr Scimone in which she declared that her future livelihood depended on persons like Mr Tabak and other members of the Table of Knowledge, and that she would do whatever was necessary to ensure that she earned a living.

Due to the absence of relevant records, the Commission is unable to determine whether Ms Morgan acted corruptly in approving this application. However, the Commission is satisfied that Ms Morgan should never have had any involvement in relation to this application because of the obvious conflict of interest arising from her relationship with Mr Tabak. The Commission is further satisfied that Ms Morgan failed to disclose her conflict to the Council because she wanted to assess and approve the application herself in order to ingratiate herself with Mr Tabak.

© ICAC

Assessment and determination of the Victoria Square DA in 2004

Perform Developments purchased much of the land on which Victoria Square was built only shortly before or after the DA for this development was submitted to the Council on 9 July 2004. In March 2004 the then-owner of one large part of this land at 13 Belmore Street submitted a proposal to the Council for construction of a building containing six or nine residential apartments. The Council provided pre-lodgement advice between 19 and 29 April 2004 "that the current proposal would not be supported if lodged". The Council's assessment included the comment that any development on the site "should not look out of scale and out of context with what is surrounding". Shortly after receiving this advice the owner agreed to sell the land to Perform Developments. According to Council records, Ms Morgan was one of two "responsible officers" for this pre-lodgement application, but the Commission has been unable to ascertain the precise role she performed.

Overview of significant development controls and constraints

Pursuant to section 76A of the *Environmental Planning and Assessment Act 1979* ("EPA Act"), Victoria Square could be lawfully constructed 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 section 79C of the EPA Act. One such matter was the *Wollongong Local Environmental Plan 1990* ("WLEP 1990").

Under WLEP 1990 the site for Victoria Square was at all relevant times zoned 3(a) (General Business Zone) and had a maximum permissible floor space ratio (FSR) of 1.5:1. The FSR of Victoria Square is more than twice this control at 3.11:1. In light of this, there were only two possible means by which consent for the development could be lawfully granted:

- rezoning the land – this would have involved a potentially lengthy 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 DA for Victoria Square. It appears that at the time of the assessment and determination of this DA Ms Morgan had delegated authority to make determinations under SEPP 1, although the position is not entirely clear.

Another very important environmental planning instrument in relation to Victoria Square was the *Illawarra Regional Environmental Plan No. 1* ("IREP 1"). Pursuant to clause 139(2) of IREP 1 the Council was precluded from granting consent to the erection of a building on the Victoria Square 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 proposed Victoria Square development is almost three times this control at 31 metres (10 storeys).

In deciding whether to grant concurrence under clause 139(2) of IREP 1 the Director-General or his/her delegate is required to consider a range of matters specified in clause 139(3). It appears that at the time of the assessment and determination of the Quattro DA Ms Morgan had delegated authority to grant concurrence under clause 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 Wollongong City Centre Structure Plan (A Strategy for the Revitalisation of the Wollongong City Centre)* ("draft WCCS Plan") and *Draft Development Control Plan No. 56: City Centre Development* ("draft DCP 56"). 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. The Victoria Square site is located outside both the proposed "City Core and "City Frame". In addition, both the draft WCCS Plan and draft DCP 56 proposed that the Victoria Square site would:

- have a permissible FSR of 1.5:1, whereas Victoria Square has a FSR of 3.11:1; and
- accommodate a building height of three levels (10 metres), whereas Victoria Square has a height of 10 levels (31 metres).

By law, neither the draft WCCS plan nor draft DCP 56 overrode the provisions of existing environmental planning instruments, such as WLEP 1990 and IREP 1. However, on 15 December 2003 the full Council made a resolution (No. 529) to the effect that: draft DCP 56 should "be used as a guide" in assessing DAs for proposed developments that exceeded any standard in WLEP 1990 and IREP 1; and that any such DA "must be accompanied by a detailed report which provides a rationale" for the proposed exceedence of any standard in WLEP 1990, IREP 1 or draft DCP 56. On 23 February 2004 the full Council resolved to review, evaluate and revise its City Centre Revitalisation Strategy, including draft DCP 56, but it did not revoke draft DCP 56 or rescind resolution No. 529.

From this review of planning instruments and documents, it is evident that Victoria Square vastly exceeded existing and proposed development controls that were applicable to the site at the relevant time.

A further constraint in relation to the assessment and determination of the DA for Victoria Square was that Ms Morgan was required to comply with a range of relevant Council policies and procedures, some of which are referred to below. Ms Morgan testified that as a senior officer at the Council she acquainted herself with "all relevant Council policies and procedures".

The DA for Victoria Square

The DA for Victoria Square was lodged with the Council by Perform Development's architects on 9 July 2004. It was accompanied by a Statement of Environmental Effects dated 18 June 2004 and an Urban Design Study dated 30 June 2004. The DA and accompanying documents:

- do not include an application to rezone the site;
- include an application pursuant to SEPP 1 to exceed the FSR development standard of 1.5:1, but the application does not address the fundamental issues required to be considered in assessing such an application;
- contain a bare assertion that there is justification for exceeding the 11-metre height restriction under clause 139(2) of IREP 1, but do not address the matters specified in clause 139(3) of IREP 1 required to be considered in assessing whether to concur to such an exceedence (and the height restriction is erroneously referred to as 20 metres, instead of 11 metres, in one document); and
- do not contain an assessment of the proposed development against the standards contained in draft DCP 56 and do not include a "detailed report which provides a rationale" for the proposed exceedence of those standards, as required by resolution No. 529 made by the Council on 15 December 2003.

Ms Morgan was the sole "responsible officer" for the DA and is the person who actually assessed and determined it.

Pre-lodgement events, including $2,200 cash payment

Ms Morgan testified that she probably knew in May 2004, at which time she and Mr Tabak were in a sexual relationship, that he planned to lodge a DA with the Council for the proposed Victoria Square development. At around this time she, along with her supervisor Mr Zwicker, attended what she referred to in contemporaneous notes as a "Pre-Pre Lodgement" meeting with Mr Tabak and his architect to discuss the proposed development. The actual date of this meeting is not clear, but it appears to have taken place between mid-May and late June-2004. Ms Morgan's attendance at this meeting indicates that by that time she had been selected as the person who would be responsible for assessing the forthcoming DA, but there is no available evidence as to how this selection came to be made. Mr Tabak admitted to the Commission that prior to lodgement of the DA for Victoria Square he knew that Ms Morgan would be involved in assessing it because of her attendance at a pre-lodgement meeting with the Council.

In June 2004 Mr Tabak arranged for a company he controlled, Tabak Cement Rendering Pty Ltd, to assist Ms Morgan with renovations to her house by performing significant plastering work. On 21 June 2004 the company issued an invoice for the job in the amount of $2,637.80. On or shortly after 6 July 2004 Ms Morgan gave Mr Tabak a personal cheque bearing that date for the full amount of the invoice. Ms Morgan testified that Mr Tabak had asked her to pay for the

© ICAC

work by cheque "in order to make it look legitimate" and said he would pay her back in cash. She said he later gave her $2,200 cash without offering a reason.

Ms Morgan conceded that she should not have accepted the cash payment from Mr Tabak and appeared to admit that she believed it was given to her by him "as a bribe or inducement", although her evidence on this point is not entirely clear. She also admitted that she did not disclose her receipt of the cash to the Council and conceded that she should have.

Mr Tabak denied making the cash payment to Ms Morgan. However, the Commission fully accepts Ms Morgan's evidence in relation to this matter for the following reasons:

- she provided her testimony in a far more convincing manner than Mr Tabak;
- her testimony involved substantial admissions against her own interests, whereas his was entirely self-serving; and
- her testimony was corroborated by her former husband, Adam Morgan, who informed the Commission that she told him at the time that she would pay for the plastering work by cheque and Mr Tabak would reimburse her with cash and that sometime shortly after she told him this she showed him "a large amount of cash and said that she had been given it by Tabak as a reimbursement for the cheque she had paid for the plastering work done by his company".

The Commission is satisfied that Mr Tabak gave Ms Morgan the $2,200 cash payment between 6 July and 15 July 2004 (the date on which he departed overseas for five weeks), during which period the DA for Victoria Square was lodged with the Council (on 9 July 2004). At the time he initially offered her the money and the time he subsequently gave it to her he was aware that she would be responsible for assessing the DA. He offered and gave her the money with the intention of inducing her to assess and determine the DA in a way favourable to his interests. Ms Morgan agreed to receive, and then received, the cash payment knowing it was intended by Mr Tabak as an inducement for her to assess and determine the DA for Victoria Square in a way favourable to his interests.

Non-compliance with Council's Urban Design Assessment Policy

The Council's Urban Design Assessment Policy ("UDA Policy") required the following processes to be followed *prior to lodgement of a DA* for a "significant development" (the definition of which clearly covered Victoria Square):

- the applicant to prepare and submit to the Council a detailed urban design study ("UDS") for the proposed development;
- Council officers and ultimately the Council itself to review the UDS and identify agreed design principles and development controls for the proposed development;
- the applicant to prepare concept plans for the proposed development reflecting the agreed principles and controls; and
- the concept plans to be reviewed by Council officers pursuant to "the pre-lodgement protocol" set out in the Council's Development Administrative Unit Policy.

It was initially proposed that the UDA Policy would be applied in relation to Victoria Square. For example:

- the Statement of Environmental Effects (SEE) for the proposed development dated 18 June 2004 specifically refers to the UDA Policy and expressly acknowledges its applicability to the proposed development;
- the SEE was accompanied by a UDS dated 30 June 2004, which is expressed to have been prepared in accordance with the UDA Policy; and
- notes taken by Ms Morgan of a "Pre-Pre Lodgement" meeting, apparently held between mid-May and late June 2004, appear to indicate that it was envisaged that there would be an initial examination of the proposed development by the Council followed by a pre-lodgement review of it before actual lodgement of the DA.

However, the DA for Victoria Square, accompanied by the SEE and UDS, was subsequently lodged with the Council on 9 July 2004 without any of the processes set out in the UDA Policy, or the pre-lodgement protocol, having been followed. A significant consequence of this was that Councillors were not informed of, nor provided with an opportunity to express agreement or disagreement to, the substantial exceedence of the applicable FSR and height development controls proposed in relation to the development.

© ICAC

The UDA Policy provides that it "will be administered by" the DAC Division of the Council, within which Ms Morgan worked as a senior officer at the relevant time. As the responsible officer for the Victoria Square DA, Ms Morgan was responsible for ensuring that it was assessed in accordance with all relevant Council policies and procedures.

Ms Morgan admitted that at the relevant time she was aware of the UDA Policy and did not seek to apply it in relation to Victoria Square. However, she claimed that this was because in 2004 a manager at Council, whose identity she could no longer recall, told her "not to use the policy". The Commission does not accept this evidence for the following reasons:

(i) Ms Morgan did not produce any further information or material to support her claim;

(ii) the Council's file does not contain any record of advice having been given or a decision having been made not to apply the UDA Policy in relation to Victoria Square, which is particularly significant given that the SEE and UDS expressly refer to the applicability of the policy;

(iii) Council records show that the UDA Policy has been in force without modification since 2002; and

(iv) in June and July 2004 reports relating to at least three DAs that had been assessed in accordance with the UDA Policy were presented at General Meetings of Council containing numerous references to the UDA Policy without any suggestion that it was no longer being applied at that time.

The Commission is satisfied that Ms Morgan deliberately failed to apply the UDA Policy to Victoria Square, when she knew that it ought to have been applied, in order to enable the DA to be swiftly approved by her without proper scrutiny from the Council.

Offer to sell Ms Morgan a unit in Victoria Square for "a good price"

Ms Morgan testified that Mr Tabak offered to sell her a unit off-the-plan in Victoria Square for "a good price". She said that he did not mention a specific price or say "cost price", but that she understood his words to mean "a price less than market value". When asked whether the offer was "an inducement" to her, she replied "it could be seen as one". She said that she could not recall exactly when the offer was made, but conceded that it could have been while she was assessing the DA for the proposed development.

Ms Morgan said that she thought about Mr Tabak's offer "for about a week" and she spoke to her then husband (Adam) about the offer but they decided not to accept the offer.

Adam Morgan, his mother, Barbara Morgan, and Mr Vellar all recalled Ms Morgan talking about an offer from Mr Tabak to sell her a unit cheaply or for a good price.

Mr Tabak claimed that he had no recollection of offering to sell Ms Morgan a unit or townhouse in Victoria Square or having any discussions with her about the possibility of her purchasing one. He conceded that he might have had such discussions with her and since forgotten about them because he "spoke to a lot of people about sales".

The Commission is satisfied that in or before July 2004 Mr Tabak offered to sell Ms Morgan a unit in Victoria Square for a price less than its market value and that the offer was still standing in late September 2004, during which period she was assessing the DA for Victoria Square. The Commission is also satisfied that the offer was made by Mr Tabak as an inducement or reward for Ms Morgan to assess and determine the DA in a way favourable to his interests.

Absence of an Informal Planning Conference

The Council had a policy on Informal Planning Conferences ("the IPC Policy"), the objective of which was to "encourage reasoned debate and resolution of contentious development applications" and "establish a structured but informal procedure for mediation". The IPC Policy states that "Council will hold Informal Planning Conferences to consider contentious development applications" and indicates that such conferences are normally attended by Councillors, Council officers, applicants and objectors. The Policy stipulates that IPCs will be chaired by the Lord Mayor or Deputy Lord Major, or in their absence, a Ward Councillor, and "should be attended by at least two Councillors". The Policy provides for DAs considered at an IPC to be reported to the Council itself for determination, subject to the following two exceptions:

> *Subject to agreement by all relevant participants, upon resolution of all relevant issues the Chairperson may direct that the application need not be reported to Council but be determined under delegated authority.*

© ICAC

> *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.*

The Policy provides that "[a]ny adjoining or nearby resident who may be affected by a development application may request an Informal Planning Conference" and only identifies the following ground for denying such a request:

> *The Lord Mayor in consultation with the Ward Councillors and the Manager Development Assessment and Compliance may deny any request for a Conference where in their opinion any such request is without basis or considered to be vexatious.*

The DA for Victoria Square was placed on public exhibition on 20 July 2004. At least three objections were received by the Council, raising issues such as excessive height and bulk and concerns about car parking and increased traffic.

In mid-August 2004 Ms Morgan sent an email, with a subject heading "Victoria Square – IPC request from NC6", to Messrs Zwicker and Gilbert in which she invited them to a meeting on 17 August 2004 and wrote:

> *I just wanted to meet up to discuss if we really need to organise this IPC or if we can get the LM* [Lord Mayor] *to agree to not hold one as we only have 3 objections which don't necessarily have a lot to them.*

The Commission has been unable to locate any records indicating whether the meeting took place and, if so, what the outcome was. However, on 17 August 2004 Ms Morgan sent an email to Mr Zwicker in which she referred to the request for an IPC from one of the objectors and wrote:

> *I believe that an IPC is not warranted for this* [DA] *due to the fact that there* [were a] *very small number of submissions received and the issues raised can all be considered during the assessment of the application.*

Ms Morgan did not submit that the request for an IPC was "without basis or considered to be vexatious", which is the only ground identified in the IPC Policy for denying a request for an IPC. She did not attempt to address the submission made that the proposed development exceeded "current planning principles in relation to height and FSR", which was the most significant issue and did not identify the extent to which the proposed development exceeded those principles; namely, that the proposed FSR was more than twice, and the proposed height was almost three times, the existing development controls.

On 17 August 2004 Mr Zwicker forwarded Ms Morgan's email to the Lord Mayor, Alex Darling, and two relevant Ward Councillors, David Brown and Anne Wood, with a copy sent to Mr Gilbert. On 18 August 2004 Mr Darling's assistant replied by email stating "LM says delegated authority is fine". Following receipt of this email Ms Morgan immediately sent an email to Messrs Zwicker and Gilbert in which she wrote:

> *The LM has agreed that this application can be dealt with under delegated authority but he has not indicated that an IPC is not required.*
>
> *Could you please confirm that the LM agrees that an IPC is not required for this development prior to determination under delegated authority.*

The Commission has not located any response to this email or any other record indicating what the nature of any response might have been. On 18 August 2004 Cr Brown responded to Mr Zwicker's email of the previous day stating:

> *When can we expect the traffic report/assessment by our engineers? I don't think the level of public comment warrants an IPC/Round table.*
>
> *I think I need to look at the detailed plans before I can make my mind up finally about this one.*

On 19 August 2004 Mr Zwicker replied to Cr Brown's email stating that Ms Morgan had left relevant documents in his pigeonhole and suggesting that they discuss the matter the following week after he had reviewed the material. There are no other contemporaneous records on the Council's file for the DA identifying what subsequently occurred in relation to this issue, including any response from Cr Wood to Mr Zwicker's original email. However, on 23 August 2004 Ms Morgan sent an email to Mr Tabak in which she wrote:

> *Neighbourhood Committee 6 requested an IPC. I am in the process of liaising with Councillors Brown & Wood & Alex Darling to see if we can get out of it. It's looking good at this stage …*
>
> *Hopefully we are looking at a couple of weeks for an approval provided … Councillors agree not to have any further community consultation.*

In addition, on 7 October 2004, after the DA had been approved by Ms Morgan pursuant to delegated authority without having been referred to the Council itself, Ms Morgan wrote to Neighbourhood Committee 6 and informed it that its request for an IPC had been denied in the following terms:

> *following discussions between the Lord Mayor, Ward Councillors and Council staff it was* [a]*greed that an IPC was not required for this application and that the application be determined under delegated authority.*

On 18 February 2005 Ms Morgan also sent an email to Mr Tabak with the subject heading "VS" (an obvious reference to Victoria Square) in which she wrote:

> *VS went through at an opportune time. It went under the radar in terms of community interest and hence was able to be dealt with swiftly and without interference. Very few developments of comparable size are that fortunate.*

During her testimony Ms Morgan conceded that she was aware of the Council's IPC Policy and, in breach of that Policy, she arranged for an IPC to be avoided on inadequate grounds and that in doing so she denied public consultation and assisted Mr Tabak.

Mr Tabak denied that he was aware of the IPC Policy or knew of any wrongdoing by Ms Morgan in relation to this matter.

The Commission is satisfied that an IPC should have been held in relation to Victoria Square, that Ms Morgan was aware of this and that she deliberately arranged for an IPC to be avoided by failing to provide adequate information to her superiors and Councillors and by putting forward spurious grounds for not having one. Her motivation for so doing was to assist Mr Tabak by placing herself in a position where she could approve the DA herself pursuant to delegated authority without proper scrutiny from the public and Councillors.

Further cash payment of $3,300

Ms Morgan testified that Mr Tabak gave her a second cash payment of $3,300 in late September 2004 shortly before she approved the DA for Victoria Square (on 1 October 2004) and went on a holiday with her husband to Fiji (10 to 18 October 2004).

At a compulsory examination prior to the public inquiry Ms Morgan testified that months prior to actually going on the holiday to Fiji with her husband she had talked about the proposed trip with Mr Tabak and he had said "How much is it going to cost? … I would like to send you on that holiday with your husband". She said he made this offer on a number of occasions and although she initially declined, she eventually accepted. One subsequent morning before she left to go on the trip, Mr Tabak helped her put her young child in her car and threw in a bundle of cash, which she said totalled $3,300. She thought he gave her the money to ease his guilt for having ended their sexual relationship, although it also crossed her mind that he may have given it to her for her work in assessing the DA for Victoria Square. She thought he made the payment just after she had approved the DA for Victoria Square, but conceded that it could have been a few days before the DA was approved.

At the public inquiry her testimony was somewhat different. In particular, she stated that Mr Tabak gave her the $3,300 in late September 2004 and said it was to say "thank you" for her assistance in assessing the DA for Victoria Square. She also conceded that she should not have accepted the payment and appeared to admit that she believed it was given to her by Mr Tabak as a bribe or inducement, although her evidence on this point is not entirely clear. She further admitted that she did not disclose her receipt of the payment to the Council and conceded that she should have.

Adam Morgan, who is regarded by the Commission as an honest and cooperative witness but appears to have a relatively poor recollection of dates and specific details, told the Commission that on a Saturday in 2004 Ms Morgan showed him $2,000 "made up of fifty-dollar bills held together with an elastic band" and said that Mr Tabak had left it on the floor of her car. He said she justified keeping the money because "she wasn't getting any recognition through the Council for her hard work and it was a reward for her good work".

On 28 and 29 September 2004 there were a number of emails and telephone calls or text messages between Ms Morgan and Mr Tabak. For example: on 28 September 2004 at 12.56 pm she sent an email to him with the words "we need to chat re VS any chance to meet up?"; later that day there were five telephone calls or text messages between them; on 29 September 2004 at 8.29 am she sent him an email with the words "I do not know what to say as it was not expected but thank you"; later that day there were three telephone calls between them; and on 30 September 2004 at 3.07 pm Mr Tabak sent her an email with the words "for a nice girl like you with a good hart [*sic*] thank [*sic*] very very much from gt". This email from Mr Tabak appears to be a reply to her email to him at 8.29 am the previous day because the subject heading is "Re:", indicating that it is a reply to an email with a blank subject heading, and that email from Ms Morgan had a blank subject heading. It was contended on behalf of Mr Tabak that his email could have been a reply to a later email Ms Morgan sent him on 30 September 2004 at 2.41 pm, but the Commission rejects this contention because that email did not a have blank subject heading.

Ms Morgan was shown these emails by the Commission for the first time at the public inquiry. After seeing them she agreed that Mr Tabak gave her the $3,300 cash payment on or about 29 September 2004.

© ICAC

Mr Tabak denied having given Ms Morgan the $3,300 cash payment and said he did not recall receiving her emails on 28 and 29 September 2004 and did not recall sending her the email on 30 September 2004. He said he did not know what those emails related to and suggested that she was "probably" thanking him for "lunch" when she wrote "I do not know what to say as it was not expected but thank you" in her email to him on 29 September 2004. The Commission regards this as highly unlikely given that the email was sent at 8.29 am and there had been a number of calls between them the previous afternoon, during which she could have thanked him for lunch if he had taken her out for lunch that day. It also seems most unlikely that a mere lunch would have caused Ms Morgan to use the words she did in her email (and Mr Tabak said that he did not give her any other gifts or benefits at this time). It is far more likely that Ms Morgan was thanking Mr Tabak for a substantial gift, such as a significant cash payment.

Even though there are inconsistencies between the testimony given by Ms Morgan in relation to this matter at her compulsory examination and the public inquiry, the Commission accepts her version of events over Mr Tabak's testimony in relation to this matter for the following reasons:

- she provided her testimony, particularly at the public inquiry, in a far more convincing manner than he did;
- her testimony involved substantial admissions against her own interests, whereas his was entirely self-serving; and
- her testimony, particularly at the public inquiry, was supported by that of Adam Morgan and is more consistent with the email evidence.

The Commission is satisfied that Mr Tabak gave Ms Morgan a $3,300 cash payment on or around 29 September 2004 as an inducement or reward for assessing the DA for Victoria Square in a manner favourable to his interests and that she accepted the payment knowing that it was given to her for that purpose.

Parking and traffic issues

The three objections received by the Council in relation to the DA for Victoria Square raised significant concerns about parking and traffic issues. In her email of 17 August 2004, in which she argued against holding an IPC, Ms Morgan incorrectly claimed that car parking for the development met Council's requirements and standards and indicated that an assessment of traffic issues would be undertaken by the Council's traffic engineer.

On 8 September 2004 Ms Morgan referred the DA to the Roads and Traffic Authority (RTA) for advice in relation to parking and traffic issues. On 20 September 2004 Ms Morgan informed Mr Tabak by email that the Council's traffic unit would not provide its assessment until after 13 October and that she would be on holidays until 20 October 2004. She also wrote "Your call on speaking to others in here. I won't mind". It appears that Mr Tabak and/or Ms Morgan then spoke to Mr Oxley, who promptly spoke to the head of the Council's traffic unit, and on 21 September 2004 Mr Oxley sent Ms Morgan an email in which he indicated that he had arranged for the traffic assessment to be expedited and that he would "let Glen know".

On 28 and 30 September 2004 the Council's traffic engineer provided assessments of parking and traffic issues that were critical of many aspects of the proposed development. In particular, the engineer:

(i) identified a shortfall of 14 parking spaces and recommended that the applicant be required to provide 14 additional spaces or make a payment to the Council for the deficiency;

(ii) identified that a number of the parking spaces were too small and recommended that they be increased to meet applicable standards;

(iii) rejected a proposal for two loading zones on the street and recommended that all loading and unloading of service vehicles be required to take place within the site with all vehicles entering and exiting in a forward direction; and

(iv) recommended 13 additional parking and traffic conditions to be applied to any approval of the development.

On 30 September 2004 Ms Morgan sent an email to Mr Oxley in which she brought to his attention the issues raised by the traffic engineer about the size of the parking spaces and loading zones / service vehicles, but failed to mention any of the other issues (including the shortfall of 14 parking spaces) or that relevant advice had been requested and not yet received from the RTA. In her email she essentially agreed with the engineer's recommendation in relation to the first issue but strongly argued against the engineer's recommendation in relation to the second issue, contending that the proposal for two loading zones should be accepted and the applicant should not be subjected to any of the requirements stipulated by the engineer in relation to service vehicles (she claimed that the applicant had advised that it would cost $750,000 to comply with

those requirements). Later on 30 September 2004 Mr Oxley sent an email to Ms Morgan in which he wrote: "I agree with your proposals". Ms Morgan promptly forwarded the internal Council email correspondence between herself and Mr Oxley to Mr Tabak.

On 1 October 2004, prior to the receipt of advice from the RTA, Ms Morgan approved the DA for Victoria Square subject to conditions. Those conditions: fail to reflect the traffic engineer's recommendations in relation to the shortfall of 14 parking spaces; fail to reflect the traffic engineer's recommendations on a range of other issues, which Ms Morgan had not referred to in her email to Mr Oxley; and are not supported by any documents on the Council's file that record a decision not to accept those recommendations. In addition, by letter dated 7 October 2004, the RTA provided advice to the Council that substantially accorded with the traffic engineer's recommendations, including that all loading and unloading of service vehicles be required to take place within the site with all vehicles entering and exiting in a forward direction.

The Commission is satisfied that Ms Morgan deliberately ignored significant deficiencies relating to parking and traffic issues, and failed to wait for pending advice from the RTA about such matters, when she assessed and approved the DA for Victoria Square.

Assessment and determination

In 2004–05 the average time taken by the Council to determine a DA for a development costing more than $5 million was 181 days (including the days on which the DA was lodged and determined). Ms Morgan determined the DA for Victoria Square, which cost $31 million, in just 83 days.

As referred to in Chapter 2 of this report, at all relevant times Ms Morgan was under a duty to create and retain records relating to the exercise of her official functions. The Council's file for the Victoria Square DA is devoid of records relating to a range of significant matters within Ms Morgan's area of responsibility. The most serious deficiency is the absence of an assessment report. In particular, the file does not contain any record of:

(i) a SEPP 1 determination having been made to exceed the FSR control of 1.5:1 under WLEP 1990 and allow a FSR of 3.11:1;

(ii) concurrence having been granted to exceed the height control of 11 metres under IREP 1 and allow a height of 31 metres; or

(iii) the DA having been assessed in accordance with section 79C of the EPA Act.

The first two of these matters were necessary preconditions to any approval of the DA.

However, the Commission located an electronic version of what appears to be a draft, incomplete purported assessment report for the Victoria Square DA on the personal disk drive of Ms Morgan on the Council's computer system (which is not generally accessible to other Council officers). The report bears Ms Morgan's name, but not her signature, and is dated "September 2004". However, the electronic properties of the document record that it was last modified and saved by Ms Morgan on 18 October 2005 (more than a year after the DA was approved). Accordingly, the content of the report at the time the DA was actually determined on 1 October 2004 is not known.

The draft report mainly consists of a 'cut-and-paste' reproduction of material from documents provided by the applicant and contains little actual or purported analysis of relevant matters. In particular:

- it refers to the SEPP 1 application provided by the applicant (which did not address the fundamental issues required to be considered in assessing such an application) and includes a statement to the effect that it is considered "reasonable" to support the application without recording whether any determination under SEPP 1 was or would be made, let alone identifying the reasons for any such determination;
- it refers to clause 139(2) of IREP 1, which imposes differing height controls of either 20 or 11 metres depending on the particular location of the land, without identifying which height control applies to the site or containing a recommendation or conclusion as to whether concurrence should be granted to exceed that control;
- it does not refer to all of the matters specified in section 79C of the EPA Act that are required to be considered in determining a DA and does not contain any ultimate recommendation or conclusion as to whether consent for the DA should be granted or refused; and
- it does not identify, let alone justify, the proposed conditions of any consent.

At a compulsory examination prior to the public inquiry Ms Morgan claimed that she genuinely believed that the DA for Victoria Square should have been approved on its merits. At the public inquiry, however, she conceded or admitted that she should not have assessed or determined the DA at all because of her conflict of interest and that she failed to perform her

© ICAC

duty of ensuring that relevant Council policies and procedures were complied with. She also conceded that she knowingly failed to assess the SEPP 1 application in accordance with relevant principles, did not assess the application objectively and she approved the DA contrary to every policy and planning instrument that regulated that development.

Mr Tabak unconvincingly claimed that he had very little knowledge of significant issues or events relating to the assessment of the DA for Victoria Square. The Commission rejects this claim, noting that Mr Tabak personally attended a pre-lodgement meeting with Council officers relating to Victoria Square and email records show that Ms Morgan frequently kept him informed of relevant matters relating to the assessment of the DA.

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 DA for Victoria Square. 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 Ms Morgan and Mr Tabak. The conclusions and opinions in Mr Kennan's report that are relevant for present purposes may be summarised as follows:

- the requirements of the Council's Urban Design Assessment Policy were not complied with in the pre-lodgement stage of the development;
- the requirements of the Council's IPC Policy were not followed in the assessment of the DA;
- the provision of parking and loading facilities is unsatisfactory and is indicative of a development which is too large for the site;
- 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 3.11:1 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; and
- there was no justification on planning grounds to grant concurrence under clause 139(2) of IREP 1 to a development with a proposed height of approximately 31 metres on the site and no reasonable person having regard to relevant matters would have concluded that there was such justification.

The Commission accepts each of these conclusions or opinions. In addition, in light of the matters referred to earlier in this chapter, the Commission is satisfied that Ms Morgan deliberately failed to undertake any genuine assessment of the DA against the applicable development standards and controls because she knew that Victoria Square grossly exceeded them and should not have been approved.

Modification to development consent for Victoria Square in 2005

There is no evidence that Mr Tabak and Ms Morgan had any kind of sexual relationship after she approved the DA for Victoria Square, but telephone records and emails demonstrate that they continued to have fairly frequent contact and maintained a friendship. For example: from October 2004 to May 2005 there were at least 70 telephone calls or text messages between them; in January and February 2005 she sent emails to him ending with the words "Your friend always"; in February 2005 he sent her an email in which he wrote "i [*sic*] do value my friendship with you"; and from March to July 2005 there were various other emails of a personal nature between them. In light of their history and ongoing friendship, Ms Morgan continued to have an obvious and extreme conflict of interest in relation to the exercise of any official functions affecting Mr Tabak's interests.

In addition, in 2005 Ms Morgan was still intent on setting up her own business as a town planning consultant. For example, in March 2005 she sent an email to Mr Tabak in which she stated that she would be leaving the Council in "about 3–4 months"; in April 2005 she prepared business cards and letterheads for her proposed business; and in May she told Mr Zwicker that she might leave the Council "in the next 2–3 months". In light of this and previously referred to evidence, the Commission is satisfied that in mid-to-late 2005 Ms Morgan still hoped to secure Mr Tabak as a future client for her proposed business.

The notice of consent for Victoria Square issued by Ms Morgan on 1 October 2004 included a condition (No. 54) that a monetary contribution under section 94 of the EPA Act ("section 94 contribution") of $217,102 was payable to the Council prior to the release of the

Construction Certificate ("CC"), which occurs prior to the commencement of any construction. This condition conformed to applicable Council contribution plans (each of which provided that such payments must be made prior to issuing the CC and did not contain any relevant provision permitting payments to be deferred) and section 94B(1) of the EPA Act, which stipulates that a Council may only impose a condition relating to the payment of section 94 contributions "in accordance with" its contributions plans.

On 28 September 2005 Perform Development's town planning consultant sent a letter, accompanied by an application signed by Mr Tabak himself, seeking to modify condition No. 54 by making the section 94 contributions payable prior to the release of the Occupation Certificate (OC), which occurs at the completion of construction. Such applications to vary the conditions of a development consent must be assessed against the conditions set out in section 96 of the EPA Act. The letter stated that it was "understood that similar requests for a delay in payment prior to the release of the Occupation Certificate have been made and granted by Council for other developments".

On 10 October 2005 the town planning consultant sent an email to the Council in which she further requested a 10% reduction in the amount of section 94 contributions payable, stating "I have just spoken with Glen Tabak and apparently Beth has indicated to him that a 10% reduction in contributions would also be available".

Ms Morgan admitted that prior to the submission of these two applications she advised Mr Tabak "how to go about" preparing them. On 12 October 2005 she was assigned to assess the applications and on 18 October 2005 she issued a Notice of Determination informing Mr Tabak that both had been approved.

Mr Kennan's report contains conclusions, accepted by the Commission, that neither of the modifications to condition No. 54 made by Ms Morgan should have been approved. At the public inquiry Ms Morgan indicated that she agreed with these conclusions and Mr Tabak did not contest them, but he denied having any knowledge of, or involvement in, any impropriety by Ms Morgan relating to these matters.

Deferral of payment of section 94 contributions

Prior to approving the deferral of payment of the section 94 contributions to the OC, rather than CC, stage, Ms Morgan sent an email to Messrs Zwicker and Gilbert in which she wrote: "Due to past [applications] being approved for payment at OC rather than CC I have no problem with this request …. Can you please let me know ASAP if you agree". Later that same day Mr Gilbert replied stating "as we have varied other DAs on s94, I am ok with this one also". Ms Morgan also prepared a file note in which she recorded her reason to approve the deferral as follows "the deferment of payment was agreed to [by] my manager DAC in accordance with other deferments granted". Neither the file note nor any other record identified any purported legitimate basis for granting deferment or demonstrated that the requirements of section 96 of the EPA Act had been complied with in the determination of this application.

Ms Morgan admitted that at the time she approved deferment of payment of the section 94 contributions she knew it was wrong because it was contrary to the relevant contributions plans. She claimed that she did it because "it had been done in the past" in other cases. Evidence in relation to such past cases, including two DAs associated with Mr Vellar and approved by Ms Morgan herself, is detailed in Chapter 5 of this report. The Commission has taken that evidence into account in considering the matters dealt with in this chapter. For present purposes it is sufficient to note that the fact that there had been an improper practice in the past, which Ms Morgan knew to be improper, provided no justification for Ms Morgan to subsequently repeat that practice in relation to Victoria Square. Ms Morgan agreed with this proposition.

Ms Morgan also agreed that by advising persons such as Mr Tabak (and Mr Vellar) to apply for deferment of the payment of section 94 contributions, and then approving their applications on the basis of a precedent known by her to be wrong, she gave them "preferential treatment" and provided them with a "considerable financial benefit … to the detriment of the Council".

Reduction in the amount of section 94 contributions

Ms Morgan approved the application for a 10% ($21,710.20) reduction in the section 94 contributions payable on 18 October 2005. On that date she prepared a file note in which the only comments she provided in relation to this matter are: "s94 contributions have been recalculation [*sic*] with a 10% reduction as given under the urban consolidation policy. Total payable at the time of endorsement (ie 1/10/2004) is $195391.80". The file note does not identify any reasons why the reduction was considered to be available under the relevant policy and there is no indication that Ms Morgan either consulted anyone else who agreed that the reduction was available or complied with the requirements of section 96 of the EPA Act in determining this matter.

The Council's Urban Consolidation Policy provided that a 10% reduction "will apply to residential development which meets all the criteria outlined in Table 3" of the policy. It is now common ground that Victoria Square did not meet all of those criteria. At the public inquiry Ms Morgan admitted that she wrongly applied this reduction to Victoria Square, but she claimed that at the time she genuinely believed it did apply. She claimed that she looked at the Policy at the time, but there is no record of her having actually considered each of the specified criteria and determined that all of them were satisfied. As referred to on page 29 of Part 2 of the Commission's report in relation to this investigation, on 18 August 2005 Ms Morgan similarly granted a 10% reduction in the amount of section 94 contributions payable in respect of the Quattro development, in which Mr Vellar had a substantial interest, when it too did not meet all of the specified criteria.

Failure to wait for expert advice

In October 2005 Zoran Sarin was the Council's Section 94 Planning Coordinator and part of his role, as stated in his position description, was "to ensure compliance with [the EPA Act] and Council's relevant policies" in relation to section 94 contributions. On 12 October 2005, the same day Ms Morgan was assigned to assess the two applications to modify condition No. 54 of the Consent for Victoria Square, he received a "referral" from Mr Zwicker to provide advice in relation to this matter. The referral created a "task" in the Council's computer system that was supposed to be "completed" before the applications could be determined.

On 18 October 2005, the same day as Ms Morgan approved the applications, Mr Sarin completed his advice in terms to the following effect:

(i) while deferment of the payment of section 94 contributions to the OC stage "has been done in the past in a small handful of applications, it would appear to be contrary to the contributions plan"; and

(ii) the 10% reduction in the amount of the contributions would be acceptable only if it was confirmed that the development met the specified criteria in Council's Urban Consolidation Policy.

Mr Sarin told the Commission that when he went to forward his advice and complete the task in the Council's computer system he discovered that it had already been completed by Ms Morgan and the consent had already been issued. Mr Sarin informed the Commission that while the lead planner for a DA does have discretion to close-off most tasks even if they have not been completed, it is not the normal practice for a planner to issue a development consent without all of the referrals and other tasks being complete. He told the Commission he did not know why Ms Morgan had done so in this case.

In light of the overall circumstances relating to this matter, the Commission is satisfied that Ms Morgan wrongly and dishonestly deferred the due date for payment of the section 94 contributions, and granted a 10% ($21,710.20) reduction in the amount of section 94 contributions payable, in relation to Victoria Square when she knew that the development was not eligible for either concession.

Findings of fact

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

1. Mr Tabak had a substantial interest in the DA for Victoria Square, which was lodged with the Council on 9 July 2004 and determined on 1 October 2004, and in the application in 2005 to modify the conditions of consent for that development.

2. Ms Morgan was responsible for assessing and determining that DA, including for a period prior to lodgement, and the subsequent application and she approved both.

3. At all relevant times Ms Morgan had a sexual relationship or close friendship with Mr Tabak, which gave rise to an obvious and extreme conflict of interest.

4. Between early July and early October 2004 Mr Tabak gave Ms Morgan two cash payments, of $2,200 and $3,300 respectively, as inducements or rewards for her to assess and determine the DA for Victoria Square in a way favourable to his interests and she accepted both cash payments knowing they were intended as such.

5. In or before July 2004 Mr Tabak made an offer, which stood until at least late September 2004, to sell Ms Morgan a unit in Victoria Square for less than its market value as an inducement or reward for her to assess and determine the DA for Victoria Square in a way favourable to his interests and Ms Morgan considered the offer throughout that period knowing it was intended as such, although ultimately she did not purchase any unit.

6. In assessing and determining the DA for Victoria Square in 2004 Ms Morgan deliberately:

   (a) failed to apply the Council's UDA Policy, when she knew it should have been applied, so she could swiftly approve the DA without proper scrutiny from the Council;

   (b) ensured that the requirements of the Council's IPC Policy were not followed, when she knew they should have been followed, so she could swiftly approve the DA without proper scrutiny from the public and Councillors;

   (c) ignored significant deficiencies of the proposed development relating to parking and traffic issues that had been brought to her attention and failed to wait for advice from the RTA about such matters, which she knew was pending, before approving the DA;

   (d) failed to undertake any genuine assessment of the application under SEPP 1 to exceed the maximum FSR of 1.5:1 that applied to the site and permit the proposed FSR of 3.11:1 because she knew it should not have been approved;

   (e) failed to undertake any genuine assessment of whether concurrence under clause 139(2) of IREP 1 should have been granted to exceed the maximum building height of 11 metres that ordinarily applied to the site and permit a development with a proposed height of 31 metres because she knew it should not have been granted;

   (f) failed to undertake a proper assessment of the DA itself in accordance with section 79C of the EPA Act;

   (g) failed to make and retain adequate records relating to the exercise of her official functions;

   (h) failed to avoid, or disclose to the Council, the conflict of interest arising because of her sexual relationship and friendship with Mr Tabak;

   (i) failed to reject, and disclose to the Council, the two cash payments given to her by Mr Tabak referred to in finding of fact 4; and

   (j) failed to disclose to the Council the offer made by Mr Tabak to sell her a unit in Victoria Square for less than market value referred to in finding of fact 5.

7. Ms Morgan engaged in the conduct set out in finding of fact 6 with the intention of improperly advantaging Mr Tabak:

   (a) in return for the cash payments he gave her referred to in finding of fact 4;

   (b) in the hope that he would sell her the unit in the development for less than its market value referred to in finding of fact 5;

   (c) in the hope or expectation that she would gain future work from him in relation to her proposed town planning consultancy business; and

   (d) in order to financially benefit him because of her personal affection for him.

8. In assessing and determining the application to modify the conditions of consent for Victoria Square in 2005 Ms Morgan deliberately:

   (a) permitted deferment of the payment of the section 94 contributions, when she knew that such deferment was not permissible under the applicable contribution plans;

   (b) authorised a 10% ($21,710.20) reduction in the amount of section 94 contributions payable, when she knew that the development was not eligible for such a reduction;

   (c) failed to wait for expert advice about such matters, which she knew was pending, before approving the application;

© ICAC

(d) failed to avoid or disclose the conflict of interest arising because of her past and present relationship with Mr Tabak and past receipt of cash payments from him; and

(e) selectively advised Mr Tabak to apply to defer and reduce the contributions in anticipation of engaging in the conduct set out in (a), (b) and (d).

9. Ms Morgan engaged in the conduct set out in finding of fact 8 with the intention of improperly advantaging Mr Tabak:

(a) in return for the cash payments he gave her referred to in finding of fact 4;

(b) in the hope or expectation that she would gain future work from him in relation to her proposed town planning consultancy business; and

(c) in order to financially benefit him because of her personal affection for him.

Corrupt conduct

In determining findings of corrupt conduct, as defined in sections 7 to 9 of the ICAC Act, the Commission has applied the principles set out in Appendix 2 of this report.

Ms Morgan

The Commission finds that Ms Morgan engaged in corrupt conduct on the basis that:

(i) her conduct set out in finding of fact 4 is conduct of a public official that:

- constitutes or involves the dishonest or partial exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; could adversely affect the exercise of official functions by a public official or public authority, and could also involve official misconduct and matters of a similar nature to bribery, within the meaning of sections 8(2)(a),(b) and (x) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the criminal offence of corruptly receiving benefits contrary to section 249B(1) of the *Crimes Act 1900* (NSW) (“the Crimes Act”); and could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act;

(ii) her conduct set out in findings of fact 6 to 9 is conduct of a public official that:

- constitutes or involves the dishonest or partial exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; adversely affects the exercise of official functions by a public official or public authority, and could also involve official misconduct, within the meaning of section 8(2)(a) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the common law offence of misconduct in public office; and could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act.

Mr Tabak

The Commission finds that Mr Tabak engaged in corrupt conduct on the basis that his conduct set out in findings of fact 4 and 5 is conduct that:

- could adversely affect the honest or impartial exercise of official functions by a public official, within the meaning of section 8(1)(a) of the ICAC Act; could adversely affect the exercise of official functions by a public official or public authority, and could also involve matters of a similar nature to bribery, within the meaning of sections 8(2)(b) and (x) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the criminal offence of corruptly giving or offering benefits contrary to section 249B(2) of the Crimes Act.

Section 74A(2) statements

In making a public report, the Commission is required by the provisions of section 74A(2) of the ICAC Act to include, in respect of each “affected” person, a

© ICAC

statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

(a) *obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*

(b) *the taking of action against the person for a specified disciplinary offence,*

(c) *the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.*

In relation to the matters referred to in this chapter of the report, the Commission considers Ms Morgan and Mr Tabak to be affected persons and makes the following statements pursuant to section 74A(2) of the ICAC Act.

Ms Morgan

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Morgan for the following criminal offences:

- corruptly receiving a benefit, contrary to section 249B(1) of the Crimes Act, in relation to the receipt of each of the cash payments from Mr Tabak set out in finding of fact 4;
- the common law offence of misconduct in public office in relation to her assessment and approval of the DA for Victoria Square in 2004 and her assessment and approval of the application to modify the conditions of consent for that development in 2005 set out in findings of fact 6 to 9;
- wilfully making a false statement to, or attempting to mislead, the Commission contrary to section 80(c) of the ICAC Act in relation to her written response dated 4 June 2007 to the notice issued to her under section 21 of the ICAC Act regarding the nature of her relationship with Mr Tabak.

As the Council terminated Ms Morgan's employment in June 2007, it is not necessary to make any statement in relation to any of the matters referred to in sections 74A(2)(b) and (c) of the ICAC Act.

Mr Tabak

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Tabak for the following criminal offences:

- corruptly giving a benefit, contrary to section 249B(2) of the Crimes Act, in relation to each of the cash payments he gave to Ms Morgan set out in finding of fact 4;
- corruptly offering a benefit, contrary to section 249B(2) of the Crimes Act, in relation to the offer he made to sell Ms Morgan a unit in Victoria Square for less than its market value set out in finding of fact 5; and
- wilfully making a false statement to, or attempting to mislead, the Commission contrary to section 80(c) of the ICAC Act in relation to statements he made to Commission investigators in June 2007 and December 2007 in relation to his relationship with Ms Morgan.

Chapter 4: Ms Morgan's assessment and approval of DAs relating to Michael Kollaras

This chapter examines Ms Morgan's assessment and approval, between 2002 and 2005, of three DAs, and her performance of a number of other official Council functions, in relation to two developments in Wollongong in which Michael Kollaras had a substantial interest. Each development was owned by a different company that was jointly owned, controlled and managed by Michael Kollaras and his brother Tass Kollaras, namely, Kollco Holdings Pty Ltd ("Kollco") and Kollaras & Co Pty Ltd ("Kollaras & Co").

The most significant development is a five-storey building at 14 Harbour Street containing three luxury apartments, one penthouse, a roof-top pool and bar, and 10 car parking spaces. Both Mr Vellar and Mr Tabak were substantially involved in the construction of the development, which was completed in 2005 for a total cost of around $4 million. Ms Morgan was responsible for assessing and approving the initial DA for the development in 2002 and dealing with a number of other applications or issues in 2004 and 2005.

The other development is an office and warehouse at 91–95 Montague Street, which is the principal place of business of a number of the companies owned, managed and controlled by the Kollaras brothers. In 2005 Ms Morgan assessed and approved a DA for the construction of an undercover loading bay attached to the warehouse.

Relationship between Ms Morgan and Michael Kollaras

Ms Morgan and Michael Kollaras commenced a social relationship through meetings of the Table of Knowledge shortly after she returned to work at the Council on 1 March 2004. It soon developed into a friendship, but there is conflicting evidence about the precise nature and extent of their relationship.

Ms Morgan testified that she had a sexual relationship with Michael Kollaras commencing in or around August 2004 and concluding in January 2005. Her testimony is supported to some extent by records showing that between late July 2004 and late January 2005 there were 133 calls or text messages between their mobile phones, including many at night or on weekends, and over 200 emails between them, many of which contain messages of a personal or sexual nature. In her emails Ms Morgan regularly referred to Michael Kollaras as "my most favourite Greek"; variously described him as "sexy", "delectable", "gorgeous" and "completely adorable"; and stated "I love you" or "I miss you" a number of times. In his emails Michael Kollaras referred to Ms Morgan as "my most favourite girl" and "gorgeous girl".

Michael Kollaras denied having ever had a sexual relationship with Ms Morgan and claimed that they merely had an "extremely close" and "very flirtatious" friendship. He agreed that their emails contained constant references to sex and conceded that a person reading them would probably infer that there was a close sexual relationship. He maintained, however, that they "were just teasing each other" and that he is "a warm, passionate man" who often jokes about sex. He testified that his friendship with Ms Morgan lasted from mid-2004 until mid-2005 and stated "she was my closest friend [or] one of my closest friends".

The Commission has ultimately found it unnecessary to determine whether Ms Morgan and Michael Kollaras had a sexual relationship. The Commission is satisfied that between mid-2004 and mid-2005 they had a very close personal relationship which, even if it was not a sexual relationship, gave rise to an obvious and extreme conflict of interest on the part of Ms Morgan in relation to the exercise of any Council functions affecting Michael Kollaras's interests. The Commission is also satisfied that throughout this period Ms Morgan desired to secure Michael Kollaras as a future client for her proposed private consulting business.

There is no evidence of Michael Kollaras having improperly given or offered any significant gifts or benefits to Ms Morgan. In addition, there is no evidence that Tass Kollaras has engaged in any kind of impropriety.

In May 2007 the Commission issued a notice to Ms Morgan under section 21 of the ICAC Act requiring her to identify (among other things):

(i) the "precise nature of any relationship or association" she had had with Michael Kollaras; and

(ii) whether she had "had any kind of meeting with [him] for any purpose", other than an official Council meeting;

Ms Morgan provided a response to the notice dated 4 June 2007 in which she addressed these two matters as follows:

> *(i) I would consider my relationship with Michael Kollaras to be that of an acquaintance; and*
>
> *(ii) I have never had a meeting with* [him] *other than an official Council meeting.*

Each of these responses is either false in itself or, by omitting material facts, creates a false impression. Ms Morgan subsequently admitted that her responses were untrue.

The Commission is satisfied that the overriding reason why Ms Morgan provided her false responses was that she knew that truthful responses would reveal wrongdoing on her part and, in providing the responses she did, she intended to mislead the Commission in the hope that this would prevent detection of improper conduct she had engaged in.

14 Harbour Street

The initial DA for this five-storey development, which was signed by both Michael and Tass Kollaras on behalf of Kollco, was lodged in February 2002. Ms Morgan was assigned to assess it. In July 2002 she approved it, notwithstanding that the applicable development control plan had a four-storey height limit. The Commission has not identified any wilful impropriety in relation to this specific matter. In particular, there is no evidence that Ms Morgan had any kind of personal relationship with Michael Kollaras or any other relevant person at the time.

The notice of determination, which was dated 10 July 2002, provided that "consent for the development will lapse unless development is commenced within two years". The builder originally chosen for the development was Mr Vellar and within the two-year period he undertook excavation work, but on 8 June 2004 Mr Tabak was appointed to manage the project. A company associated with Mr Tabak, Wideform Constructions Pty Ltd ("Wideform"), subsequently became the builder, but Mr Tabak continued to be the actual or *de facto* project manager. During her testimony Ms Morgan indicated that she knew of Mr Vellar's and Mr Tabak's personal involvement in this development.

Michael Kollaras claimed that he had no direct involvement in the development (even though he intended to reside in the penthouse and he personally signed the initial DA). The Commission does not accept this claim, as it is inconsistent with email records and other evidence (including some parts of Michael Kollaras's own testimony).

Ms Morgan conceded that she should not have had anything to do with any Council determination relating to 14 Harbour Street after the commencement of her relationship with Michael Kollaras. When asked why she continued to be involved in such determinations after that point in time she said "I don't know". When Michael Kollaras was asked whether he thought it was improper for Ms Morgan (whom he had just described as "my closest friend [or] one of my closest friends") to be dealing with applications relating to 14 Harbour Street, he said "I wouldn't know … I don't make the rules of Council".

Extension of development consent

On 16 June 2004 Kollco's architect sent a letter to the Council, personally addressed to Ms Morgan, containing the following text:

> *We advise that the … DA Approval is soon reaching its 2 year expiry date.*
>
> *We would appreciate an extension of the … DA, as our clients are about to gain construction certificate* [sic] *and are awaiting final consultant information.*
>
> *Included is a cheque for $79.00.*

Council records show that a facsimile copy of the letter was received on 16 June 2004, but the original was not received until 21 or 22 June 2004 (and it is inferred that the cheque was not received until that date either). The Council's computer system also records that Ms Morgan started assessing the application on 16 June 2004 at 11.47 am and approved it four minutes later. Furthermore, at 12.01 pm that day she emailed to Mr Tabak (even though his name did not appear on the letter of request) a letter addressed to the architect informing him that the consent had been extended until 10 July 2005. The Council has no records, such as a file note by Ms Morgan, identifying the reasons why the extension was granted.

Ms Morgan admitted that prior to the application for the extension being submitted she told either Michael Kollaras or Mr Tabak to make the application because the excavation work that had been completed by Mr Vellar might not be sufficient to constitute "commencement" of the development, although she said that she could not recall whether she was actually involved in the drafting and making of the application itself. She also admitted that she approved the application and could not recall creating any record of the reasons for her decision, even though she knew that there were relevant criteria that should have been addressed in assessing the application.

In relation to the timing of the above events it is significant to note that:

- on 12 June 2004 Ms Morgan had sex with Mr Tabak at a hotel (as established by her credit card statements and own testimony); and
- on 15 June 2004 Ms Morgan sent an email to Mr Scimone in which she declared, among other things, that her future livelihood depended on persons like Michael Kollaras and Mr Tabak and that she would do whatever was necessary to ensure that she earned a living.

The Commission is satisfied that Ms Morgan, because of her personal relationships with Mr Tabak and Michael Kollaras and desire to secure them as future clients for her proposed consulting business, selectively gave them proactive assistance and advice in relation to the making of the application to extend the development consent and then expedited its determination. However, due to the absence of relevant records the Commission is unable to ascertain whether her actual approval of the application was justified.

Construction Certificate

On 28 July 2004 Kollco applied to the Council for a Construction Certificate (CC) in relation to the development. Ms Morgan is not recorded as having any official role in relation to the assessment of this application, but email records show that she involved herself to a significant extent. For example:

- On 25 August 2004 she sent an email to Michael Kollaras, addressing him as "my most favourite Greek", in which she wrote:

  [G]*ive John Gilbert a call to chase up your CC. He is the Manager Development Assessment and Compliance … Your application should have been out by now seeing it's a relatively straight forward 4 unit development. Also tell him you have a complainant next door so you need to get your CC out so that her problems with the site can be addressed.*

- On 31 August 2004 Michael Kollaras sent Ms Morgan an email in which he wrote "John Gilbert didn't call me!" and she replied with an email 15 minutes later in which she wrote:

  I have spoken to John. He is chasing the building surveyor. I also said that you thought you were getting a phone call yesterday. So he will call you today … I now feel terrible as I advised Glen to send this into us rather than go private.

- On 7 September 2004 Ms Morgan sent an email to Mr Gilbert, entitled "CC for Wideform (Michael Kollaras) 14 Harbour Street", in which she wrote:

  [The building surveyor] *has spoken to me and advised that there are a significant number of outstanding issues in relation to providing information required to issue the CC …*

  The only thing I am worried about is that although they have done the wrong thing by not submitting all required info (though I don't know how it then got through the front counter) … we are getting back to them after it has been with us for 41 days which is not going to look good for us.

  Perhaps a phone call to Glen Tabak who is project managing this job for Michael Kollaras would help to smooth the waters …

The Construction Certificate was issued on 22 October 2004.

It is significant that Ms Morgan was in a close personal relationship with Michael Kollaras, and also had a close friendship with Mr Tabak, during the period of these emails.

The Commission is satisfied that Ms Morgan, because of her personal relationships with Michael Kollaras and Mr Tabak and her desire to secure them as future clients for her proposed consulting business, selectively gave them proactive assistance and advice in relation to the application for a Construction Certificate and also sought to expedite its determination. However, there is no available evidence to suggest that the certificate was ultimately issued without proper justification.

Complaint handling

From July 2004 to August 2005 Ms Morgan was responsible for handling serious complaints about the Harbour St development from a neighbour relating to excavation work completed by Mr Vellar in 2003 and construction work undertaken after Mr Tabak became the project manager in mid-2004. In numerous emails Ms Morgan advised the neighbour that she had contacted or would contact the owner of the site or project manager, but there are no records that such contact actually occurred.

In the course of handling some of the complaints Ms Morgan dealt directly with Michael Kollaras. For example, the following email exchanges occurred in July and August 2005:

- the neighbour sent an email to Ms Morgan in which she stated that "no action has been taken to fix" a problem she had previously complained about;
- later that day Ms Morgan forwarded the email to Michael Kollaras and asked him (in Mr Tabak's absence) to look into the complaint and speak to the neighbour;
- three minutes later Ms Morgan sent Michael Kollaras another email of a personal nature in which she addressed him as "my favourite Greek";
- Michael Kollaras then sent an email to Ms Morgan, addressing her as "Gorgeous Girl", in which he referred to the complaint and asserted that the neighbour "is really exaggerating all this";
- the neighbour then sent Ms Morgan an email in which she said that she had spoken to Michael Kollaras and been told that the problem should "be fixed next week" and she also mentioned that she would be "going away for a couple of weeks";
- Ms Morgan then forwarded the neighbour's email to Michael Kollaras and wrote "looks like you will have a bit of time to get this done"; and
- a little over two weeks later the neighbour emailed Ms Morgan and complained that the problem had still not been fixed.

It is significant that the neighbour's complaints directly or indirectly related to or involved each of Michael Kollaras and Messrs Tabak and Vellar because of their roles or interests in the development and that during the period when Ms Morgan was handling the complaints she was in an ongoing sexual relationship with Mr Vellar, had just concluded a sexual relationship with Mr Tabak, but remained a close friend of his and accepted a $3,300 cash payment from him, and she had a continuing close friendship with Michael Kollaras.

The Commission is satisfied that Ms Morgan, because of her personal relationships with Michael Kollaras and Mr Tabak and desire to secure them as future clients for her proposed consulting business, deliberately failed to objectively and diligently address the complaints that were made by the neighbour in relation to this development.

Modification to increase permitted height

Council records show that the height of the 14 Harbour Street development has always been a contentious issue and was the main ground of objection to the initial DA by local residents. On 16 March 2005 Kollco's architect submitted an application to modify the conditions of consent to raise the height of the building by 920mm and make other external and internal changes. Email records show that two days later Ms Morgan had coffee with the Table of Knowledge, including Michael Kollaras, and afterwards he invited her to "come down more often" and she replied "ok I will". In addition, Ms Morgan testified that, following a request from Michael Kollaras, she provided him with information and assistance "about what he needed to do, how he should go about lodging his DA".

On 22 March 2005 Ms Morgan sent an email to Mr Tabak in which she wrote "Kollco modification not allocated yet … Will let you know when" and she also exchanged flirtatious emails with Michael Kollaras. On 23 March 2005 Ms Morgan received an email from Mr Zwicker informing her that the DA had been allocated to her for assessment and the next day she forwarded that email to Mr Tabak with the message "Looks like this [DA] is mine".

The Council's computer records management system ("Pathway") records that a different Council officer, Chris Hammersley, assessed and approved the DA on 30 March 2005. On that date a notice of determination generated by the Pathway system, bearing Mr Hammersley's name and electronic signature, was issued to Kollco's architect informing him that consent had been granted. However, less than half an hour after the DA was approved Ms Morgan sent an email to Michael Kollaras in which she wrote "Your lucky day today … approval issued this morning". He promptly sent her an email back in which he wrote "You're the best. Thank you very very much". She then replied by writing:

> *… just a clever girl will tell you about it later* [sic]. *Tell Tabak he definitely owes Chris a lunch. Not that he did anything but give me his computer to access for half an hour but he still owes him one.*

The Council file contains no records clarifying who actually assessed the DA, what considerations he or she took into account and what the reasons were for approving it.

Ms Morgan ultimately admitted that she approved the DA using Mr Hammersley's computer while logged on under his name. At the public inquiry she was asked whether she did this to hide her participation in the application and make it look as though Mr Hammersley

had approved it. She initially replied "I could have", but later denied that she had. The following exchange then occurred:

[Counsel Assisting]: Why did you use Hammersley's computer?

[Ms Morgan]: Because at certain times our log-on to the [computer] *system would not work, and when the log-on went off you couldn't issue anything, you couldn't do anything, and sometimes it would take days or even weeks to get your log-on working again properly, so in order to do any work—*

Q: Why did [Mr Tabak] *have to give* [Mr Hammersley] *a lunch?*

A: Because Chris had given up half an hour of his work so that I could get the consent out ....

Q: Did Chris give you his password?

A: I don't know his password ... Chris was probably already logged-on.

Q: You can just sit down at someone else's desk if it's already logged-on?

A: With Chris it – I must have asked because my log-on wasn't working, to use his log-on to do it.

Mr Hammersley informed the Commission that while Ms Morgan (who was a friend of his) might have used his computer when she was logged-on under her own name, he had never allowed her to use his computer while logged-on under his name. At the public inquiry Ms Morgan was informed of his statement and she responded as follows:

Well I believed he did give me the right to use his computer because when you leave a computer you're supposed to shut it down or turn it off so that people can't access it when you're not there.

Ms Morgan ultimately claimed that the only reason why she used Mr Hammersley's computer, while logged-on under his name, was because her own log-on was not working. She further represented that because she was logged-on under Mr Hammersley's name when she assessed and approved the DA the Pathway system recorded that it was assessed by him (rather than her) and automatically generated the notice of determination bearing his name and electronic signature. She essentially denied any wilful wrongdoing.

The Commission does not accept Ms Morgan's claims for the following reasons:

- The Commission accepts Mr Hammersley's statement that he never allowed Ms Morgan to use his computer while logged-on under his name and regards it as extremely unlikely that any public official would genuinely believe that he or she had a right to use an official computer system while logged-on under someone else's name unless he or she had been granted explicit authority to do so, particularly in light of the fact that the Council's Policy on Computer Systems Acceptable Usage contained the following provision:

  Council staff are provided with a unique identification (username and password) to enable them to access Council computer systems. Staff may not share their username and password with other Council staff ... Council staff will not attempt to gain unauthorised access to Council computer systems or aid others to do so.

- Even if it is accepted that Ms Morgan believed that she had permission to use Mr Hammersley's log-on and the only reason she did so was because her own log-on was not working, she still knowingly created false records in the Pathway system (which falsely represent that he, and not her, assessed and determined the DA) and knowingly issued a notice of determination containing a false representation (it falsely represents that it was prepared by him, and not by her).

- While the Pathway system usually automatically generates a notice reflecting the details under which the person determining the DA was logged-on, it is (as Ms Morgan herself testified in relation to the Quattro DA) possible to effectively override this process and physically produce a notice with different details. Accordingly, even if Ms Morgan did have to use Mr Hammersley's log-on details to assess and determine the DA in the Pathway system, she could have produced an accurate notice of determination bearing her own name. Her failure to have done so is indicative of wilful wrongdoing.

- If she had not wilfully intended to create the false records in the Pathway system and issue the notice containing a false representation it is more likely than not that she would have, at the very least, created a file note or some other record clearly identifying what had occurred and explaining why it occurred. She did not do so.

- Even if Ms Morgan's claims are true, there is no available evidence of any kind of legitimate urgency that would have necessitated or justified what occurred in relation to this matter (i.e. creating false records in an official system) instead of, for example, postponing determination of the DA until Ms Morgan's log-on worked again or permitting her to initially determine it outside the Pathway system (and notify the applicant of the outcome) and subsequently enter the relevant details into that system so that an accurate record would be maintained.
- Ms Morgan's emails in relation to this matter to Mr Tabak on 22 and 24 March 2005 and to Michael Kollaras are, at the very least, indicative of a lack of impartiality on her part in relation to the entire handling of this particular DA.

It is also noteworthy that the events in relation to this matter occurred when Ms Morgan was actively planning to set up her own business as a town planning consultant (for which she hoped to secure Michael Kollaras and Mr Tabak as clients). For example, in early March 2005 she informed Mr Tabak that she would be leaving the Council in a few months and in April 2005 she prepared business cards and letterheads for her proposed business.

The Commission is satisfied that Ms Morgan, because of her personal relationships with Mr Tabak and Michael Kollaras and desire to secure them as future clients for her proposed consulting business, selectively gave them proactive assistance and advice in relation to the DA, expedited its determination and approved it under someone else's name. However, due to an absence of relevant records the Commission is unable to determine whether the DA was actually approved without proper justification.

91–95 Montague Street

On 11 May 2005 Kollaras & Co submitted to the Council an application for construction of an undercover loading bay attached to an existing warehouse at 91–95 Montague Street, the principal place of business of a number of companies owned, managed and controlled by the Kollaras brothers. On 19 May 2005 the DA was allocated to Ms Morgan as the sole "responsible officer" and she approved it in less than one day, when the average time taken by the Council to process and determine DAs was almost one hundred days. The Commission was unable to locate any records relating to the actual assessment of this DA, such as a report demonstrating that relevant matters were taken into consideration.

During the month prior to approval of the DA there were various emails between Ms Morgan and Michael Kollaras of a personal nature, in which she refers to him as "My Most Favourite Greek", he refers to her as "Gorgeous Girl" and there are apparent references to her having coffee with the Table of Knowledge. None of the emails refers to this DA.

Due to the absence of relevant records, the Commission is unable to determine whether the DA was approved by Ms Morgan without proper justification. However, the Commission is satisfied that Ms Morgan should never have assessed this DA because of the obvious conflict of interest arising from her relationship with Michael Kollaras.

Knowledge and involvement of Michael Kollaras in conduct of Ms Morgan

The relevant evidence, particularly email records, clearly establishes that during a period when Michael Kollaras and Ms Morgan had a close personal relationship:

(i) he was aware that she was exercising various official Council functions in relation to the development at 14 Harbour Street, in which he had a substantial interest;

(ii) he had direct communications with her in relation to her exercise of a number of those functions; and

(iii) he was aware that she was exercising or attempting to exercise some of her functions in a manner favourable to his interests.

There is little or no direct evidence that Michael Kollaras was intimately aware of how Ms Morgan went about exercising her official functions or actively encouraged her to provide any unduly favourable treatment. Counsel Assisting submitted that "there is insufficient evidence to establish" that Michael Kollaras was complicit in any improper conduct by Ms Morgan. The Commission accepts this submission. In particular, it is noted that Michael Kollaras, through his evidence and written submissions on his behalf, categorically denied any knowledge of or involvement in improper conduct and no other witness, including Ms Morgan, contradicted his denials.

Findings of fact

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

1. Michael Kollaras had a substantial interest in the development at 14 Harbour Street, which was the subject of a number of applications or complaints to the Council between mid-2004 and mid-2005. During this period Mr Tabak was the actual or *de facto* project manager for the development and both he and Michael Kollaras had direct or indirect personal involvement in the applications or complaints.

2. Ms Morgan exercised a range of official Council functions in relation to those applications or complaints.

3. At all relevant times Ms Morgan had very close personal relationships with Michael Kollaras and Mr Tabak, which gave rise to an obvious and extreme conflict of interest.

4. In relation to applications or complaints concerning the development at 14 Harbour Street submitted to the Council between mid-2004 and mid-2005 Ms Morgan:

   (a) provided Michael Kollaras and/or Mr Tabak with proactive assistance and advice in respect of applying for an extension of the development consent, applying for a Construction Certificate and applying for a modification to the conditions of consent to increase the permitted height of the development and make other changes;

   (b) expedited, or sought to expedite, the determination of each of those applications;

   (c) failed to handle complaints about the development objectively or diligently;

   (d) dishonestly approved the application for a modification to the conditions of consent under someone else's name;

   (e) failed to make and retain adequate records relating to the exercise of her official functions; and

   (f) failed to avoid, and dishonestly failed to disclose to the Council, the conflict of interest arising because of her personal relationships with Michael Kollaras and Mr Tabak.

5. Ms Morgan purposefully engaged in the conduct set out in finding of fact 4 with the intention of improperly advantaging Michael Kollaras and/or Mr Tabak:

   (a) in the hope or expectation that she would gain future work from each of them in relation to her proposed town planning consultancy business; and

   (d) in order to assist or benefit each of them because of her personal affection for each of them.

Corrupt conduct

The Commission finds that Ms Morgan engaged in corrupt conduct on the basis that her conduct set out in findings of fact 4 and 5 is conduct of a public official that:

- constitutes or involves the dishonest or partial exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; adversely affects the exercise of official functions by a public official or public authority, and could also involve official misconduct, within the meaning of section 8(2)(a) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the common law offence of misconduct in public office and could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act.

Section 74A(2) statements

Pursuant to section 74A(2) of the ICAC Act, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Morgan for the following criminal offences:

- the common law offence of misconduct in public office in relation to her conduct set out in findings of fact 4 and 5; and
- wilfully making a false statement to, or attempting to mislead, the Commission contrary to section 80(c) of the ICAC Act in relation to her response of 4 June 2007 to a section 21 notice concerning her past relationship and meetings with Michael Kollaras.

© ICAC

The Commission is not of the opinion that consideration should be given to any of the matters referred to in section 74A(2) in relation to Michael Kollaras.

© ICAC

Chapter 5: Ms Morgan's assessment and approval of DAs and other applications relating to Frank Vellar

This chapter examines Ms Morgan's assessment and/or approval of DAs and other applications between 2004 and 2006 relating to at least four proposed developments in Wollongong in which Mr Vellar had a substantial interest. She also provided him with a range of Council information relating to other matters.

The owner of each of the four proposed developments was either a company owned and controlled by Mr Vellar or an immediate relative of Mr Vellar. It appears that no construction has commenced in relation to any of the developments.

The most significant proposal related to a $100 million development on the corner of Flinders, Campbell and Keira Streets known as "Quattro" comprised of four buildings containing 281 residential units, two commercial suites, 18 rental premises, five home offices and 803 parking spaces. Ms Morgan assessed the DA for this development from September 2004 and approved it on 18 August 2005, even though it grossly exceeded applicable development controls. The Commission addressed this matter in detail, finding that both Ms Morgan and Mr Vellar engaged in serious corrupt conduct in relation to it in Part Two of this report. The final section of this chapter includes statements under section 74A(2)(a) of the ICAC Act relating to that matter.

The second proposed development involves the construction of 51 three-bedroom residential units on land described as Lot 3, Phillips Avenue, West Wollongong. The initial DA for this development was approved on 18 April 2002, without any apparent involvement of Ms Morgan. It was a condition of consent that section 94 contributions amounting to $136,600 be paid prior to the release of the Construction Certificate (CC). In April 2005 Mr Vellar applied for payment of the contributions to be deferred until prior to release of the Occupation Certificate (OC). Ms Morgan approved this application.

The third proposed development involves the construction of four three-bedroom units over four levels, with 10 car parking spaces, at 22 Harbour Street. Ms Morgan was involved in the assessment of the initial DA for this development in 2002 and that DA was approved by another Council officer in 2003. Ms Morgan had further involvement in relation to this proposed development in July 2004 and February and March 2006.

The fourth proposal was for a controversial multi-million dollar redevelopment of the North Beach Bathers' Pavilion, which is located on Crown land in respect of which the Council acts as trustee. Ms Morgan was responsible for assessing the DA for this development between December 2004 and October 2006, at which time that role was transferred to another Council officer. In January 2008, following opposition from the community and the Heritage Office, the Council refused to grant consent for the development.

Relationship between Ms Morgan and Mr Vellar

Ms Morgan and Mr Vellar both eventually admitted that they commenced a sexual relationship in May 2004, which lasted until at least February 2008. However, Mr Vellar claimed that there was a significant pause in their relationship between June or July 2004 and February or March 2005 (during which period the DAs for Quattro and the North Beach Bathers' Pavilion were lodged and allocated to Ms Morgan for assessment). For reasons set out in Part 2 of the report, including that it is inconsistent with email records and testimony of Ms Morgan, the Commission has rejected Mr Vellar's claim and concluded that any pauses in their sexual relationship between May 2004 and February 2008 were relatively brief and during any such periods they still "remained close friends".

Some features of the personal relationship between Ms Morgan and Mr Vellar, which are relevant to the matters referred to in this chapter, are:

- 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.

© ICAC

- In February 2005, after Mr Broyd raised concerns that Ms Morgan might have a conflict of interest that could warrant removing her as the responsible officer for the Quattro DA, Mr Gilbert asked her about her relationship with Mr Vellar and she admitted to having a friendship but did not disclose that it was a sexual relationship or that he had given her gifts. Based on what she told him, Mr Gilbert concluded that there was not a significant conflict of interest and decided to let her continue to assess the DA. Ms Morgan also 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 his DAs were reallocated to someone else.
- 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 town planning consultancy business. In April 2005 she even prepared business cards and letterheads for the business containing the address of that building. She hoped to secure Mr Vellar as a client for her business.
- From March 2005 onwards Ms Morgan and Mr Vellar often declared their love for each other in emails and it is evident that by this time Ms Morgan was planning, or at least hoping for, a long-term future with Mr Vellar.
- Ms Morgan has admitted that sometime in 2005 Mr Zwicker asked her whether she was in a sexual relationship with Mr Vellar and she falsely denied that she was.
- In September and October 2005 Ms Morgan 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 as well.

Gifts and benefits from Mr Vellar to Ms Morgan

Throughout their relationship Mr Vellar provided Ms Morgan with numerous gifts and benefits, 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 (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 10 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 at 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 1 September 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 from 7 to 12 October 2006 (at least $4,816 in total).

In Part 2 of this report the Commission concluded that all of the aforementioned gifts and benefits provided in 2004 and 2005 were given by Mr Vellar 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. In reaching this conclusion the Commission took into account the fact that Ms Morgan did not disclose any of the gifts or benefits to the Council, when she knew she was obliged to, and Mr Vellar made statements during a (lawfully intercepted) telephone conversation with his wife in September 2006 which, in the Commission's

opinion, amount to an admission that he gave gifts and benefits to Ms Morgan because she could provide favourable treatment when assessing DAs in which he had an interest.

False statements by Ms Morgan and Mr Vellar

In March 2007 the Commission issued a notice to Ms Morgan under section 21 of the ICAC Act requiring her to provide information about her relationship and dealings with Mr Vellar, including identifying any travel or trips they had undertaken together, any meetings they had had for any purpose (other than an official Council meeting), any Council information she had provided to him without authorisation and any types of payments, gifts or benefits she had received from him.

The Commission received a response dated 19 April 2007 containing numerous false and misleading statements. On 18 May 2007 a Commission solicitor sent a reply to Ms Morgan's solicitor containing the following text:

> *The letter of 19 April 2007 provided by you in purported compliance with* [the notice] *is considered to be inadequate and does not appear to demonstrate a genuine effort on the part of Ms Morgan to comply with* [the notice] …
>
> *I request that you consider advising Ms Morgan to provide a supplementary statement to cure any defects in the response to* [the notice] *issued to her.*

By letter dated 4 June 2007 Ms Morgan provided the Commission with a second, more detailed, response to the notice containing further false and misleading statements.

In particular, both responses failed to mention any of the cash payments and some of the other gifts or benefits provided to Ms Morgan by Mr Vellar, included false assertions that she paid for costs associated with their overseas and interstate holidays and contained false denials about her having provided Council information to him without authorisation.

Ms Morgan admitted that information she provided to her solicitor to use in preparing the first response to the notice was knowingly false and that some of the statements in her second response were "not complete" and "not truthful".

In June 2007 the Commission issued a notice to Mr Vellar under section 22 of the ICAC Act requiring him to produce a statement he had voluntarily agreed to prepare for the Commission. He responded by producing a statement signed by himself on 15 June 2007. His statement was expressed to "state [his] relationship with various people" and identified gifts or other benefits he had given to those people. In relation to Ms Morgan it included the following passage:

> *Since 2005 we have had a sexual relationship … I asked Beth to accompany me* [on a trip to China in October 2005] *to help foster our relationship …*
>
> *As in any normal relationship we have had numerous lunches and dinners together, many at her residence. As part of this relationship I have also bought gifts for both Beth and her* [child]*, at Christmas and on birthdays, just as anyone does, when they are in a normal relationship.*

The first part of this passage is false or misleading because the sexual relationship between Mr Vellar and Ms Morgan commenced in May 2004, as both of them ultimately admitted. Significantly, it represents that they had not had a sexual relationship when the DAs for Quattro and the North Beach Bathers' Pavilion were submitted to the Council and allocated to Ms Morgan for assessment (in September and December 2004 respectively) and it implies that they either had not commenced a sexual relationship or were only at an early stage of such a relationship when the DA for Quattro was approved by Ms Morgan in August 2005 (two months prior to the trip to China). At the public inquiry it was put to Mr Vellar that this part of his statement was "deliberately false" and he replied "no, I made an error". The Commission is satisfied that Mr Vellar made this part of his statement knowing it was false or misleading.

The second part of the passage quoted above omits any reference to the cash payments and other significant gifts or benefits Mr Vellar gave to Ms Morgan and implies that the only gifts or benefits he did provide were paying for lunches and dinners they had together and buying Christmas and birthday gifts for her and her child. At the public inquiry it was put to Mr Vellar that this part of his statement is misleading because it is grossly inadequate and doesn't cover the large cash deposits and other gifts to Ms Morgan. He replied that he did not consider it to be misleading. The Commission is satisfied this part of the statement is false and misleading.

The Commission is further satisfied that the overriding reason why Ms Morgan and Mr Vellar provided their false or misleading responses was that they both knew that truthful responses would reveal wrongdoing on their part and, in providing the responses they did, they intended to mislead the Commission in the hope that it would prevent detection of improper conduct they had both engaged in.

© ICAC

Lot 3, Phillips Avenue

In 2001 a company owned and controlled by Mr Vellar, Vellar Constructions Pty Ltd ("Vellar Constructions"), submitted a DA to the Council for construction of 51 three-bedroom residential units on land described as Lot 3, Phillips Avenue, West Wollongong. The initial DA for this development was approved on 18 April 2002, without any apparent involvement of Ms Morgan. It was a condition of consent that section 94 contributions amounting to $136,600 be paid prior to the release of the CC. In April 2005 Mr Vellar applied for payment of the contributions to be deferred until prior to release of the OC. Ms Morgan approved this application.

The deferment of payment of the section 94 contributions was contrary to applicable Council contribution plans (each of which provided that payment must be made prior to issuing the CC and did not contain any relevant provision permitting payments to be deferred) and section 94B(1) of the EPA Act, which stipulates that a Council may only impose a condition relating to the payment of section 94 contributions in accordance with its contributions plans. The relevant circumstances preceding the decision to defer the payments in the present case are as follows:

- Up until May 2006 the Council had a Section 94 Committee, comprised of senior officers, and it occasionally received requests for the payment of section 94 contributions to be deferred to the OC stage. Such requests were generally denied, but it appears that a small number may have been improperly approved (there is no available evidence that any such impropriety was wilful).
- By letter dated 11 January 2005 Ms Morgan refused a request by Keira Developments Pty Ltd ("Keira"), a company unrelated to Mr Vellar, for deferment of the payment of section 94 contributions and provided the following advice:

  > [T]*he deferment of payment until the issue of the* [OC] *may be considered by Council's Section 94 Committee upon lodgement of a section 96 application to modify the development consent. This is however generally not support*[ed] *and should you wish to pursue this matter adequate justification would need to be provided in your application to convince the Committee to agree to this proposal.*

- The applicant subsequently referred Ms Morgan's letter to Mr Oxley and on 29 March 2005 Mr Oxley sent a memo to Mr Gilbert in which he, without referring to the applicable contribution plans or section 94B(1) of the EPA Act, wrote:

  > [Ms Morgan's letter] *suggests that the Section 94 contribution could be deferred until the issue of the* [OC] *and this does not seem to be an unreasonable position. The letter suggests there needs to be adequate justification, however as a matter of course we have previously deferred Section 94 contributions and I propose that the same consideration be given in relation to this particular matter.*
  >
  > *Therefore could you please arrange for an amendment to be made to the Development Consent for deferment of the Section 94 contribution until issue of the* [OC].

- On 2 April 2005 Mr Gilbert forwarded Mr Oxley's memo to Mr Zwicker and he subsequently forwarded it to Ms Morgan to implement Mr Oxley's direction, which she did.

During her testimony Ms Morgan admitted that she knew that the decision by Mr Oxley to defer the payments was wrong because it was contrary to the Council's contribution plans. She also conceded that the fact that an unlawful practice had occurred in one case was no justification for repeating that practice in other cases. Nevertheless, she immediately used Mr Oxley's decision in relation to Keira as a precedent to secure deferment of the payment of section 94 contributions for Mr Vellar in relation to Lot 3, Phillips Avenue. The relevant circumstances relating to this matter are as follows:

- After the decision was made by Mr Oxley to permit deferment of the payments by Keira, Ms Morgan told Mr Vellar about that decision.
- On 5 April 2005, at 12.33 pm, Ms Morgan sent an email to Mr Vellar entitled "s94 letter" in which she wrote "babe can I speak to you about that one at lunch … too many ears about at the moment".

- On 5 April 2005, at 3.27 pm (presumably after lunch), Ms Morgan sent Mr Vellar an email in which she wrote "s94 letter … now that was conditions 1, 2, 3 and 4 of DA2001/1244 you wish modified to read prior to issue of the Occupation Certificate". This is a reference to the conditions relating to the payment of section 94 contributions in the letter of consent for the DA for Lot 3, Phillips Avenue, that was issued on 18 April 2002 with wording requiring payment prior to the release of the Construction Certificate. Mr Vellar subsequently replied to Ms Morgan's email with the words "thanks babe … X".

- On 5 April 2005, at 4:21 pm, Ms Morgan sent Mr Vellar an email in which she wrote "s94 letter … address it to John Gilbert with a CC to Rod".

- On 5 April 2005 Mr Vellar signed a letter addressed to the Council, marked for the attention of "John Gilbert … cc. Rod Oxley", containing a request that conditions 1 to 4 of the consent for the DA for Lot 3, Phillips Avenue be "changed to now require payment of all Section 94 Contributions prior to the issue of the Occupation Certificate rather than the Construction Certificate". The only reason or purported justification offered for the proposed change was the following:

  > *We are fully aware that Council has previously on other developments deferred payment of these contributions until the Occupation Certificate and therefore request that it* [sic] *not be unreasonable and* [sic] *do the same in this instance. We await your response on this urgent matter as the current DA will lapse on the 18/04/05.*

- On 7 April 2005 Mr Vellar's letter was submitted to the Council. On 10 April 2005 Mr Oxley forwarded the letter to Mr Gilbert with the following handwritten note: "Request supported and approved". On 13 April 2005 Mr Gilbert forwarded the letter to Mr Zwicker with the following handwritten note: "This needs to be expedited". Later that day Mr Zwicker forwarded the letter to Ms Morgan with the following handwritten note: "Please issue s.96 modification as per General Manager's direction by 15 April 2005".

- On 15 April 2005 Ms Morgan approved Mr Vellar's application and issued a new letter of consent with conditions 1 to 4 worded to require payment of the section 94 contributions prior to the release of the Occupation Certificate. (Council records show that on that same date, being three days before the consent for the development was due to lapse, a Construction Certificate for "Ground Works and Retaining Walls Only" was issued by a private certifier, but the Council has informed the Commission that it does not appear that such work has commenced.)

During her testimony Ms Morgan admitted that, relying solely on a precedent she knew to be wrong, she subsequently arranged for the payment of section 94 contributions to be similarly deferred for the benefit of Mr Vellar in relation to Quattro (referred to in Part 2 of the report) and for the benefit of Mr Tabak in relation to Victoria Square (referred to in Chapter 3 of this part of the report). She further conceded that by advising persons such as Messrs Vellar and Tabak to apply for deferment of the payment of contributions, and then approving their applications, she gave them "preferential treatment" and provided them with a "considerable financial benefit … to the detriment of the Council".

Mr Vellar claimed that Ms Morgan acted unilaterally in arranging for the payment of the contributions to be deferred and that he was unaware of any impropriety, but he conceded that she did him "a favour" which provided him with a financial benefit. He claimed that he did not know why Ms Morgan had written in her email that she wanted to discuss this matter over lunch because there were "too many ears about" at her work.

It is significant that the events relating to this matter occurred in April 2005, which is when Mr Vellar first started making large (undisclosed) cash payments to Ms Morgan. At the public inquiry Mr Vellar denied that the changes Ms Morgan made to the conditions of consent in relation to Lot 3, Phillips Avenue, were what he was referring to during the telephone conversation with his wife in September 2006 when he gave the following reason for having "helped out" Ms Morgan:

> *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.*

In light of the overall circumstances relating to this matter, the Commission is satisfied that Ms Morgan, because (*inter alia*) of her personal relationship with Mr Vellar and her receipt of gifts and benefits from him, arranged for payment of the section 94 contributions

© ICAC

owing in relation to Lot 3, Phillips Avenue, to be deferred when she knew that they should not have been. The Commission is also satisfied that Mr Vellar was a knowing party to Ms Morgan's improper conduct and gave her gifts and benefits as inducements or rewards for that conduct.

22 Harbour Street

In 2002 a DA on behalf of Mr Vellar's mother was submitted to the Council for construction of four three-bedroom units over four levels, with 10 car parking spaces, at 22 Harbour Street. Ms Morgan was involved in the assessment of this DA in 2002 and it was approved by another Council officer in 2003. The Commission is not aware of any impropriety associated with the assessment or approval of this initial DA.

The initial consent for the development was granted on 26 March 2003 and was valid for two years. However, on 15 July 2004 (at which time Ms Morgan was in a sexual relationship with Mr Vellar) the Council received a letter requesting that the consent be extended until March 2006. The letter did not identify any actual or purported justification for the extension. On 20 July 2004 Ms Morgan granted the extension until 26 March 2006. The Council's file does not contain any file note or other record identifying any reasons for the extension.

On 1 February 2006 Ms Morgan sent an email to Mr Vellar entitled "22 Harbour Street", which included a record from the Council's Pathway computer system and the following message from Ms Morgan: "DA expiry 26 March 2006!!!!!!!!!!!!!!". Mr Vellar replied to that email with the following message: "Che woman you know I,m [*sic*] hopless [*sic*] ……… fair dinkum !!! what do you think I should [do] as a start???".

On 16 March 2006 Ms Morgan sent Mr Vellar a further email entitled "Harbour Street" in which she quoted section 95(4) of the EPA Act ("a development consent … does not lapse if … work is physically commenced … before the date on which the consent would otherwise lapse") and then wrote: "You need to get something physically commenced asap and get evidence of the work to [the Council] to confirmation [*sic*]". On 22 March 2006 Mr Vellar sent an email to Ms Morgan entitled "harbour street" in which he wrote:

> *Hey gorgeous, sweety, honey, beautiful, irresistible, edible, adorable bubba ………… can you issue the extension letter for harbour st …*
>
> *Fair dinkum your* [sic] *hopless* [sic] *!!!!!!!!!!! I know i know xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxx*

The terms of the initial consent for the development were such that it was not legally possible to extend it beyond 26 March 2006, as requested by Mr Vellar, and no such extension was granted. However, Council records show that on 27 March 2006 the Council was provided with a Construction Certificate for the "installation of bored piers" purportedly issued by a private certifier on 23 March 2006. In addition, the following entry has been made in the Council's Pathway system in respect of this certificate "Work Commenced: 25-Mar-2006". However, the Council has informed the Commission that it does not appear that any work has commenced in relation to this development and, in particular, there is no evidence of bored piers having being installed.

The emails in relation to this matter are a clear example of Ms Morgan using her official Council position to proactively provide assistance to Mr Vellar and him exploiting their personal relationship to actively solicit favourable treatment from her in relation to the exercise of her official Council functions. Due to the absence of relevant records and a lack of other evidence the Commission has been unable to determine whether Ms Morgan actually acted partially or dishonestly in exercising any of her official functions or whether Mr Vellar actually received any unduly favourable treatment from her. However, the Commission is satisfied that from May 2004 onwards Ms Morgan should not have had any involvement in relation to this proposed development because of the obvious conflict of interest arising from her relationship with Mr Vellar.

North Beach Bathers' Pavilion

The North Beach Bathers' Pavilion ("the Pavilion") is located on Crown land, in respect of which the Council acts as trustee, between Cliff Road and the beach in North Wollongong. In December 2002 the Council, following a public tender process, resolved to invite a company owned and controlled by Mr Vellar, Pavilion Enterprises Pty Ltd ("Pavilion Enterprises"), to submit a DA for redevelopment of the Pavilion.

On 23 August 2004 the Council gave in-principle agreement to plans proposed by Pavilion Enterprises, pending formal determination of a DA. This involved Mr Vellar's company spending around $3.5 million on a commercial redevelopment in return for being granted a 35-year lease over the Pavilion with no rent payable for the first 20 years and 15% of the market rent payable over the next 15 years. At the time the Pavilion was

listed as a heritage item of "local significance" in the *Wollongong Local Environmental Plan 1990* ("WLEP 1990").

Appointment of Ms Morgan as the responsible officer

On 14 December 2004 Pavilion Enterprises submitted a DA to the Council for the proposed redevelopment ("the Pavilion DA"). On 20 December 2004 Ms Morgan was assigned as the responsible officer for the DA. On that same day she sent an email to Mr Vellar which included a record from the Council's internal Pathway computer system showing that she was the responsible officer for the DA.

At the public inquiry Mr Vellar testified that, prior to 20 December 2004, he spoke to both Mr Oxley and Mr Gilbert and requested that Ms Morgan be assigned to assess the Pavilion DA. When asked, during his testimony, whether he thought it was appropriate for him to make such a request, he replied "I believe I was entitled to express my opinion" and he stated that neither Mr Oxley nor Mr Gilbert objected to his request. At a compulsory examination prior to the public inquiry Mr Vellar described his relationship with Messrs Oxley and Gilbert in the following general terms after being asked whether he had ever requested any favours from Ms Morgan:

> *I do not require Ms Morgan to do me favours. I had a rapport and/or relationship from Mr Oxley all the way down the entire division. I dealt with these people on a daily basis. Friendships were generated because of the volume of the DAs and the work that we did. Wollongong is a small town and we – we live in a small township where friendships are fostered … through the business dealings every day …*

Ms Morgan's testimony lends some support to Mr Vellar's evidence. While the Council's Pathway system records that she appointed herself as the responsible officer for the Pavilion DA, she testified that she only did so after being told by a more senior Council officer that Mr Oxley wanted her to assess the DA.

Mr Oxley and Mr Gilbert both claimed that they could not recall whether they had a conversation with Mr Vellar about Ms Morgan being appointed to assess the Pavilion DA, but Mr Gilbert conceded that he might have had conversations with both Mr Vellar and Mr Oxley in relation to this issue.

In Part 2 of this report the Commission concluded that Mr Vellar spoke to both Mr Oxley and Mr Gilbert and requested that Ms Morgan be assigned to assess the Quattro DA before she was actually assigned to do so in September 2004 (email records and testimony from Mr Vellar supported this conclusion). In addition, at the public inquiry the Commission played two lawfully intercepted telephone conversations between Mr Vellar and Mr Oxley in late 2006 in which Mr Vellar asked Mr Oxley to allocate someone to assess two imminent DAs who would assess them expeditiously and Mr Oxley agreed to do so.

In light of all of the available evidence, the Commission is satisfied that Mr Vellar spoke to both Mr Oxley and Mr Gilbert and requested that Ms Morgan be assigned to assess the Pavilion DA and each of them acceded to Mr Vellar's request. The Commission is further satisfied that Mr Vellar made his request because he hoped or expected that, because (*inter alia*) of his personal relationship with Ms Morgan, she would exercise her official functions in relation to the assessment of the DA in a way favourable to his interests.

At the public inquiry Ms Morgan conceded that she should not have been the responsible officer for the Pavilion DA.

Assessment of the DA

The Pavilion DA was placed on public exhibition from 15 December 2004 to 4 February 2005. During and after that period the Council received over 50 submissions, the vast majority of which objected to the proposed development on multiple grounds, including adverse heritage impact, excessive scale, over-commercialisation and inadequate parking. In May 2005 the Council was also presented with a petition signed by 779 residents who opposed the redevelopment in the form proposed by Mr Vellar's company.

When submissions were received by the Council Ms Morgan often immediately emailed them to Mr Vellar, including at least one marked "Private and Confidential". Mr Vellar replied with comments such as "Tell her to F… off" and "what a f...... bitch". These illustrate the lack of formality and objectivity associated with assessment of the DA from an early stage.

On 10 February 2005, after Mr Broyd had raised concerns that Ms Morgan might have a conflict of interest that warranted removing her as the responsible officer for the Quattro DA, Ms Morgan sent Mr Gilbert an email in which she wrote "Frank [Vellar] will not be happy" if his DAs are reallocated to someone else. They were not reallocated and later that day Ms Morgan sent Mr Vellar an email about the Pavilion DA in which she wrote:

> [John Gilbert] *advised we are doing the opposite of what we normally do for this DA, i.e. we are working from an approval backwards so we need to make sure we have comments/evidence to support our approval decision …*

During her testimony Ms Morgan agreed that in this email she was representing that a decision had already been made to approve the Pavilion DA and that she and other Council officers were merely seeking to ensure that there were appropriate records to justify that decision. She conceded that such an approach was completely improper.

Any plans of Ms Morgan or other Council officers to swiftly approve the DA were soon thwarted by the NSW Heritage Office, which on 2 March 2005 resolved to consider listing the Pavilion on the State Heritage Register as an item of "State significance" and on 17 June 2005 secured such a listing. The practical effect of the listing was that the proposed redevelopment could not proceed, even if fully supported by the Council, without approval of the Heritage Council, which had consistently advised the Council that it would not approve the redevelopment proposed by Mr Vellar's company in its present form.

As a result of the heritage listing, work in relation to the actual assessment of the DA submitted by Mr Vellar's company effectively stalled for a lengthy period and little progress was made up until October 2006 when Ms Morgan stopped being the responsible officer and the DA was reallocated to another officer, Mark Burgess, to assess. However, during this period Ms Morgan continued to exercise various official functions in relation to the proposed redevelopment, such as representing the Council in negotiations with the Heritage Office, and acted in ways favourable to Mr Vellar's interests. She also directly provided him with a significant amount of confidential and/or internal Council information (referred to below).

After a series of ultimately unsuccessful negotiations between the Council, the Heritage Office and Mr Vellar from mid-2005 to mid-2007, the DA was finally assessed by Mr Burgess in December 2007. He prepared a comprehensive assessment report that was highly critical of most aspects of the proposed redevelopment and included conclusions that "issues raised in objection letters are generally considered to have merit" and "the proposal includes excessive commercial development … which will be to the detriment of the heritage significance of the building". On 8 January 2008 the Council formally determined to refuse consent for the redevelopment.

Leaking of information to Mr Vellar

Email records show that in 2005 Ms Morgan forwarded internal Council emails between herself and other officers to Mr Vellar in ways that did not disclose to the other officers that he had received them. For example:

- On 15 March 2005 she sent Mr Vellar a set of emails between herself and Cr David Brown in which he referred to a recommendation he might make about the DA. When forwarding the emails to Mr Vellar she wrote: "NOT TO BE REPEATED/FORWARDED!!!!!". On a printout of this email found at Mr Vellar's premises this message from Ms Morgan had been obliterated.
- On 8 April 2005 she sent Mr Vellar a set of emails in which Cr Anne Wood raised questions and concerns about the DA and Mr Vellar responded (to Ms Morgan) with the words: "TELL HER …. BUSY!!!!! AND SHE,LL [*sic*] BE CHIPPED!" (Ms Morgan and Mr Vellar claimed that the term "chipped" was used by them to mean "you were just going to cut [people] out of your life or cut out their involvement with you", rather than "that you were going to do them harm").
- On 25 May 2005 she forwarded to Mr Vellar sensitive email correspondence between senior Council officers, which included references to confidential legal advice obtained by the Council to the effect that it should engage an external and independent planning consultant to assess the Pavilion DA because the Council had a conflict of interest arising from the fact that it was the trustee of the site.
- On 25 May 2005 she also forwarded to Mr Vellar an email sent on behalf of Mr Broyd in which he recommended to Mr Oxley and other senior officers that the Council engage an independent planning consultant to assess the Pavilion DA. On a printout of this email found at Mr Vellar's premises the words "NO WAY" have been written by Mr Vellar. In addition, Mr Vellar replied to Ms Morgan's email with the following message: "SPOKE TO RO [Rod Oxley] ALL OK TELL DB [David Broyd] to F… OFF OR HE WILL BE CHIPPED HAVE STARTED THE ENGINE AND AM ON THE WAY !!! XXXXXXXXX".

© ICAC

When Ms Morgan was questioned about some of these emails at the public inquiry she admitted sending them to Mr Vellar and disingenuously offered the following reason for doing so:

> *I thought it was my job to keep him informed … on what was going on with his application in terms of the assessment process.*

When she was subsequently asked in broader terms about providing Council information to Mr Vellar she more candidly admitted that from mid-2004 onwards she gave him internal and confidential information that "should not have been made available to him", because he requested it.

In addition, when the Commission executed search warrants at Mr Vellar's premises it found copies of the following documents, among others, relating to the Pavilion DA:

- A heritage report dated March 2005 prepared for the Council by an external consultant. The words "Very Confidential Heritage Report" had been handwritten on the report by Mr Vellar.
- An internal Council memo dated 23 May 2005 containing a summary of confidential legal advice received by the Council relating to: its liability to pay compensation to Mr Vellar's company if the Heritage Council or the Council itself required the scale of the proposed redevelopment to be reduced or if the Council decided not to proceed with the redevelopment at all; and the desirability of the Council engaging an independent external consultant to assess the DA because of the Council's conflict of interest. A handwritten note on the memo indicates that Ms Morgan was one of the intended recipients of it. In addition, the words "W.C.C – Highly Confidential" had been written on the memo by Mr Vellar.

At the public inquiry Mr Vellar admitted that Ms Morgan provided him with the aforementioned memo and told him that it was confidential. He also admitted that he knew that he should not have received it.

Mr Vellar further admitted that after he received the previously mentioned email sent to him by Ms Morgan on 25 May 2005 (containing Mr Broyd's recommendation that an independent planning consultant be engaged to assess the Pavilion DA) he telephoned Mr Oxley and objected to an independent consultant being appointed. He said that he did so because any such consultant would not have knowledge of the DA and denied that he did it because he knew that an independent person would not approve the DA. The Commission is satisfied that the overriding reason why Mr Vellar objected to the appointment of an independent consultant was that he wanted Ms Morgan to continue assessing the DA because he hoped or expected that she would do so in ways favourable to his interests.

It is significant that the aforementioned Council information was provided by Ms Morgan to Mr Vellar at around the same time as he started making large (undisclosed) cash payments to her and she was also actively planning to establish her own town planning consulting business, in respect of which she wished to secure Mr Vellar as a client.

It is also significant that Weekly Status Reports of the Council's DAC Division show that Ms Morgan remained the responsible officer for the Pavilion DA up until 3 October 2006. Accordingly, all of the previously identified gifts and benefits provided by Mr Vellar to Ms Morgan in 2006 – namely, the costs associated with the trips to Melbourne in February 2006, the Hunter Valley on 1 September 2006 and Fiji from 7 to 12 October 2006 (which was organised on or before 30 September 2006) – were given or at least offered when Ms Morgan was still in a position of being able to provide favourable treatment or confidential information to Mr Vellar in relation to the assessment of the Pavilion DA.

Provision of information by Ms Morgan to Mr Vellar relating to other matters

At the public inquiry a folder was tendered containing evidence, including copies of over 100 emails, showing that between August 2004 and late 2006 Ms Morgan provided Mr Vellar with a large volume of Council information relating to matters other than the four proposed developments previously referred to. The information provided includes land ownership records, internal and external reports, copies of correspondence and a range of documents or records relating to the Council's assessment and determination of DAs. The following are some characteristics of this evidence:

- Most of the information relates to DAs that were not assessed or determined by Ms Morgan. There is no apparent legitimate reason for her having accessed, let alone provided to Mr Vellar, that information.
- Most of the information relates to land not owned (at least not at the time the information was provided) by Mr Vellar or any associated person or entity. There is no apparent legitimate reason for him having received that information from her.

- It is evident from the email records that most of the information was solicited by Mr Vellar and that some of it was sought by him for the purpose of deciding whether to purchase the properties in question. For example, in November 2005, after receiving from Ms Morgan a number of records relating to a parcel of land, he immediately forwarded them to his architect with the message "can we do a quick feaso" (an apparent reference to a "feasibility study").
- Many of the records provided to Mr Vellar by Ms Morgan are marked "Internal Use Only" or "Office Use Only".
- In March 2005 Ms Morgan emailed Mr Vellar a copy of a report prepared for the Council and included the message "For your eyes only ... please Frankie".
- In July 2005, after receiving from Ms Morgan information about a property extracted from the Council's internal computer system, Mr Vellar promptly forwarded it to his business partner with the message "For your eyes only".
- In June 2005 a block of six units at 10 Crown Street, which Mr Vellar had no legal interest in at the time, was advertised for sale. Between July 2005 and early 2006 Ms Morgan sent Mr Vellar Council information and advice relating to the property that would have been of value to any prospective purchaser. There is no apparent legitimate reason for Ms Morgan having accessed, or Mr Vellar having received, that information. In January 2006 Mr Vellar offered to purchase the property for $1.75 million. His offer was subsequently accepted (his records show that after renovating the building he expected to sell the units for a total net profit of $1.2 million to $1.5 million). After Mr Vellar purchased the property Ms Morgan provided him with specific assistance in relation to two DAs that were submitted to the Council on his behalf, but were not assessed or determined by Ms Morgan.
- In 2005 and 2006 Ms Morgan provided Mr Vellar with Council information about DAs submitted by companies he owned or controlled relating to properties on Old Springhill Road, Coniston, and Five Islands Road, Unanderra, even though Ms Morgan had no role in assessing those DAs. At the relevant times the Council officer assessing the DAs, Bryce Short, complained to Mr Gilbert that he suspected that Ms Morgan was leaking information to Mr Vellar, but no action was taken.
- In January 2006 Ms Morgan sent to Mr Vellar, as attachments to three otherwise completely blank emails, copies of six (entirely justified) complaints submitted to the Council about the approval of the DA for Mr Vellar's proposed Quattro development. The complaints contained the complainant's personal details and referred to his intention to lodge further complaints with government Ministers.
- Many of the emails contain messages suggesting that Council information was provided by Ms Morgan and/or requested by Mr Vellar as a personal favour. For example, after providing Mr Vellar with land ownership records Ms Morgan wrote in one email "Love you babe XXXX … Cant [*sic*] wait for my kiss!!". Similarly, when requesting information from Ms Morgan or thanking her for providing it Mr Vellar often referred to Ms Morgan as "babe" or "bubba" and concluded his messages with numerous crosses (signifying kisses).
- Ms Morgan continued to provide land ownership records to Mr Vellar in circumstances such as those referred to above even after she was advised by email on 29 November 2005 that it was Council policy that such records could only be disclosed for strictly limited purposes (none of which applied to Mr Vellar).

In addition, when the Commission executed a search warrant at Ms Morgan's home in late 2006 it found a Council file relating to a DA for 38 Montague Street, Fairy Meadow. At the public inquiry Ms Morgan, who had no role in assessing the DA, admitted that she wrongly took the file home because Mr Vellar, who had no legal interest in either the DA or property, had asked her to do so and said he wanted to look at it.

At the public inquiry Mr Vellar made a general admission that between August 2004 and late 2006 he requested and received Council documents from Ms Morgan, including some that were of a confidential nature.

At the public inquiry Ms Morgan also made a general admission that from mid-2004 (when they commenced their sexual relationship) onwards Mr Vellar requested Council information from her, including information relating to other persons' DAs and other confidential or internal information that should not have been made available to him, and she provided it to him knowing that she should not have done so.

The evidence relating to the provision of Council information by Ms Morgan to Mr Vellar, coupled with the evidence relating to the unduly favourable treatment she provided in relation to the assessment of DAs relating to the four proposed developments in which he had substantial interests (particularly Quattro), convincingly demonstrates that between mid-2004 and late 2006 Ms Morgan deliberately abused her position and exploited opportunities provided by it for the personal benefit of Mr Vellar (and herself) and he actively encouraged and assisted her to do so by requesting that she be appointed to assess his DAs, soliciting improper favours from her and providing her with inducements and rewards.

Findings of fact

In addition to the specific findings of fact relating to the assessment and determination of the Quattro DA referred to in Part 2 of this report, the Commission is satisfied to the requisite degree that the following facts have been established:

1. Between mid-2004 and late 2006 a number of DAs and/or other applications relating to the following four proposed developments in which Mr Vellar had substantial interests were submitted to the Council: "Quattro"; the construction of units at Lot 3, Phillips Avenue, West Wollongong, and 22 Harbour Street, Wollongong; and redevelopment of the North Beach Bathers' Pavilion.
2. Between mid-2004 and late 2006 Ms Morgan was responsible for assessing and/or determining such DAs or other applications.
3. At all relevant times Ms Morgan was in a sexual relationship with Mr Vellar, which gave rise to an obvious and extreme conflict of interest.
4. In 2004 Mr Vellar spoke to Messrs Gilbert and Oxley and requested that Ms Morgan be appointed to assess the DAs for Quattro and the North Beach Bathers' Pavilion, and in May 2005 he objected to an independent planning consultant being appointed to assess the latter DA, because he hoped or expected that Ms Morgan, because of (*inter alia*) his personal relationship with her, would assess them in ways favourable to his interests.
5. From mid-2004 to October 2006 Mr Vellar provided the following gifts and benefits to Ms Morgan as inducements or rewards for favourable treatment in relation to the DAs referred to in finding of fact 1 above, and for the improper provision by her to him of Council information relating to other matters, 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 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 10 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 at 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;

© ICAC

- 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 1 September 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 from 7 to 12 October 2006 (at least $4,816 in total).

6. In relation to the proposed construction at Lot 3, Phillips Avenue, West Wollongong, Ms Morgan in April 2005 deliberately:

   (a) misused information about a past improper deferment of section 94 contributions in another case to selectively advise Mr Vellar to seek deferment of the payment of section 94 contributions amounting to $136,600, when she knew that such deferment could not properly be granted;

   (b) deferred payment of those contributions, when she knew that it was improper to do so; and

   (c) failed to avoid, or disclose to the Council, the conflict of interest arising because of her personal relationship with Mr Vellar and receipt of gifts and benefits from him.

7. In relation to the DA for the redevelopment of the North Beach Bathers' Pavilion Ms Morgan between late 2004 and late 2006 deliberately:

   (a) decided to approve, or recommend approval of, the DA before completing a genuine or objective assessment of it;

   (b) provided Mr Vellar with confidential or internal Council information, when she knew that she was not authorised to do so and he was not entitled to receive it, including the following:

      (i) on 15 March 2005 she sent him internal emails between herself and Cr Brown;

      (ii) on 8 April 2005 she sent him internal emails between herself and Cr Wood;

      (iii) on 25 May 2005 she sent him internal emails between herself and more senior Council officers, which included references to confidential legal advice obtained by the Council;

      (iv) on 25 May 2005 she sent him an internal email sent on behalf of Mr Broyd containing a recommendation that Council engage an independent planning consultant to assess the DA;

      (v) she provided him with a heritage report dated March 2005 relating to the redevelopment prepared for the Council by an external consultant;

      (vi) she provided him with an internal Council memo dated 23 May 2005 containing a summary of confidential legal advice received by the Council; and

   (c) failed to avoid, or disclose to the Council, the conflict of interest arising because of her personal relationship with Mr Vellar and receipt of gifts and benefits from him.

8. Between August 2004 and late 2006 Ms Morgan also provided Mr Vellar with a range of Council information, including confidential or internal information, relating to matters other than the four proposed developments referred to in finding of fact 1, when she knew that she was not authorised to do so and he was not entitled to receive it.

9. Ms Morgan purposely engaged in the conduct set out in findings of fact 6 to 8 with the intention of improperly advantaging Mr Vellar:

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

   (b) in the hope or expectation that she would gain future work from him in relation to her proposed town planning consultancy business; and

   (c) in order to financially benefit him, because of her personal affection for him and desire to share a long-term future with him.

© ICAC

10. Ms Morgan engaged in the conduct set out in findings of fact 6 to 9 as part of an ongoing concerted plan with Mr Vellar, who knowingly encouraged and assisted her to do so by means such as engaging in the conduct set out in findings of fact 4 and 5 and actively soliciting improper favours or favourable treatment from her in connection with the exercise of her official Council functions.

Corrupt conduct

Ms Morgan

The Commission finds that Ms Morgan engaged in corrupt conduct on the basis that:

(i) her conduct set out in finding of fact 5 is conduct of a public official that:

- constitutes or involves the dishonest or partial exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; could adversely affect the exercise of official functions by a public official or public authority, and could also involve matters of a similar nature to bribery, within the meaning of sections 8(2)(b) and (x) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the criminal offence of corruptly receiving benefits contrary to section 249B(1) of the Crimes Act and could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act.

(ii) her conduct set out in findings of fact 6 to 9 is conduct of a public official that:

- constitutes or involves the dishonest or partial exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; involves the misuse of information or material acquired in the course of her official functions; adversely affects the exercise of official functions by a public official or public authority, and could also involve official misconduct, within the meaning of section 8(2)(a) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the common law of offence misconduct in public office; and could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act.

Mr Vellar

The Commission finds that Mr Vellar engaged in corrupt conduct on the basis that:

(i) his conduct set out in finding of fact 5 is conduct of a person that:

- could adversely affect the honest or impartial exercise of official functions by a public official, within the meaning of section 8(1)(a) of the ICAC Act; could adversely affect the exercise of official functions by a public official or public authority, and could also involve matters of a similar nature to bribery, within the meaning of sections 8(2)(b) and (x) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the criminal offence of corruptly giving or offering benefits contrary to section 249B(2) of the Crimes Act.

(ii) his conduct set out in finding of fact 10 is conduct of a person that:

- could adversely affect the honest or impartial exercise of official functions by a public official, within the meaning of section 8(1)(a) of the ICAC Act;
- could adversely affect the exercise of official functions by a public official or public authority, and could also involve a conspiracy to commit official misconduct, within the meaning of sections 8(2)(a) and (y) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the criminal offences of aiding and abetting the common law offence of misconduct in public office and conspiring to commit the common law offence of misconduct in public office.

© ICAC

Section 74A(2) statements

In relation to the matters referred to in this chapter of the report, and in relation to the matters set out in Part 2 of the report, the Commission considers Ms Morgan and Mr Vellar to be affected persons and makes the following statements pursuant to section 74A(2) of the ICAC Act.

Ms Morgan

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Morgan for the following criminal offences:

(i) corruptly receiving a benefit, contrary to section 249B(1) of the Crimes Act, in relation to the receipt of each of the gifts and benefits from Mr Vellar set out in finding of fact 5;

(ii) the common law offence of misconduct in public office in relation to her conduct:

- in assessing and determining the Quattro DA (set out in findings of fact 8 and 9 in Part 2 of the Report);
- relating to Lot 3, Phillips Avenue, West Wollongong, set out in findings of fact 6 and 9 in this chapter;
- relating to the North Beach Bathers' Pavilion set out in findings of fact 7 and 9 in this chapter;
- relating to the provision of Council information to Mr Vellar set out in findings of fact 8 and 9 in this chapter;

(iii) conspiring (with Mr Vellar) to commit the common law offence of misconduct in public office in relation to her conduct in assessing and determining the Quattro DA;

(iv) wilfully making a false statement to, or attempting to mislead, the Commission contrary to section 80(c) of the ICAC Act in relation to:

- her reponse dated 19 April 2007 to the notice issued to her under section 21 of the ICAC Act in March 2007 concerning the extent of her dealings with Mr Vellar and;
- her second response, of 4 June 2007, to that notice concerning the extent of her dealings with Mr Vellar.

As the Council terminated Ms Morgan's employment in June 2007, it is not necessary to make any statement in relation to any of the matters referred to in sections 74A(2)(b) and (c) of the ICAC Act.

Mr Vellar

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Vellar for the following criminal offences:

(i) corruptly giving a benefit, contrary to section 249B(2) of the Crimes Act, in relation to each of the gifts and benefits he gave to Ms Morgan set out in finding of fact 5;

(ii) aiding and abetting, and conspiring to commit, the common law offence of misconduct in public office in relation to:

- his conduct in relation to Quattro set out in finding of fact 11 in Part 2 of the Report; and
- his conduct in relation to finding of fact 10 in this chapter;

(iii) wilfully making a false statement to, or attempting to mislead, the Commission contrary to section 80(c) of the ICAC Act in relation to his written response to the notice issued to him under section 22 of the ICAC Act concerning the timing of his sexual relationship with Ms Morgan and the extent of the gifts and benefits he provided to her.

Chapter 6: Conduct of John Gilbert

This chapter examines Mr Gilbert's role in approving the Quattro development application, his relationship with Mr Vellar and his failure to appropriately deal with complaints concerning Ms Morgan's relationship with Mr Vellar.

Mr Gilbert's official responsibilities and obligations

Mr Gilbert was employed by the Council as the Manager, Development Assessment and Compliance (DAC) from 20 October 2003 until he resigned in November 2007. Ms Morgan worked in the DAC Division, although Mr Gilbert only became her immediate supervisor when she held the position of Development Manager, Administration from January 2006 to June 2007. Prior to that time Ms Morgan's immediate supervisor was Mr Zwicker, who reported directly to Mr Gilbert.

Mr Gilbert was responsible for ensuring that DAs were assessed and determined in accordance with legislative requirements and Council policies. He also had delegated authority to determine DAs himself.

Pursuant to the Council's 2004 Code of Conduct, Mr Gilbert was also required to "report any instances of possible corruption [or] maladministration". A similar reporting obligation is contained in paragraphs 10.1 and 10.3 of the Model Code of Conduct and the 2005 Code of Conduct.

From 1 January 2005 Mr Gilbert was under a statutory duty to fulfil the obligations set out in the Model Code of Conduct and the 2005 Code of Conduct pursuant to section 440(5) of the LG Act. In addition, throughout the period of his employment with the Council he was under a further duty, pursuant to section 439(1) of the LG Act, to "act honestly and exercise a reasonable degree of care and diligence" in carrying out his official functions.

The Commission is satisfied that, at all relevant times, Mr Gilbert was aware of the obligations and duties outlined above. None of these obligations is considered by the Commission to be novel or overly demanding.

Mr Gilbert as a witness

Mr Gilbert cooperated with the Commission in relation to its investigation, but he was an unsatisfactory witness at the public inquiry. In particular, he frequently claimed to have no recollection of important matters which a person in his position could reasonably be expected to recall and there were significant inconsistencies in his evidence. The Commission is not satisfied that he made a genuine attempt to recollect and recount matters that were potentially adverse to his interests.

Mr Gilbert's relationship with Mr Vellar

Mr Vellar gave evidence to the effect that he developed a friendship with Mr Gilbert, among other Council officers, because of his frequent dealings with the Council and discovery that they both shared an interest in motorcycles, shooting and red wine.

Mr Gilbert described his relationship with Mr Vellar as "mainly professional", but also identified a number of "social" interactions between himself and Mr Vellar, most of which involved Ms Morgan as well.

In about November 2004 Mr Gilbert received "a pack of four bottles of wine … worth around $100". This occurred after Mr Gilbert gave Mr Vellar a bottle of wine of comparable value at a lunch they had together and another bottle to try. By this time Mr Gilbert had been actively involved in decisions relating to Mr Vellar's proposed Quattro development and he had direct or indirect responsibilities in relation to the Pavilion DA (the pre-lodgement application for which was submitted to the Council on 27 September 2004). Mr Gilbert could not offer any explanation as to why he failed to declare receipt of the wine as required by Council's Code of Conduct. He conceded that it "would have been prudent" to have disclosed it, but claimed that he did not "believe [he] had a duty" to do so. The Commission does not accept that he was unaware of his duty to declare receipt of the wine.

Mr Gilbert informed the Commission that while he worked at the Council he had lunch with Mr Vellar at restaurants on seven occasions, as well as coffee at a café twice, and Ms Morgan attended all of the lunches (usually with no-one else present). He admitted that some took place prior to lodgement of the Quattro DA

(on 22 September 2004). In addition, email records show that two of the lunches occurred, or were planned, shortly before the Quattro DA was approved (on 18 August 2005), while another occurred shortly after its approval. On 16 December 2005 Mr Vellar, Mr Gilbert and Ms Morgan had lunch together (by themselves) at the Flying Fish restaurant in Sydney, which (according to credit card statements) cost $713 and was paid for by Mr Vellar.

Mr Gilbert stated that while some of his lunches with Mr Vellar were "just to have lunch", others "related to developments Mr Vellar was working on and to provide advice on the approach to take dealing with them". Mr Gilbert did not create records of what was discussed at these luncheon meetings. In addition, he conceded that they "could be construed" as breaching the Council's Code of Conduct, which provided that various types of interactions between council staff and developers were "inappropriate", but he sought to justify his actions by claiming that such lunches were "not uncommon in Wollongong".

In September 2006 Mr Gilbert, Mr Vellar and Ms Morgan spent a social weekend together (by themselves) at Mr Vellar's farm in Oberon, with Mr Vellar driving them to and from the property. At the time of this trip Mr Gilbert and Ms Morgan both had substantial responsibilities in relation to the assessment of the Pavilion DA, yet neither of them disclosed the trip to any other Council officer (apart from Mr Gilbert possibly verbally mentioning it to his personal assistant).

In written submissions from Mr Gilbert's barrister it was contended that "the evidence of the alleged friendship" between Messrs Gilbert and Vellar "establishes nothing higher than a felicitous relationship between two persons dealing with each other in business". This submission is rejected. The evidence establishes that the relationship between the two men went well beyond a normal professional working relationship and amounted to what can properly be characterised as a friendship. The Commission is satisfied that they had become friends by the time Mr Vellar gave Mr Gilbert the bottles of wine in November 2004, by which time they had known each other for a year and had a number of lunches together. Their friendship continued until at least late 2006.

Mr Gilbert's knowledge of Ms Morgan's relationship with Mr Vellar

The Commission is satisfied that Mr Gilbert had become a friend and confidant of Ms Morgan by the end of 2004.

It is common ground that Ms Morgan never explicitly told Mr Gilbert that she and Mr Vellar were in a "sexual" relationship. However, she maintained that it was clearly implicit from what she told him about their relationship that it was sexual in nature and that she believed that "throughout 2005" (and thereafter) he was aware that they had a sexual relationship, as opposed to a mere friendship. For example, Ms Morgan gave unchallenged evidence that during 2005 and 2006:

- She continually talked to Mr Gilbert about her relationship with Mr Vellar, including telling him they "have coffee every morning" and "lunch every day".
- She regularly spoke to Mr Gilbert about Mr Vellar's family and his personal details and mentioned weekend trips they went on together, such as their regular trips to Mr Vellar's farm in Oberon (from January 2005 onwards).
- She had ongoing discussions with Mr Gilbert "about my relationship with Frank and where things were heading and what was happening" and she told him about difficulties she was having with her husband, in response to which Mr Gilbert "would console me and give me advice" and say things like "at least you've got Frank there to support you and make sure that you're okay".
- On numerous occasions in 2006 Mr Gilbert said things like "we'll have to get you and Frank over to dinner with my wife and I on a Friday night".

Mr Gilbert maintained that he had no knowledge or belief of a sexual relationship between Ms Morgan and Mr Vellar while she worked at Council. Mr Gilbert gave the following evidence relating to his knowledge of their relationship:

- At around the end of 2004 he became aware of a "friendship" between Ms Morgan and Mr Vellar "from comments Ms Morgan made about seeing Mr Vellar for dinner dates".
- He was aware that Ms Morgan regularly visited Mr Vellar's farm in Oberon.
- He heard various rumours about "a relationship" between Ms Morgan and Mr Vellar and about them having travelled overseas together, but he did not seek to verify the accuracy of the rumours or take other action because he often heard "rumours about various people", he is "fairly open-minded" and he trusts people.

© ICAC

The Commission is satisfied that by the end of 2004 (at which time Ms Morgan was the responsible officer for both the Quattro and Pavilion DAs) Mr Gilbert knew that Ms Morgan and Mr Vellar had a friendship involving "dinner dates" and by mid-2005 (by which time Ms Morgan had separated from her husband) he knew that they had an intimate relationship as a couple, even if he had no actual knowledge of the sexual nature of their relationship.

The 2004 Code of Conduct, the Model Code of Conduct and the 2005 Code of Conduct each expressly identified "a friendship" as the first example of a type of relationship that could give rise to a non-pecuniary conflict of interest and stated that "[p]erceptions of conflicts of interest are as important as actual conflicts of interest". The Model Code and 2005 Code also stipulated that Council staff must "take timely and appropriate action to avoid, or if not, to disclose any actual, potential or reasonably perceived conflict of interest" and that such disclosures must be made "promptly, fully and in writing".

As Manager of the DAC Division Mr Gilbert was obliged to ensure that Ms Morgan complied with the Council's Code of Conduct. Mr Gilbert claimed that when he found out about the dinner dates in late 2004 he "orally advised Ms Morgan to ensure her pecuniary interests had been recorded correctly in Council's register". There is no record to support his claim and (according to his own evidence) he was not aware of any matter that Ms Morgan should have recorded in her pecuniary interest return (such as her having received significant gifts from Mr Vellar).

Not only did Mr Gilbert take no effective action to deal with any conflict of interest but he also failed to appropriately deal with complaints he received concerning Ms Morgan's relationship with Mr Vellar.

Mr Gilbert's handling of complaints about Ms Morgan and Mr Vellar

Prior to the public inquiry Mr Gilbert provided the Commission with a written statement in which he claimed that he had no recollection or records of anyone expressing concern about a relationship between Ms Morgan and Mr Vellar.

However, there was evidence that complaints or concerns were raised with Mr Gilbert by a number of persons on different occasions.

Mr Broyd, who was Mr Gilbert's immediate superior from late 2003 until mid-2005, told the Commission that in February 2005 he was told that Ms Morgan had been seen having coffee with Mr Vellar and he asked Mr Gilbert to speak to Ms Morgan and ascertain whether she should be removed from the assessment of DAs relating to Mr Vellar because of a conflict of interest. He said that Mr Gilbert undertook to discuss this with Ms Morgan. Mr Gilbert later told him there was no need to remove her from the assessment of the applications. Mr Broyd accepted that advice.

Ms Morgan said that by early February 2005 she had told Mr Gilbert that she had a "friendship" with Mr Vellar and she believed that he also knew it was a sexual relationship (although she had not explicitly told him so). She said that Mr Gilbert told her "David [Broyd] wants to take you off [the Quattro] DA because of your association with Frank. But … I'm leaving you on it". Ms Morgan's testimony is supported by emails between her and Mr Gilbert. On 9 February 2005 Mr Gilbert sent her an email entitled "Chin up!" in which he wrote "sorry to upset you". On 10 February 2005 Ms Morgan replied with an email in which she wrote:

> *I can't express to you how strong my disappointment is that … David* [Broyd] *wants to pull me off the job … John, the DAs can be reallocated … Frank will not be happy but as David does not seem to care about our local development industry that won't worry him.*

Even after being shown a copy of this email, Mr Gilbert initially claimed that he had no recollection "of anyone expressing concern" about a relationship between Ms Morgan and Mr Vellar or Mr Broyd "wanting to pull Ms Morgan off a job". However, at the public inquiry, after hearing the testimony of Mr Broyd and Ms Morgan, he conceded that he did have a discussion with Ms Morgan about her relationship with Mr Vellar in early 2005 "because Mr Broyd … did raise it with me" and that he did "provide advice to Mr Broyd on that". However, he maintained that he could not recall anything else about the matter.

The Commission received evidence that another senior Council officer, Bryce Short, complained to Mr Gilbert about Ms Morgan and Mr Vellar in 2005 and 2006. Mr Short stated that in September 2005, after hearing rumours that "Ms Morgan was seeing Mr Vellar" and "had received flowers and handbags" from him, he came to suspect that she was "leaking information" to him in relation to a DA (email records show that his suspicion was correct) and he verbally reported his suspicion to Mr Gilbert on 14 September 2005 (less than a month after the Quattro DA was approved). Mr Short stated that Mr Gilbert responded to his complaint with words to the effect of "Yeah yeah I will take care of it". He was never informed what action, if any, Mr Gilbert took against Ms Morgan. Email records show that the day after Mr Short's complaint Mr Gilbert and Ms Morgan

had, or at least arranged to have, lunch (apparently organised before Mr Short's complaint) at a restaurant with Mr Vellar.

Another senior Council officer, Mark Biondich, told the Commission that in September 2005 Mr Short told him about his suspicion that Ms Morgan had improperly provided Council information to Mr Vellar. Mr Biondich shared Mr Short's suspicion and verbally reported to Mr Gilbert that he believed that Ms Morgan was passing internal Council information to Mr Vellar. He said Mr Gilbert told him that he would look into the matter.

Mr Short also informed the Commission that in May 2006 he verbally complained to Mr Gilbert about Ms Morgan's conduct in relation to a different DA submitted to the Council by one of Mr Vellar's companies. Mr Short stated that Mr Gilbert responded to his complaint by saying "I am aware of the issue and will do something about it". He was never informed what action, if any, Mr Gilbert took against Ms Morgan.

Mr Gilbert could not initially recall Mr Short complaining to him about Ms Morgan's conduct. After being made aware of Mr Short's claims he recalled Mr Short having complained to him in September 2005 that Ms Morgan was leaking Council information to Mr Vellar. He could not recall what, if anything, he did in relation to the complaint. He further maintained that he did not recall Mr Biondich having raised a similar complaint with him and he had no recollection at all of Mr Short having made a second complaint to him about Ms Morgan in 2006.

Mr Zwicker informed the Commission that he became aware of office rumours of a relationship between Ms Morgan and Mr Vellar sometime in 2005 or early 2006. He asked her whether she was in a relationship with Mr Vellar but she denied that she was. He nevertheless conveyed his suspicions to Mr Gilbert, who said he would discuss the matter with Ms Morgan. Mr Zwicker said Mr Gilbert never got back to him and he was unaware of whether Mr Gilbert ever raised the matter with Ms Morgan.

At the public inquiry Mr Gilbert conceded that he did recall Mr Zwicker raising concerns with him about a relationship between Ms Morgan and Mr Vellar. He believed that he did subsequently have a discussion with Ms Morgan, but he did not think that he ever got back to Mr Zwicker.

There is considerable uncertainty about when Mr Zwicker raised his concerns with Mr Gilbert. Mr Zwicker thought he did so in 2006, whereas Mr Gilbert thought it was in late 2004 and Ms Morgan gave evidence suggesting that it was in 2005. It is possible that Mr Zwicker raised concerns with Mr Gilbert about Ms Morgan and Mr Vellar on more than one occasion. For example, Mr Gilbert informed the Commission that Mr Zwicker also told him that he had heard rumours that "Ms Morgan travelled overseas with Mr Vellar" (which she did in October 2005 and October 2006) and that in response he "orally advised Ms Morgan to ensure that her pecuniary interests had been recorded correctly in Council's register". He did not seek to verify the accuracy of the rumours, did not create any written records of his conversations with Mr Zwicker and Ms Morgan and did not inform any other person about the matter.

After the public inquiry another senior Council officer, Peter Coyte, informed the Commission that he received a telephone call from a local resident who complained about Ms Morgan assessing the Pavilion DA and said "the whole town knows she is having an affair with [Mr] Vellar and she should not be dealing with his development applications". Mr Coyte stated that soon after this discussion he mentioned the call to Ms Morgan and told her that if there was a relationship she needed to disclose it to her manager. According to him, she said she would speak with Mr Gilbert.

Mr Coyte says that later that day he met with Mr Gilbert and had a conversation with him to the following effect:

> *Coyte: John, has Beth Morgan had a conversation with you about a phone call I received from a resident, alleging that she has been having an affair with Frank Vellar? I met her today and advised that she formally put on record her position.*
>
> *Gilbert: Yes I am aware of the claim and am taking steps to ensure that strategies are in place to manage any real or perceived conflict of interest. That involves removing her from dealing with any Development Applications from Mr Vellar or any of his associated companies.*

It was the very next day, Saturday (16 September 2006), that Ms Morgan, Mr Gilbert and Mr Vellar travelled to Mr Vellar's farm in Oberon and spent the weekend there together. Approximately two weeks later Ms Morgan was replaced by Mr Burgess as the responsible officer for the Pavilion DA. There are no records identifying the reasons for her replacement but both Ms Morgan and Mr Zwicker have stated that Ms Morgan herself asked to be replaced. Mr Zwicker stated that the only reason she offered for seeking to be replaced was that "her workload was too high" and that he agreed to replace her even though he did not consider that she had "any immediate workload pressure".

© ICAC

Mr Gilbert was provided with a copy of Mr Coyte's statement and specifically asked whether he agreed with or disputed the matters referred to in the statement and whether the decision to replace Ms Morgan as the responsible officer for the Pavilion DA was triggered by the matters referred to in the statement. Mr Gilbert recollected having a conversation with Mr Coyte some time in September 2006 about Ms Morgan, but he did not further elaborate on the content of that conversation or indicate whether he agreed with or disagreed with Mr Coyte's version of that conversation. He also recalled having a conversation with Ms Morgan about her on-going dealing with the Bathers' Pavilion DA, but was "positive that in that conversation there was no mention of the reason for that being because she was having 'an affair' with Mr Vellar". As he recalled events, Ms Morgan asked to be taken off the DA because she had moved to a new role which did not involve assessing DAs.

The Commission accepts the evidence of Messrs Broyd, Short, Biondich, Zwicker and Coyte and is satisfied that each of the complaints or concerns they raised with Mr Gilbert about Ms Morgan and Mr Vellar, coupled with his own knowledge of the relationship between the two, caused Mr Gilbert to suspect that Ms Morgan had, at the very least, breached the Council's Code of Conduct. Mr Gilbert did not create records of any of the complaints or concerns and there is no evidence that he reported them to any other officer or took any action himself to address them.

Written submissions from Mr Gilbert's barrister sought to justify Mr Gilbert's conduct in handling complaints about Ms Morgan on two grounds. Firstly, it was submitted that Mr Gilbert had no actual knowledge that Ms Morgan and Mr Vellar were in a sexual relationship and it was effectively contended that this relieved him of any obligation to take action in relation to the complaints or concerns. Secondly, the following submission was made in relation to Mr Gilbert's failure to directly ask Ms Morgan about the nature and extent of her relationship with Mr Vellar:

> [T]*he Commissioner is asked to accept that in the 21st century there are real restraints upon males in employment situations of superiority to younger attractive females being seen to behave in any discriminatory, harassing or prurient manner – over and above what one would hope a civilised person (in times past perhaps what one would have called 'a gentleman') would self-impose in any event. Hindsight is very well, but how likely is it that anyone in Mr Gilbert's position would really have felt able to directly enquire of Ms Morgan about her sexual activities?*

The Commission does not accept either of these submissions. In light of the fact that Ms Morgan was the responsible officer for a number of DAs relating to Mr Vellar, and that Mr Vellar had actually requested that she be assigned to assess the highly contentious Quattro and Pavilion DAs, each of the complaints or concerns raised with Mr Gilbert about Ms Morgan and Mr Vellar was serious and called for prompt positive action. Mr Gilbert was under a duty to ensure that the matters raised with him were properly investigated, that the Council's Code of Conduct was complied with, that any necessary remedial action was undertaken, that relevant records were created and retained and that reports were made to appropriate officers. He failed to carry out any of these basic tasks.

The Commission is satisfied that Mr Gilbert effectively ignored all of the complaints and concerns and wilfully failed to perform his official functions in relation to these matters without any reasonable excuse. The Commission is further satisfied that he did so because of his own friendships with Mr Vellar and Ms Morgan. Indeed, in light of those friendships, Mr Gilbert had an obvious conflict of interest. He should have immediately reported each of the matters, and disclosed his own conflict in writing, to another appropriate Council officer. His decision to accompany Ms Morgan and Mr Vellar on an undisclosed weekend trip to Mr Vellar's farm after receiving, and ignoring, all of the complaints and concerns, is extraordinary.

Mr Gilbert's role in relation to the Quattro DA

Mr Gilbert had a major role in relation to the assessment and approval of the Quattro DA.

Council records show that in December 2003, long before the Quattro DA was lodged, Mr Gilbert attended meetings of the Central Wollongong Planning Committee (CWPC) and the full Council at which the proposed development was considered in detail. His presence at these meetings would have alerted him to the following facts about Quattro:

- it had a proposed FSR of 4.25:1 that was almost three times the applicable development control of 1.5:1 under WLEP 1990;
- it had a proposed maximum height of 48 metres (15 storeys) that was more than four times the applicable control of 11 metres under clause 139(2) of IREP 1;
- the proposed FSR and height also vastly exceeded proposed future controls in draft DCP 56 (which, in any event, did not override the existing controls);

© ICAC

- Council planning officers and the external Urban Design Advisory Service (UDAS) had recommended that its scale be significantly reduced;
- on 23 October 2003 DIPNR advised the Council that it did not support the proposed development because its height, bulk and scale were "excessive";
- on 2 December 2003 the CWPC effectively resolved to reject the proposed development, notwithstanding having received a presentation from Sebvell (Mr Vellar's company) and a report from Mr Oxley in which he stated that Quattro "will provide an iconic development" on a "key entry site to the inner core of the city centre"; and
- on 15 December 2003 the full Council passed a resolution (No. 529) clearly indicating that it did not support the proposed development.

On 3 December 2003, the day after the CWPC effectively resolved to reject the proposed development, one of Mr Vellar's employees sent an email to him and others in which she wrote "[w]e now need to reassess our approach for this site", but "[w]e know that for the time being we have the support of Faye [*sic*], John & Rod". This is a reference to Fay Steward, the Council's then Manager of Strategic Planning, Mr Gilbert and Mr Oxley.

Mr Broyd, the immediate superior of both Mr Gilbert and Ms Steward, expressed the (entirely correct) view from an early stage that Quattro could not properly be supported with a SEPP 1 objection to vary existing development standards and that Mr Vellar should apply for the site to be rezoned if he was not prepared to reduce the scale of the proposed development. A rezoning application would have involved a potentially lengthy public process with the decision to rezone or not being ultimately made by the then Minister for Infrastructure and Planning, acting on advice from DIPNR.

On 1 June 2004 Mr Gilbert sent an email to Ms Steward relating to the proposed imminent lodgement of the DA for Quattro in which he wrote:

> *How far does the design depart from the current standard? … I ask this because if David* [Broyd] *is to apply the same approach he has, he will refuse as soon as it comes off exhibition. David is determined to take a strong stand on what he says are the current standards. I feel obliged to forewarn* [Mr Vellar's employee] *… I will ask David how he is going to approach this DA but if he supports* [the assessment of] *it under the current controls all hell will break loose…*

This email is indicative of a lack of objectivity on the part of Mr Gilbert in relation to the assessment of this proposed development.

In late June 2004 (three months before lodgement of the Quattro DA) Mr Broyd advised Mr Vellar that if he wished to proceed with the development at its currently proposed height and scale he should seek to have the site rezoned rather than rely on SEPP 1. On 1 July 2004 Mr Broyd informed Mr Gilbert that he had provided this advice to Mr Vellar.

In July 2004 Mr Vellar telephoned Mr Gilbert and requested that Ms Morgan, with whom he was in a sexual relationship by that time, be appointed to assess the forthcoming Quattro DA. On 19 July 2004 Mr Gilbert sent an email to Mr Vellar's employee in which he referred to this matter as follows:

> *Initially I was going to use* [an external] *consultant, but Frank (Vellar) said he was not all that happy with this approach. I feel the applicant has to be comfortable with whoever* [sic] *we use so we will use an in house officer and I am thinking Beth Morgan. I have had initial discussions with Ron Zwicker along these lines.*

Mr Zwicker could not recall having any such discussion with Mr Gilbert. He told the Commission that it "is not normal practice for developers to be consulted or to have a say in which planner is allocated to assess their DA". Mr Gilbert agreed with Mr Zwicker's comment and also claimed that he did not normally get involved in decisions about who to appoint to assess particular DAs. He did not know why he got involved in such a decision in respect of the Quattro DA.

It is not clear from the evidence who was responsible for arranging for Ms Morgan to be assigned to assess the Quattro DA. At the very least, Mr Gilbert acquiesced in her assignment to assess the DA.

The DA for Quattro was lodged on 22 September 2004.

By letter dated 16 November 2004, DIPNR advised the Council in strong terms that the Quattro DA should not be approved. In particular, it stated that (and explained why): the height, bulk and scale of Quattro were excessive and out of context with surrounding developments; and it would be inappropriate to permit a FSR of 4.25:1 pursuant to SEPP 1 or a maximum height of 48 metres (15 storeys) pursuant to clause 139(2) of IREP 1. Mr Gilbert became aware of this advice soon after it was received by the Council.

On 22 November 2004 the Quattro DA was assessed by a Design Review Panel (DRP), which included three independent experts who were highly critical of the proposed development. On 23 November 2004 Mr Gilbert (and Ms Morgan) received an email from Mr

Zwicker in which he summarised the experts' criticisms, including their opinion that the density, scale and height of Quattro were grossly excessive.

On 10 December 2004 Mr Gilbert attended an Informal Planning Conference (IPC) relating to the Quattro DA, at which residents expressed strong opposition to the proposed development, claiming that its height and FSR were excessive and unjustifiable.

On 18 January 2005 Messrs Broyd and Zwicker met with Ms Morgan to discuss a memo she had prepared dated 17 January 2005, in which she expressed the opinion that Quattro "could be supported" with its proposed height of 15 storeys (48 metres). A file note of the meeting indicates that both Messrs Broyd and Zwicker disagreed with Ms Morgan's opinion, considered Quattro to be "excessive", regarded six storeys as a more appropriate height and instructed Ms Morgan to send a letter to Mr Vellar informing him that the height of the proposed development should be reduced to six storeys. On 24 and 27 January 2005 Mr Broyd sent emails to Ms Morgan, which were also received by Mr Gilbert, further directing that the proposed letter be sent to Mr Vellar.

On 31 January 2005 Mr Gilbert sent a memo to Mr Broyd in which he wrote:

> *Further to your e-mail requesting a letter be written to the applicant seeking a reduction in height from the proposed 15 storeys down to 6 storeys, the following comments are made:*
>
> *While this development has been discussed with planning officers of Council prior to my employment here, initial meetings that I was in attendance at in October and November 2003 did always discuss heights of around 14 to 15 storeys. At the time heights of this magnitude were discussed as being justified for an "iconic" site and a "gateway" site to the city.*
>
> *Further to this, in correspondence from Council to the applicant … no documented concern with heights proposed were* [sic] *raised.*
>
> *In fact, …* [at] *meetings held prior to lodgement when the urban design components were discussed* [there was] *support, in principle* [for] *such a built form.*
>
> *In my view, it would be inappropriate to now write to the applicant advising them six storeys is the preferred alternative as this should have been clearly articulated prior to any pre-lodgment and subsequent lodgment of the development application …*

The Commission considers this memo to be misleading and spurious. While the proposed height of 14 to 15 storeys had been discussed at various meetings, it had, as Mr Gilbert knew, been continually rejected both before and after lodgement of the DA, including by Council planning officers (other than Ms Morgan), UDAS, DIPNR, the CWPC, the full Council and the external DRP experts. His memo also contained no reference to the requirements of clause 139 of IREP 1 which needed to be satisfied before any height above 11 metres could be lawfully approved and which, as DIPNR had informed the Council, could not reasonably be satisfied in relation to Quattro.

As detailed in the next chapter of this report, in late January 2005 Mr Oxley overruled Mr Broyd on issues relating to the height of Quattro and thereafter Mr Broyd ceased to oppose the proposed height. However, none of these events affected the existing development controls or obviated the need for a spot rezoning or SEPP 1 determination as a precondition for approval of the Quattro DA. During his evidence to the Commission Mr Gilbert indicated that he was fully aware of these matters.

On 10 February 2005 a meeting was held between Sebvell representatives and Council officers, including Mr Gilbert and Ms Morgan. The minutes record that it was agreed that Sebvell would lodge a SEPP 1 application, rather than pursue a rezoning of the site, to seek to exceed the FSR development control (Sebvell subsequently lodged a purported SEPP 1 application which did not identify, let alone address, the fundamental issues required to be considered in making a lawful determination under SEPP 1). Mr Gilbert's diary contains the following entry, among others, relating to the meeting on 10 February 2005: "Frank V – not happy. $1.2m spent on development to date".

On 9 June 2005 Mr Gilbert invited Mr Vellar and Ms Morgan to a lunch on 16 June 2005.

On 13 July 2005 Ms Morgan sent Mr Vellar an email in which she wrote, "I spoke to John and we are going to work on a delegated approval for Quattro by the end of the month".

On 19 July 2005 Mr Gilbert sent Ms Morgan an email in which he wrote:

> *Beth, talking to Frank this arvo and he is keen, as we all are, to get* [Quattro] *out. As I understand it, we are waiting on info* [from] *traffic and once we have that we can then finalise. Can we discuss as I have promised Frank a timeline to delivery and said I would get back to him within 24 hours.*

On 20 July 2005 Ms Morgan sent Mr Gilbert a proposed timeline which provided for the DA to be approved on 1 August 2005 and included the following comment: "If we hold off to … 7 August we can give Frank a birthday present". On 29 July 2005 Mr Gilbert invited Mr Vellar and Ms Morgan to a further lunch on 5 August 2005.

On 4 August 2005 Ms Morgan sent Mr Vellar an email in which she informed him that section 94 contributions amounting to almost $850,000 would be payable in relation to the development, but that she would "be trying to get jg [John Gilbert] to agree" to the amounts being payable prior to the release of Occupation Certificates, rather than Construction Certificates. Mr Gilbert agreed to this deferment, even though (as referred to in Chapter 5 of this report) it was contrary to relevant Contribution Plans and section 94B(1) of the EPA Act. At the public inquiry Mr Gilbert claimed that at the time he believed that he was entitled to agree to the deferment. He conceded that Mr Vellar did not provide any reasons for the deferment to be made and he did not create any record of his decision.

On 11 August 2005 Ms Morgan sent Mr Gilbert an email entitled "Quattro" in which she wrote "told Frank it wont [*sic*] be out this week … my god he is not happy".

There is a remarkable dearth of Council records evidencing any actual assessment of the Quattro DA or consideration of pertinent planning issues, apart from those relating to traffic, in the six months prior to its determination (on 18 August 2005). In addition, emails from the pre-lodgement phase onwards indicate that throughout the assessment process both Mr Gilbert and Ms Morgan were preoccupied with Mr Vellar's happiness.

Delegated authority

The Quattro DA should have been reported to the Council itself for determination because of the requirements of the Council's Policy on Informal Planning Conferences (IPCs), but instead it was determined by Mr Gilbert and Ms Morgan under delegated authority in breach of that Policy.

Ms Morgan admitted that she was a party to a deliberate breach of this Policy and Mr Gilbert conceded that at the time the DA was approved he knew that the Policy had not been complied with, but they both claimed that Mr Oxley was to blame for the breach. The Commission is satisfied that on 18 August 2005 Mr Gilbert was fully aware that the Policy had not been, and was not proposed to be, complied with and he nevertheless willingly permitted the DA to be determined knowing it was wrong to do so.

Determination of the DA on 18 August 2005

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. It is common ground that Ms Morgan drafted the Notice herself and that Mr Gilbert permitted her to issue it under his name, and bearing his electronic signature, by letting her use a computer while logged-on under his name. 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 said that prior to 18 August 2005 she believed that she had authority to approve the DA herself and thought 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" or "separate" herself from the final decision to grant consent because of her relationship with Mr Vellar. Ms Morgan said that Mr Gilbert acceded to her request.

Mr Vellar ultimately conceded that he also asked Mr Gilbert to sign the Notice, instead of Ms Morgan, because of his concern that it might be alleged that he had received favouritism from Ms Morgan, and that Mr Gilbert agreed to do so.

Mr Gilbert told the Commission that Ms Morgan asked him to sign the Notice and he agreed to, but he claimed that he could not recall whether she gave him any reasons for her request. He also conceded that he had telephone calls with Mr Vellar on the day the Notice was issued, including before it was issued, but claimed he could not recall the content of those conversations. The Commission is satisfied that both Ms Morgan and Mr Vellar asked Mr Gilbert to have the Notice issued under his name, instead of Ms Morgan's, and he did so knowing that the reason for their request was to conceal or obscure Ms Morgan's role in the final decision to approve the DA because of her relationship with Mr Vellar.

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. While the Commission accepts that

Mr Gilbert did not assess the DA himself, it does not accept that he believed that Ms Morgan had properly assessed it.

Ms Morgan did not, either on or before 18 August 2005, provide Mr Gilbert with any written report containing an assessment of the Quattro DA or other crucial matters, such as the SEPP 1 application or considerations under clause 139(3) of IREP 1. Ms Morgan and Mr Gilbert both conceded that such a report would "normally" be prepared in relation to a significant DA and neither of them could explain the absence of one in relation to this DA, particularly given the size and contentiousness of the development.

In addition, apart from the Notice itself, there are no documents or other records recording Mr Gilbert's decision, or the reasons for it, to grant consent for the proposed development. His diary entry for 18 August 2005 contains references to many other relatively minor matters on that day, including him attending a meeting relating to another DA at around the time the Notice was finalised and issued, but has no reference at all to the Quattro DA.

The most significant 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, although they both knew that the acceptance of such an application was a precondition to lawful approval of the DA. At the public inquiry Mr Gilbert effectively conceded that, in light of the strong advice from DIPNR on this specific issue, he knew that SEPP 1 could not properly be used to permit the proposed FSR for Quattro.
- The Commission also received unchallenged expert evidence, which it accepts, that not only was the SEPP 1 application submitted in relation to the Quattro DA not well-founded, but that 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.
- Neither Ms Morgan nor Mr Gilbert granted concurrence to the exceedence of the height control of 11 metres pursuant to clause 139(2) of IREP 1, although they both knew that such concurrence was a precondition to lawful approval of the DA. Mr Gilbert's evidence in relation to 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 1]"), but at the public inquiry he claimed 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 turning his mind to each of the considerations in clause 139(3) and then making a conscious decision to exercise his authority to grant concurrence under clause 139(2).
- The Commission also received unchallenged expert evidence, which it accepts, that not only was there no justification on planning grounds to grant concurrence to the proposed height of Quattro under clause 139(2) of IREP 1, but that no reasonable person having regard to relevant matters would have concluded that there was justification.

In light of the overall evidence, the Commission is satisfied that Mr Gilbert deliberately failed to undertake any genuine assessment of the DA against the applicable development standards and controls because he knew that Quattro grossly exceeded them and should not have been approved and he deliberately failed to create, or ensure the creation of, any records identifying the reasons for approving the DA because he knew that no proper reasons existed. The Commission is further satisfied that Mr Gilbert approved the DA primarily because of his friendships with both Mr Vellar and Ms Morgan and his desire to please Mr Vellar.

Pressure from Mr Oxley

The evidence establishes that Mr Oxley strongly supported Quattro and made it plain to Mr Gilbert that he expected the DA to be approved and wanted it approved expeditiously.

It was submitted on Mr Gilbert's behalf that Mr Oxley placed him "under extraordinary pressure" and that his position became "quite intolerable". At the public inquiry, however, Mr Gilbert was asked if he felt "under any duress or threat" that his position was at risk if

© ICAC

he did not perform his duties in ways suggested by Mr Oxley, and further asked whether Mr Oxley pressured him to do anything he did not want to do in relation to the assessment of the Quattro DA. His ultimate response was merely that Mr Oxley expressed "very clear and strong" views on matters which "influenced [his] decision making" by causing him "to look at things in a more alternative way" and also affected the enjoyment of his job. He did not claim that Mr Oxley placed him under duress or otherwise pressured him to do anything against his will in relation to the assessment of the Quattro DA.

There is no record of Mr Gilbert having ever held, let alone raised, any contrary or dissenting views to those held by Mr Oxley in relation to the Quattro DA.

While the Commission accepts that the strong support for Quattro from Mr Oxley would have placed pressure on Mr Gilbert to approve the DA and to do so expeditiously, the available evidence does not establish that this pressure caused him to do anything against his will in relation to this particular matter.

Findings of fact

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

1. By late 2004 Mr Gilbert had become aware of a friendship involving "dinner dates" between Ms Morgan and Mr Vellar and by mid-2005 he was aware that the two of them were in an intimate relationship as a couple.

2. Between February 2005 and September 2006, during which period Ms Morgan was responsible for assessing a number of DAs in which Mr Vellar had substantial interests, serious complaints or concerns about Ms Morgan's relationship and/or dealings with Mr Vellar were raised with Mr Gilbert by Messrs Broyd, Short, Biondich, Zwicker and Coyte and Mr Gilbert deliberately:

   (a) failed to make records of the complaints or concerns;

   (b) failed to report the complaints or concerns to other appropriate officers;

   (c) failed to ensure that the matters raised were adequately investigated;

   (d) failed to ensure that Ms Morgan complied with the Council's Code of Conduct and/or take other appropriate remedial action; and

   (e) failed to avoid, or fully disclose in writing, his own conflict of interest arising from his friendships with both Mr Vellar and Ms Morgan.

3. Mr Gilbert engaged in the conduct set out in finding of fact 2, knowing it was wrong to do so, because of his friendships with both Mr Vellar and Ms Morgan.

4. In relation to the assessment and determination of the Quattro DA in 2004 and 2005 Mr Gilbert wilfully, dishonestly and partially:

   (a) ignored criticism or rejection of the proposed development from the Urban Design Advisory Service, the Design Review Panel, the Department of Infrastructure, Planning and Natural Resources, the Central Wollongong Planning Committee and the Council itself;

   (b) acceded to Ms Morgan's and Mr Vellar's request for the Notice of Determination to be issued under his name, instead of Ms Morgan's, in order to conceal or obscure Ms Morgan's role in the decision to approve the DA;

   (c) failed to undertake, or to ensure that anyone else undertook, any assessment of the application under SEPP 1 to exceed the maximum FSR of 1.5:1 that applied to the site and permit the proposed FSR of 4.25:1 because he knew it could not reasonably have been approved;

   (d) failed to undertake, or ensure that anyone else undertook, any assessment of whether concurrence under clause 139(2) of IREP 1 should be granted to exceed the maximum building height of 11 metres that ordinarily applied to the site and permit a development with a proposed height of 48 metres because he knew it could not reasonably have been granted;

   (e) allowed the DA to be determined under delegated authority in breach of the Council's Policy on Informal Planning Conferences knowing that pursuant to that Policy the DA should have been reported to the Council itself for determination;

(f) allowed the DA to be approved without undertaking, or having ensured that anyone else had undertaken, any genuine assessment of it and knowing that it could not be lawfully approved because no application under SEPP 1 had been approved and no concurrence under clause 139(2) of IREP 1 had been granted;

(g) failed to create, or ensure the creation of, any records identifying his reasons for approving the DA because he knew that no proper reasons existed; and

(h) failed to avoid, or disclose to the Council, the conflict of interest arising because of his friendships with both Ms Morgan and Mr Vellar.

5. Mr Gilbert engaged in the conduct set out in finding of fact 4 with the intention of improperly advantaging Mr Vellar because of his friendship with both Mr Vellar and Ms Morgan and his desire to please Mr Vellar.

Corrupt conduct

The Commission finds that Mr Gilbert engaged in corrupt conduct on the basis that his conduct set out in findings of fact 2 to 5 is conduct of a public official that constitutes or involves the dishonest or partial exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act and could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act, and reasonable grounds for dismissing a public official, within the meaning of section 9(1)(c) of the ICAC Act.

Section 74A(2) statement

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

In light of the fact that Mr Gilbert is no longer employed by the Council, the Commission is not of the opinion that consideration should be given to any of the matters referred to in section 74A(2)(b) and (c) of the ICAC Act.

© ICAC

Chapter 7: Conduct of Rod Oxley

This chapter examines Mr Oxley's intervention in the Council's development assessment and approval processes on behalf of Mr Vellar, including his conduct in relation to the assessment and determination of the Quattro DA, and his possible awareness of Ms Morgan's relationship with Mr Vellar.

Mr Oxley's official responsibilities and obligations

Mr Oxley was Council's General Manager for 19 years from 1988 until he resigned on 31 May 2007. From 1 July 2005 until February 2006 he also acted as the Director of Environment and Planning. While acting in this position he had direct responsibility for Council's DAC Division.

As General Manager, Mr Oxley was responsible for directing the efficient and effective internal management of the Council, its functions and staff. This included ensuring that Council's functions and activities were implemented in compliance with the law and Council policies and resolutions and that both he and Council staff complied with the applicable Codes of Conduct. He was under a statutory duty pursuant to section 439(1) of the LG Act, to "act honestly and exercise a reasonable degree of care and diligence" in carrying out his official functions.

Pursuant to the Model Code of Conduct and the 2005 Code of Conduct he was also responsible for receiving complaints about and enquiring, or causing enquiries to be made, into suspected breaches of these Codes.

The Commission is satisfied that, at all relevant times, Mr Oxley was fully aware of his official responsibilities and the provisions of the Council's Codes of Conduct and relevant policies.

Mr Oxley as a witness

At the public inquiry Mr Oxley often claimed to have no recollection of significant matters which a person in his position could reasonably be expected to recall. The Commission found much of his evidence unconvincing and is not satisfied that he made a full attempt to recollect and recount matters that were potentially adverse to his interests.

Mr Oxley's relationship with Mr Vellar

Mr Vellar told the Commission that he had known Mr Oxley for around 15 years during which they had developed a friendship. Their relationship involved lunching together "approximately once every 15 months", meeting at social events and occasionally talking about personal issues. He said Mr Oxley occasionally met with him and other members of the Table of Knowledge for coffee (the very day after he resigned from the Council Mr Oxley was photographed having coffee with the Table of Knowledge, although Mr Vellar was not present).

Mr Vellar told the Commission that on some occasions he briefed Mr Oxley on development proposals or raised concerns about existing DAs. He said Mr Oxley followed these matters up, including by sometimes intervening on his behalf in relation to the way council planners or their managers were dealing with his DAs. Ms Morgan similarly testified that it was Mr Vellar's practice to telephone Mr Oxley "if there was a drama or a problem" in relation to his DAs.

Mr Oxley claimed that he did not have a relationship or association with Mr Vellar. The Commission rejects his claim. The available evidence demonstrates that the two men had a close relationship, pursuant to which requests for favourable treatment were frequently made by Mr Vellar and acceded to by Mr Oxley.

Mr Oxley's diary indicates that between 2000 and 2006 he had 34 meetings with Mr Vellar, at least 11 of which involved lunches or coffees at restaurants or cafés.

Mr Oxley admitted that in 2005 and 2006, at times when the Council was assessing the Quattro and/ or Pavilion DAs, he met with Mr Vellar twice at restaurants (with Mr Vellar paying for Mr Oxley's lunch on both occasions) and at least once at a café to discuss development proposals or applications. No-one else was present and he did not create any records of what was discussed or disclose any meeting to any other Council officer. Mr Oxley admitted that in attending these meetings he knowingly breached clause 8.8 of the Model Code of Conduct and the 2005 Code of Conduct, which specifically prohibits any Council officer from meeting with developers alone or out of normal business hours. Despite being specifically asked, he failed to adequately explain why he chose to have the meetings outside Council premises.

© ICAC

In December 2005, a few months after the Quattro DA was approved and at a time when the Council was assessing the highly controversial Pavilion DA, Mr Vellar gave Mr Oxley a dozen bottles of "good red wine" costing $263.90 as a Christmas present. Mr Oxley conceded that he should have disclosed this gift and/or recorded it in the Council's Gifts Register, but he claimed that his failure to do so was an oversight after his return to work after the Christmas break.

The Commission lawfully intercepted telephone conversations between Mr Vellar and Mr Oxley on 4 October and 8 November 2006 in which Mr Vellar requested and Mr Oxley agreed to provide what can only properly be regarded as concessions or preferential treatment in relation to two imminent DAs. During the first conversation Mr Vellar said that he would be lodging a DA in about six weeks time and requested that "someone … be allocated to that to have an express result put on it" and ensure it "sees the right channel". Mr Oxley agreed to the request and asked Mr Vellar to call him when he lodged the DA so he could "make certain that we get someone right on it, straight away". The second conversation proceeded as follows:

Vellar: Um, I was – courtesy to let you know, um, our DA … will be coming in I think within the next four to six weeks … Um, do we get someone that can push this thing out, ah, at, at the most expedient pace possible.

Oxley: Yeah, okay.

Vellar: Um, you know, whilst ah, conforming obviously to, ah, to all the planning requirements.

Oxley: Yep.

Vellar: Ah but can we get some form of, ah, undertaking from – from someone that ah – that ah we – we get allocated someone that ah, you know, not gonna –

Oxley: Stuff around.

Vellar: Yeah.

Oxley: Yeah, I'll get ah – I'll get ah one of the um more experienced or bit more laterally thinking planners to um be put onto it.

Vellar: I like that diplomatic ah, answer you gave me.

Oxley: (laughs)

Vellar: (laughs)

Oxley: Yeah okay no, so you reckon four to six weeks?

Vellar: Yeah … we've actually got two DAs …

Oxley: Righto, well they – they'll – they'll actually go through our major projects committee now which we've established.

Vellar: Right.

Oxley: So, ah and that – that in itself guarantees ah a proper ah experienced team to be put together to ah to assess them and deal with them … But I'll um, I'll reinforce that at the time so when you lodge it or the day before you lodge it let me know.

Vellar: Yeah, okay then.

Oxley: So I can make certain it gets to the right um, the right message gets through.

There is some doubt as to whether during the telephone conversations Mr Oxley actually agreed to provide treatment to Mr Vellar that was necessarily *unduly* favourable and there is no evidence that he subsequently provided such treatment in relation to either of the two DAs.

The following are instances where Mr Oxley's conduct benefited Mr Vellar:

- As detailed in Chapter 5, in April 2005 Mr Oxley directed the deferment of payment by Mr Vellar's company of section 94 contributions amounting to $136,600 in relation to a proposed development on Phillips Avenue contrary to the Council's contribution plans and section 94B(1) of the EPA Act. He did not check the contribution plans before doing so or document the reasons for his decision. As also noted in Chapter 5, Mr Oxley directed that similar concessions be made in respect of at least one other DA.
- In May 2005 Mr Oxley failed to adopt an appropriate recommendation from both the Council's external lawyers and Mr Broyd that an external planning consultant, rather than Ms Morgan, be engaged to assess the Pavilion DA because the Council had a conflict of interest arising from the fact that it was the trustee of the site. Mr Vellar testified that when he learned of this recommendation he telephoned Mr Oxley and objected to an independent consultant being appointed. After this telephone call he sent an email to Ms Morgan in which he wrote "SPOKE TO RO [Rod Oxley] ALL OK TELL DB [David Broyd] to F… OFF".

© ICAC

- On 21 September 2006 Mr Oxley met Mr Vellar by himself at a café, and on 3 October 2006 they met again in Mr Oxley's office with another Council officer, and during one or both of those meetings Messrs Oxley and Vellar "verbally cut a deal" relating to the Pavilion DA whereby the Council would agree "to spend a million dollars in infrastructure" for the proposed development instead of Mr Vellar having to spend that money or construct the infrastructure himself. Such a proposed deal was subsequently presented to and ultimately endorsed by the full Council.

The evidence is not sufficiently clear and precise to support a positive finding that Mr Oxley wilfully provided unduly favourable treatment to Mr Vellar. The Commission is not satisfied that his actions or omissions in relation to any of the particular matters, in themselves, constituted corrupt conduct. In particular, the Commission is not satisfied to the requisite degree that Mr Oxley acted dishonestly or partially, within the meaning of those terms in section 8(1) of the ICAC Act.

Mr Oxley's role in relation to the Quattro DA

The Commission received substantial evidence, which it accepts, that Mr Oxley had a strong pro-development philosophy. It is important to emphasise that there is nothing necessarily improper or corrupt in a council officer or councillor having a pro-development philosophy as long as it is not so blinkered or excessive as to amount to bias and the steps taken to support particular development proposals do not involve dishonesty, partiality or contraventions of the law or the Council's Code of Conduct, policies or resolutions.

Mr Oxley strongly supported the proposed Quattro development, both before and after the DA was lodged with the Council. One of the issues considered by the Commission was whether his conduct in relation to the Quattro development went beyond an acceptable pro-development philosophy.

On 28 February 2003 Sebvell (Mr Vellar's company) representatives, including Mr Vellar, and Council planning officers attended a workshop to discuss the concept of Quattro. The minutes indicate that Sebvell proposed a height of 12 storeys for the development, whereas Council officers were inclined towards eight storeys given the scale of other development in the area.

On 23 April 2003 Mr Vellar and Sebvell representatives met with Mr Oxley, Alex Darling, the then Lord Mayor of Wollongong, and Bronwyn Seiden, the Council's then Manager of Strategic Planning. The minutes of the meeting record that Mr Vellar stated that he wanted the height of Quattro to be "a minimum of 12 storeys", that Mr Darling indicated that he would "agree to increased heights based on merit of site and design" and that Mr Oxley was in agreement, wanted to see an increase in heights in the CBD and advised Ms Seiden to reach agreement with planners prior to submission of the DA to the Planning Committee.

Mr Oxley told the Commission that in mid-2003 he was aware that Dr Mouritz, the Council's then Director of Planning and Environment, and Council assessment officers opposed any height for Quattro above nine storeys, which reflected the proposed future height control in draft DCP 56 (itself a policy not allowed by the EPA Act).

By June 2003 Mr Vellar proposed that the maximum height of Quattro be increased to 14.5 storeys and on 18 June 2003 Sebvell's own planning advisor, David Laing, sent Mr Vellar an email in which he indicated that such a height was excessive and unjustifiable. His email included the following passage: "we can do all the lobbying we like with WCC [Wollongong City Council] but we won't get anywhere if [DIPNR] … will not support a development of this scale. [DIPNR] have told us as much already".

On 21 August 2003 Mr Laing sent Mr Vellar a further email in which he advised that Council assessment officers were refusing to support any development exceeding nine storeys. Mr Laing recommended that Sebvell seek to ensure that the support it had from Messrs Oxley and Darling "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 storeys (around 48 metres) and an FSR of 4.25:1.

Mr Oxley's diary records that in September and October 2003 he had three meetings with Mr Vellar, including a lunch, but there is no record of what they discussed.

Mr Oxley attended meetings of the CWPC and full Council in December 2003 at which Quattro was considered in detail. His presence at these meetings would have alerted him to the following facts about Quattro, if he was not already aware of them:

- it has a proposed FSR of 4.25:1 that was almost three times the applicable control of 1.5:1 under WLEP 1990;

© ICAC

- it had a proposed maximum height of 48 metres (15 storeys) that was more than four times the applicable control of 11 metres under clause 139(2) of IREP 1;
- the proposed FSR and height also vastly exceeded proposed future controls in draft DCP 56 (which, in any event, did not override the existing controls);
- Council planning officers and the external Urban Design Advisory Service (UDAS) had recommended that its scale be significantly reduced; and
- on 23 October 2003 DIPNR advised the Council that it "does not support" the proposed development because its "height, bulk and scale" were "excessive".

At the meeting of the CWPC on 2 December 2003 Sebvell made a presentation in support of the proposed development and the Committee also received a report from Mr Oxley in which he stated that Quattro "will provide an iconic development" on a "key entry site to the inner core of the city centre". The Committee effectively resolved to reject the proposed development because of its excessive scale.

The day after the CWPC meeting Mr Vellar's employee sent an email to him and others in which she wrote "[w]e now need to reassess our approach for this site", but "[w]e know that for the time being we have the support of Faye [*sic*], John & Rod". This is a reference to Fay Steward, the Council's then Manager of Strategic Planning, Mr Gilbert and Mr Oxley.

At the meeting of the full Council on 15 December 2003 a resolution (No. 529) was passed clearly indicating that the Council did not support Quattro and regarded any height above nine storeys as excessive. Mr Vellar himself admitted that his interpretation of the resolution was that the Council had, in effect, closed the door on the DA, yet he decided to proceed at very large cost.

Mr Vellar told the Commission that in 2004 he telephoned Mr Oxley and suggested that Ms Morgan (with whom Mr Vellar was in a sexual relationship by that time) be appointed to assess the imminent DA for Quattro. He said Mr Oxley was non-committal and did not disagree or oppose the suggestion. Mr Oxley said he could not recall such a discussion. In light of the overall evidence, particularly the telephone conversations between Messrs Vellar and Oxley in October and November 2006 and other decisions taken by Mr Oxley which benefited Mr Vellar (which are referred to earlier in this chapter) the Commission is satisfied that Mr Vellar requested Mr Oxley assign Ms Morgan to assess the Quattro DA. It is not clear on the evidence who was ultimately responsible for assigning Ms Morgan. At the very least Mr Oxley acquiesced to her assignment.

Shortly after the DA for Quattro was lodged with the Council (on 22 September 2004) and Ms Morgan was assigned to assess it, DIPNR advised the Council that the DA should not be approved. In particular, it stated that (and explained why) it would be inappropriate to permit the proposed FSR pursuant to SEPP 1 or proposed height pursuant to clause 139(2) of IREP 1. Mr Oxley became aware of this advice soon after it was received.

In late November 2004 the external experts from the Design Review Panel concluded that the density, height and scale of the proposed Quattro development were grossly excessive and recommended that its height be reduced to between six and 10 storeys. Mr Oxley conceded that he became aware of these views shortly after they were expressed.

On 10 December 2004 there was an Informal Planning Conference (IPC) relating to the Quattro DA, at which residents expressed strong opposition to the proposed development, claiming that its FSR and height were excessive and unjustifiable. Mr Oxley did not attend the IPC, but it is evident that he was informed of the outcome soon after it was held.

At 9:00 am on 13 January 2005 Mr Oxley met with Mr Vellar by himself at a café, at Mr Vellar's request. Mr Oxley did not disclose the meeting to any other Council officer or create any record of what was discussed. At the public inquiry he claimed that he could not recall what was discussed at the meeting. Council records show that later that same day Ms Morgan commenced drafting a memo, which was completed on 17 January 2005, containing a cursory assessment of Quattro and including an opinion that the DA "could be supported" with the development having its full proposed height of 15 storeys.

On 18 January 2005 Messrs Broyd and Zwicker met with Ms Morgan and both informed her that they disagreed with her memo, considered Quattro to be "excessive" and regarded six storeys as a more appropriate height. Mr Broyd also directed her to send a letter to Mr Vellar informing him that the height of the development should be reduced to six storeys.

Mr Vellar agreed he had a practice of ringing Mr Oxley if there was a problem in relation to his DAs. Mr Vellar called Mr Oxley and also met with him to express his disappointment that Mr Broyd wanted the development scaled back to six storeys.

On 20 January 2005 Mr Broyd attended a meeting with Mr Oxley, and others, at which Ms Steward presented a draft Local Environmental Plan (LEP) and new

© ICAC

draft Development Control Plan (DCP) in which the Quattro site was (for no legitimate planning reason apparent to the Commission) identified as having a permissible height of 14+ storeys while other land in its immediate vicinity was restricted to heights of four to six storeys. Mr Broyd subsequently requested that Ms Steward change the height of the Quattro site to six storeys, rightly observing that "the indicative height of 14+ storeys is clearly inappropriately presumptive and compromising" to the assessment and determination of the DA. However, Ms Steward opposed this course, stating: "What the draft LEP is doing is retrospectively reflecting the outcomes we would like to see with respect to developer initiatives".

In late January 2005 Mr Oxley, in line with his previously expressed support for Quattro and without referring the matter to the Council, overruled Mr Broyd and endorsed Ms Steward's position. Mr Oxley explained his view in emails as follows: "where we know that we have specific proposals then these need to be reflected in the new controls" and "I don't think that we can put out a draft LEP that is not cognisant of or recognises that there are some significant applications that we are currently dealing with". This reasoning ignores the fact that the initial proposal and subsequent application relating to Quattro had, as Mr Oxley knew, been continually rejected both before and after lodgement of the DA, including by Council planning officers (other than Ms Morgan), UDAS, DIPNR, the CWPC, the full Council and the external DRP experts.

Following Mr Oxley's intervention, Mr Broyd withdrew from any involvement with the draft LEP and new draft DCP because of his "very strong professional opinion on these matters". He also ceased to oppose the proposed height of Quattro because he considered that there was "organisational commitment to support it". Council officers subsequently proceeded to develop the draft LEP and new draft DCP with the height of the Quattro site shown as 14+ storeys. However, neither of these draft plans was exhibited prior to the determination of the Quattro DA and they did not override the existing development controls in WLEP 1990 and IREP 1 (or obviate the need for a spot rezoning or SEPP 1 determination as a precondition for approval of the Quattro DA).

Mr Oxley's intervention and overruling of Mr Broyd, who later resigned because of what he described as a clash of values with Mr Oxley, cleared the way for Ms Morgan and Mr Gilbert to proceed with a favourable assessment of the DA for Mr Vellar. At the public inquiry Mr Gilbert stated that the approach endorsed by Mr Oxley (of tailoring the draft LEP and new draft DCP to meet the requirements of Mr Vellar's proposed development) was unusual, could be viewed as improper and was inconsistent with the Council's resolution of 15 December 2003. He also gave the following evidence:

> *[Counsel Assisting]: Well, the impression I get and please correct me if I'm wrong … is that somewhere earlier in the piece someone decided this development was going to go ahead and thereafter everyone just worked towards that end? Is that a mistaken view of what was taking place?*
>
> *[Mr Gilbert]: It's a view that could be taken, that's for sure.*
>
> Q. *What is there that's contrary to that view that you'd like me to consider?*
>
> A. *I don't think there is anything contrary to that view.*

On 10 February 2005 Messrs Oxley and Vellar had lunch together at a restaurant by themselves. Mr Vellar requested the meeting and paid for Mr Oxley's lunch. Mr Oxley did not disclose the meeting to any other Council officer and there is no apparent record of what they discussed. At the public inquiry Mr Oxley stated that they had "general discussions in relation to future and ongoing development within Wollongong", but claimed that he could not recall whether their discussions extended to Quattro. That same day Mr Vellar also had a formal meeting relating to the Quattro DA with Council officers, not including Mr Oxley, at which a range of decisions favourable to Mr Vellar were made, including that Council officers would not oppose the proposed height of 15 storeys.

In mid-to-late April 2005 Mr Oxley requested and received from Mr Gilbert a status report on the Quattro DA. In early May 2005 Mr Oxley had another undisclosed and undocumented meeting at a restaurant with Mr Vellar, who paid for Mr Oxley's lunch.

On 1 July 2005, following the resignation of Mr Broyd, Mr Oxley "assumed management responsibility" for the DAC Division. From at least this time onwards Mr Oxley received from Mr Gilbert weekly progress reports on significant DAs which were discussed at weekly Environment & Planning Directorate (EPD) meetings they both attended. The reports and minutes of the meetings show that Mr Oxley was kept regularly informed of issues relating to the Quattro DA up until its approval on 18 August 2005.

Mr Oxley's diary shows that he had two meetings in his office with Mr Vellar in July 2005. It appears likely that there was some discussion of the Quattro DA at these meetings because Mr Vellar testified that in July 2005 he spoke to Mr Oxley and expressed his frustration as to why the DA had not been determined. His testimony accords with that of Mr Gilbert, who claimed that in

© ICAC

August 2005 Mr Oxley put pressure on him to promptly approve the DA, and also accords with an email sent from Ms Morgan to Mr Vellar on 8 August 2005 in which she wrote "Rod has chased John on Quattro so your [*sic*] not forgotten my dear". At the public inquiry Ms Morgan further explained this email as follows: "I believe [Mr Oxley] rang and he chased up the status of the application … and made it clearly known that he wanted an approval to go out".

In August 2005 Mr Oxley also engaged in email correspondence with Ms Morgan relating to the Quattro DA, the content of which demonstrates that he had a keen interest in it being promptly approved. For example, on 11 August 2005 she sent him an email in which she wrote: "The draft conditions for Quattro are loaded except for the RTA conditions. We have just been advised that it is unlikely that the RTA will be providing their comments this week". He replied: "I will take this up with the RTA. This is not good enough on their part". On 17 August 2005 she sent him a further email in which she wrote: "I have been advised by the RTA that the letter is due out today. If this is the case, consent will be today or tomorrow". He replied: "Well done. Another major one out of the way". She responded: "Almost … will let you know when Frank picks it up".

Mr Oxley admitted that prior to determination of the DA he was aware that: the DA could not be approved unless the application to permit the proposed FSR under SEPP 1 was approved; the Council could not use SEPP 1 "willy-nilly" and could only properly approve a SEPP 1 application if specific criteria were satisfied; and DIPNR had advised the Council that it would not be appropriate to approve a SEPP 1 application in relation to Quattro. However, at no stage did Mr Oxley make any enquiries as to whether the SEPP 1 application for Quattro could properly be, or had in fact been, approved. In addition, at no stage did he ever receive any kind of written report containing an assessment of the Quattro DA and recommendation that it be approved, because no such report was ever prepared.

In light of all of the matters referred to in this chapter, the Commission is satisfied that:

- at all relevant times Mr Oxley was aware of the extent to which Quattro exceeded applicable development controls, particularly those relating to FSR and height; and
- at all relevant times Mr Oxley was aware of the extent to which Quattro had been opposed or criticised by relevant bodies and individuals, including UDAS, DIPNR, the CWPC, the full Council and the external DRP experts.

Having regard to these matters, coupled with Mr Oxley's extensive experience in local government and the unchallenged evidence received by the Commission to the effect that no reasonable person with relevant knowledge would have concluded that consent for Quattro should have been granted, the Commission is satisfied that prior to its determination Mr Oxley believed that the lawfulness of approval of the Quattro DA was questionable and that, in any event, within the Council there was opposition to the proposed development.

Approval under delegated authority

One of the most extraordinary features of the determination of the Quattro DA, having regard to the size and contentiousness of the development, is that it was approved under delegated authority without any report to the Council or consultation with relevant Councillors. Mr Gilbert and Ms Morgan blamed Mr Oxley for this impropriety.

An Informal Planning Conference (IPC) for the Quattro DA was held on 10 December 2004 and attended by, *inter alia*, Mr Gilbert, Ms Morgan and the two Councillors for the ward in which the Quattro site was located (David Brown and Anne Wood). At the IPC a number of substantive issues relating to the proposed development were raised but not resolved, including major issues relating to the proposed height and FSR. The terms of the Council's IPC Policy 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 after the IPC there was no consultation with either the Lord Mayor or the Ward Councillors and no direction that the DA could be determined under delegated authority was ever sought from, let alone made by, the Lord Mayor. Accordingly, the DA should have been reported to the Council itself for determination. It is also common ground that this did not occur and that the DA was determined by Mr Gilbert and Ms Morgan on 18 August 2005 in breach of the Council's IPC Policy.

It is significant that the Lord Mayor and both Ward Councillors had participated in the meetings of the CWPC and full Council in December 2003 at which resolutions were passed effectively rejecting

the proposed Quattro development because of its excessiveness (Councillor Brown even moved the motion for the resolution made by the full Council on 15 December 2003). In light of this fact there was an obvious risk that if they were consulted about the DA one or more of them would not have agreed to it being determined under delegated authority and there was a similar, if not greater, risk that if the DA was reported to the Council itself it would have refused to grant consent, particularly if the Council had been informed of the full extent to which the development was opposed or criticised by relevant bodies and individuals. These risks would have been particularly apparent to any person who attended the CWPC and full Council meetings in December 2003, which included Mr Oxley and Mr Gilbert.

Mr Gilbert told the Commission that he was aware of the Council's IPC Policy and intended to consult the Lord Mayor and Ward Councillors towards the end of the assessment process and ascertain whether they wanted the Quattro DA determined by the Council itself or agreed to it being determined under delegated authority. The intention for such consultation to take place appears to be reflected in the minutes of the meeting held on 10 February 2005 between Sebvell representatives and Council officers, including Mr Gilbert and Ms Morgan, which state "Meeting needs to be arranged between Sebvell, WCC Planning and WCC Councillors prior to DA approval", and the following entry in Mr Gilbert's own diary relating to the meeting: "Informal briefing of Councillors in the future".

On 13 July 2005 Ms Morgan sent Mr Vellar an email in which she wrote "I spoke to John and we are going [to] work on a delegated approval for Quattro by the end of the month". Mr Gilbert told the Commission that while at this time he thought the DA "was heading towards an approval", he still intended to consult the Councillors and ascertain whether they agreed to it being determined under delegated authority, as required by the Council's IPC Policy. This explanation is not inconsistent with Ms Morgan's email as her use of the words "we are going [to] work on" appears to contemplate that further work was required, such as consulting the Councillors, before a determination under delegated authority could proceed. It is noted that a year earlier, in relation to the DA for Victoria Square Ms Morgan did consult the Lord Mayor and Ward Councillors, albeit inadequately, and sought approval for a determination under delegated authority (as detailed in Chapter 3 of this report).

Reports and minutes relating to the weekly EPD meetings attended by Messrs Gilbert and Oxley in July and August 2005 contain the following entries relating to the Quattro DA:

- on 13 July 2005 it was reported or decided that the DA "will be finalised this month";
- on 21 July 2005 Mr Gilbert reported that he was "awaiting further information" from the RTA and advised "approval expected early August";
- on 3 August 2005 the following direction was made: "This matter to be discussed with the GM [General Manager] before talking to the Councillors. J Gilbert";
- on 10 August 2005 Mr Gilbert reported "Draft conditions finished. Awaiting RTA comments";
- on 17 August 2005 it was reported or decided that the DA was to be finalised that week; and
- on 24 August 2005 it was reported that the DA had been finalised.

These documents were only located by the Commission after the public inquiry and it sent copies to relevant affected persons, including Messrs Gilbert and Oxley, who were invited to provide further evidence and/or submissions to the Commission. Mr Gilbert responded by providing a signed written statement dated 13 May 2008, in which he claimed that he had a recollection of the meeting on 3 August 2005 and explained the aforementioned entry relating to that meeting as follows:

> *That my name is mentioned there is because the action of talking to the councillors would normally have been undertaken by me but that Mr Oxley had made it clear that before I did that I had to consult him. As I recall it, this came about when I raised with Mr Oxley in that meeting that I thought I should inform the councillors about the impending approval of the Quattro Development. It was my belief that this was required because of the convening of the* [IPC] *in relation to this* [DA] *on 10 December 2004.*
>
> …
>
> *As best I can recollect, in response to my raising this issue in the meeting, Mr Oxley replied by indicating that I was not to report to the councillors but that he would "deal with the councillors".*

In his written statement Mr Gilbert further indicated that he had no recollection of Mr Oxley indicating to him at the meetings on 10 and 17 August 2005 that he had consulted the Councillors in relation to the Quattro DA.

© ICAC

Mr Oxley did not provide any additional evidence in relation to the aforementioned matters, but his lawyers provided the Commission with two written submissions on his behalf. The first submission, dated 15 May 2008, addressed the entry relating to the Quattro DA in the minutes of the EPD meeting on 3 August 2005 as follows:

> *We are instructed by Mr Oxley that he wanted to ensure, given the protracted history of the matter, that all outstanding matters had been satisfactorily resolved before Mr Gilbert or Ms Morgan took it* [to] *the Councillors …*
>
> *Mr Oxley recalls asking that he be contacted before any referral to the Ward Councillors so that he could satisfy himself that all issues had been properly addressed such that they would satisfy the Councillor's* [sic] *requirements but not so as* [to] *make contact with the ward Councillor's* [sic] *himself.*

The second submission, dated 16 May 2008, contained a specific response to Mr Gilbert's written statement of 13 May 2008 and included the contention that his "evidence is unreliable and ought to be rejected".

In addition to the matters referred to above, Ms Morgan has consistently maintained that shortly before the consent for the Quattro DA was issued on 18 August 2005 Mr Gilbert, in her presence, telephoned Mr Oxley and asked him about consulting the councillors. Her version of the relevant events is recorded in email correspondence between herself and Mr Gilbert on 25 August 2006 (i.e. around a year after the events) at which time the NSW Ombudsman was seeking information from the Council about the approval of the DA. The correspondence begins with an email from Mr Gilbert to Ms Morgan in which he wrote:

> *Beth can you tell me if the ward Crs were advised this one was to be determined before it was? For example, did* [an] *email go to the Crs before it was determined.*

Ms Morgan promptly responded as follows:

> *No, when we were about to issue consent I asked if we should tell the Councillors. I remember you rang Rod* [Oxley] *who said that no he would ring and tell Anne* [Wood] *& David* [Brown] *personally after 5. Which he did.*
>
> *The consent on this went out at the time when Rod was pushing all those DA's* [sic] *… through at a rapid pace …*

It is unlikely that Ms Morgan would have recorded her version of events in writing as she did in her email (at a time when she was unaware of any investigation by the Commission) if she did not consider it to be true and accurate, given that there was every possibility that Mr Gilbert would check the matter with Mr Oxley (although there is no evidence that he actually did) and that both Messrs Gilbert and Oxley would have been in a position to directly refute her claim if it was a fabrication.

At the public inquiry, before Ms Morgan was shown or reminded of the email correspondence of 25 August 2006, she was asked why the Councillors had not been consulted before the Quattro DA was approved and she provided a version of events similar to that contained in her email. She was later cross-examined by counsel for Mr Oxley and it was repeatedly contended that her version of events was false, but she steadfastly maintained that it was correct. In addition, while she blamed Mr Oxley for the Councillors not being consulted and the IPC Policy being breached, she nevertheless admitted that she was a knowing party to a deliberate breach of that policy and ultimately did not seek to exculpate herself because of Mr Oxley's conduct.

At the public inquiry, at which time he had not been shown copies of the reports and minutes relating to the weekly EPD meetings in July and August 2005, Mr Gilbert stated that he could not actually recall having the telephone conversation with Mr Oxley alleged by Ms Morgan, but he said that he believed that Ms Morgan's evidence about the conversation was "correct". In his written statement of 13 May 2008 Mr Gilbert, after having read the aforementioned reports and minutes, claimed that he had a refreshed recollection of having had such a conversation with Mr Oxley in the week of the approval of the DA after Ms Morgan asked him if they should consult the Councillors. He recounted that conversation as follows:

> *I do remember ringing Mr Oxley to find out whether he had* [consulted the Councillors]*, but I cannot recall if Ms Morgan was present with me in my office when I rang Mr Oxley, or I told her of that afterwards.*
>
> *I do recall that in that telephone conversation Mr Oxley did say words to me to the effect of: "… no he would ring and tell Anne & David personally".*
>
> *I do not recall whether he actually used those words or whether he said words … more to the effect of "he would deal with" the councillors, nor whether he actually mentioned Anne Wood and David Brown personally.*

At the public inquiry, at which time he had not been shown copies of the reports and minutes relating to the weekly EPD meetings in July and August 2005, Mr Oxley conceded that prior to determination of the DA: he knew that, in accordance with the IPC Policy, the Lord Mayor and Ward Councillors needed

to be consulted and consent before the DA could be determined under delegated authority; and he knew that it was proposed by Mr Gilbert and Ms Morgan to approve the DA under delegated authority. He stated that it was not his role or responsibility to undertake such consultation himself and that he relied upon Mr Gilbert and Ms Morgan to consult with them and ensure that the policy was complied with. He further stated that he could not recall having the telephone conversation with Mr Gilbert alleged by both Mr Gilbert and Ms Morgan.

In the written submissions on behalf of Mr Oxley dated 15 and 16 May 2008 it was stated that Mr Oxley has no recollection of the alleged telephone conversation with Mr Gilbert, does not believe that any such conversation occurred and denies that it occurred. It was further contended that Ms Morgan's and Mr Gilbert's evidence in relation to the alleged conversation was unreliable and should be rejected by the Commission.

Shortly after the Quattro DA was approved Councillor Brown (who moved the motion for the resolution made by the full Council on 15 December 2003 indicating that it did not support Quattro) read about its approval in the newspaper and on 22 August 2005 he sent an email to Mr Oxley in which he complained that he had not agreed to the DA being determined under delegated authority and questioned why it had not been reported to the full Council. Mr Oxley replied later that same day as follows:

> *I was advised by email by both the Manager DAC* [i.e. Mr Gilbert] *and Senior DPO dealing with the DA* [i.e. Ms Morgan] *that all the issues that had been raised through the consultation process and by referrals to other agencies had been adequately addressed and that there was nothing further outstanding and as such that they had prepared the consent and it was subsequently issued subject to the normal array of conditions. The last outstanding issues related to the RTA and they apparently have been satisfied.*
>
> *This occurred sometime a week ago or so. I have not had any involvement in his DA although John Gilbert has reported its progress for the last several weeks at the regular weekly meeting that all directorate managers attend with myself.*
>
> *In regard to the consultation process I am of the understanding that all issues that were raised were addressed to the satisfaction of the planning assessment staff. However, given the various questions that you have raised I will make further enquiries to satisfy myself that all issues have been addressed and then discuss with you further.*
>
> *Obviously I am concerned that due process is followed.*

On 23 August 2003 Councillor Brown sent a further email to Mr Oxley in which he specifically pointed out that the DA was approved contrary to Council's IPC Policy. Mr Oxley replied later that same day as follows:

> *I will need to reinforce with the Manager DAC* [i.e. Mr Gilbert] *those due process* [sic] *and adopted council policies need to be reinforced to all staff. This is not something that I will want them to compromise on.*
>
> *I fully understand your position and support it … Please accept my apologies on this occasion. I will follow up on the issues as I indicated in my earlier email.*

There are a number of inconsistencies or improbabilities with the version of events ultimately put forward by or on behalf of Mr Oxley in relation to this matter. For example:

- He conceded that he knew that the Councillors had to be consulted before the DA could be determined under delegated authority, and he ultimately conceded that at the EPD meeting on 3 August 2005 he instructed Mr Gilbert to contact him before undertaking such consultation, yet he knowingly permitted the DA to be approved under delegated authority without (according to Mr Oxley's version of events) Mr Gilbert having contacted him about consulting the Councillors.
- On 17 August 2005 (the day before the DA was approved) he was told at the EPD meeting, and also informed by an email from Ms Morgan, that the DA was about to be approved and his diary indicates that in the morning on 18 August 2005 he had an "Informal Meeting with Councillors", yet the available evidence establishes that he did not inform the Councillors of the impending approval of the DA.
- In his email to Cr Brown of 22 August 2005 he misleadingly claimed not to have had any involvement in the DA.

© ICAC

- In his email to Cr Brown of 22 August 2005 he wrote that he "was advised by email by both [Mr Gilbert] and [Ms Morgan] that all the issues that had been raised through the consultation process and by referrals to other agencies had been adequately addressed", yet it is clear that all such issues had not been addressed, particularly the issues raised by DIPNR, and the Commission has been unable to locate any emails to Mr Oxley from either Mr Gilbert or Ms Morgan in which they advised him that all of the issues had been addressed.
- In his emails to Cr Brown of 22 and 23 August 2005 he undertook to make further enquiries to satisfy himself that all issues had been addressed, to reinforce the IPC Policy to Mr Gilbert and to follow up relevant issues. There is no available evidence of any such matters having been undertaken. In particular, Mr Gilbert and Ms Morgan both testified that they had no recollection of Mr Oxley following up any relevant matters with them and only became aware of Cr Brown's complaints to Mr Oxley when they were shown copies of his emails at the public inquiry. In addition, if Mr Oxley had undertaken enquiries to satisfy himself that all relevant issues had been addressed, as he undertook to, he would have soon discovered, if he did not already know, that they had not been, and particularly that there was no SEPP 1 determination.

In light of the overall evidence, the Commission prefers the evidence of Mr Gilbert and Ms Morgan in relation to the matters referred to in this chapter and, in particular, is satisfied that Mr Oxley deliberately prevented any consultation with the Lord Mayor and Ward Councillors prior to the determination of the Quattro DA, when he knew that it should have occurred. The Commission is satisfied he did so because he knew that such consultation would most likely jeopardise the proposed approval of the DA. The Commission is further satisfied that Mr Oxley engaged in this conduct in order to favour Mr Vellar.

The Commission regards the conduct of Mr Oxley as being particularly serious having regard to the seniority of his position with the Council and his responsibilities which included providing appropriate advice and assistance to the Lord Mayor and Councillors consistent with Council policies.

Mr Oxley's awareness of the Morgan and Vellar relationship

In October 2005, shortly after the approval of the Quattro DA and at a time when Ms Morgan was assessing the Pavilion DA, Mr Vellar and Ms Morgan went on a holiday together to China (it was also a business trip for Mr Vellar). Ms Morgan failed to disclose the trip in accordance with her obligations under the 2005 Code of Conduct and the LG Act. Mr Oxley heard a rumour about the trip and asked Mr Gilbert whether or not Ms Morgan had been away. Mr Gilbert responded that she had been on annual leave. Mr Oxley did not create any relevant records and claimed that he could not recall when he became aware of the rumour or who informed him of it.

Mr Oxley did not make any further attempt to verify the accuracy of the rumour or take any other kind of action in relation to this matter. He agreed, however, that if the rumour had been correct Ms Morgan should have been removed from her role in assessing the Pavilion DA.

Ms Morgan believed that Mr Oxley became aware of her relationship with Mr Vellar in September 2006, at which time she was responsible for assessing the Pavilion DA, after Mr Oxley learned of what was meant to be private email correspondence between them. The correspondence, all of which occurred on 18 September 2006, commenced with the receipt by Ms Morgan of an internal Council email referring to recent instances of "bullying and harassment" at the Council and proposed briefing sessions for managers to address the issue. Ms Morgan forwarded this email to Mr Vellar, who intended to send the following reply to Ms Morgan but accidentally sent to it another Council officer:

> *A little late guys .... !!!!*
>
> *How funny would it be if the papers got this one*
>
> *Ggggrrrrrrrrr ….. got time*

The Council officer who received Mr Vellar's reply reported this to Mr Oxley and, according to unchallenged evidence from Ms Morgan, on 19 September 2006 Mr Oxley visited Ms Morgan at her desk, handed her a printout of the email correspondence and said "Beth, you'd just better be careful where your emails go". He did not inquire as to why she sent the email to Mr Vellar or ask her anything about her relationship with him or take any other action.

© ICAC

While the content of Mr Vellar's reply (particularly the last line) is somewhat cryptic, it is indicative of some kind of personal relationship between the two, as is the fact that Ms Morgan forwarded the initial email to him in the first place.

The Commission is satisfied that the two incidents outlined above, particularly when viewed in combination, put Mr Oxley on actual notice of a likely undisclosed personal relationship between Ms Morgan and Mr Vellar and likely breaches by her of the Council's Code of Conduct. As General Manager, Mr Oxley was responsible for (*inter alia*) ensuring compliance with the Code of Conduct and diligently enquiring into suspected breaches of it, yet he effectively turned a blind eye to each of the incidents.

Findings of fact

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

1. In August 2005 Mr Oxley, believing that the lawfulness of approval for the Quattro DA was questionable and that, in any event, within the Council there was opposition to the development proposal, deliberately:

   (a) prevented consultation with the Lord Mayor and Ward Councillors in relation to the determination of the DA, when he knew it was required pursuant to the Council's Policy on Informal Planning Conferences, because he realised that such consultation would most likely jeopardise the proposed approval of the DA; and

   (b) ensured the DA was approved under delegated authority in breach of the Council's Policy on Informal Planning Conferences, when he knew that it should have been reported to the full Council for determination, because he realised that the Council was unlikely to approve it.

2. Mr Oxley engaged in this conduct in order to ensure that the DA was approved with the intention of improperly advantaging Mr Vellar.

Corrupt conduct

The Commission finds that Mr Oxley engaged in corrupt conduct on the basis that his conduct set out in findings of fact 1 and 2 is conduct of a public official that:

- constitutes or involves the dishonest or partial exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; and
- could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act, and reasonable grounds for dismissing a public official, within the meaning of section 9(1)(c) of the ICAC Act.

Other conduct

Section 13(1)(a)(ii) of the ICAC Act provides that one of the Commission's functions is to investigate allegations that "conduct liable to allow, encourage or cause the occurrence of corrupt conduct" may have occurred, may be occurring or may be about to occur. Section 74A(1) of the ICAC Act authorises the Commission to include in its investigation reports statements as to any of its findings, opinions and recommendations and statements as to the Commission's reasons for any of its findings, opinions and recommendations. Apart from making a finding that a person has engaged in corrupt conduct, the Commission is also able to make a finding and express an opinion that a person has engaged in "conduct liable to allow, encourage or cause the occurrence of corrupt conduct".

As stated in the Commission's *Report on unauthorised release of government information* (August 1992), the purpose of doing so is to "…identify conduct which, although not necessarily itself corrupt, increases the likelihood of corrupt conduct occurring". It is important to draw attention to such conduct, as stopping it can be an effective way of preventing actual corruption.

One issue for determination is whether any of Mr Oxley's conduct, apart from that conduct which is the subject of a corrupt conduct finding, was "conduct liable to allow, encourage or cause the occurrence of corrupt conduct".

Some of Mr Oxley's responsibilities as General Manager are set out at the beginning of this chapter. Under the LG Act he also had responsibility for the day-to-day management of the council. As such, he played a central role in establishing and maintaining the internal governance of, and expected standards

of behaviour within, the Council. Mr Oxley took an active interest in planning issues and between 1 July 2005 and February 2006 was the acting Director of Environment and Planning.

Mr Oxley admitted that he had what he described as an "open door approach" which extended to development applicants. The Commission obtained consistent evidence and information from persons including Ms Morgan, Mr Gilbert, Mr Broyd, Mr Zwicker and another town planner, Ms Nadine Luckman, that Mr Oxley would, not infrequently, intervene in the assessment of individual DAs in a manner sympathetic to the interests of developers. Mr Oxley's intervention in individual DAs was sufficiently regular that it became known as "The Level 10 Factor" (Mr Oxley's office being situated on the tenth floor of Council's building). The Commission is therefore in no doubt that a clear causal link existed between Mr Oxley's leadership and the performance of the Development Assessment and Compliance Division.

In determining whether Mr Oxley engaged in "conduct liable to allow, encourage or cause the occurrence of corrupt conduct" the Commission also takes into account Mr Oxley's following conduct:

(a) his meetings with Mr Vellar to discuss Mr Vellar's development proposals or applications alone and/or outside of office hours, which he knew breached the Council's Code of Conduct;

(b) his failure to take any effective action in 2005 to establish whether Ms Morgan and Mr Vellar had gone on a trip together and thereby determine whether Ms Morgan had a conflict of interest in dealing as a Council officer with any of Mr Vellar's matters;

(c) his failure to take any action in response to information known to him which clearly indicated a likely undisclosed personal relationship between Ms Morgan and Mr Vellar and likely breaches by Ms Morgan of her obligations under the Council's Code of Conduct;

(d) his decision to direct that section 94 contributions be deferred contrary to Council's Contribution Plans and section 94B(1) of the EPA Act, which created a flawed precedent that was deliberately exploited by Ms Morgan to secure deferrals, to the detriment of the Council, for Mr Tabak in relation to Victoria Square and Mr Vellar in relation to Lot 3, Phillips Avenue, and Quattro;

(e) his failure to ensure that the Quattro DA was properly assessed at a time when he knew that it exceeded applicable development controls and that DIPNR had advised that it was not appropriate to approve as a SEPP 1 application;

(f) his conduct in either ignoring or failing to properly consider expert planning advice from DIPNR, the Central Wollongong Planning Committee, the Urban Design Advisory Service, Dr Mouritz and Mr Broyd; and

(g) his failure to implement Council's resolution of 15 December 2003 concerning the Quattro DA.

Mr Oxley's conduct had the potential to affect staff and Councillors in three ways.

Firstly, some of his conduct had the direct effect of interfering with or overriding established governance mechanisms (such as the Council's Contributions Plans, the objects of SEPP 1, the receipt of expert planning advice and the decisions and oversight of Council) and the Code of Conduct in relation to his meetings with Mr Vellar.

Secondly, Mr Oxley's behaviour, both in terms of the specific conduct described above and his more general pro-development beliefs, created obvious behavioural cues that could have adversely influenced the approach that planning staff adopted when assessing DAs. Similarly, planning officers with managerial responsibilities would have had regard to Mr Oxley's beliefs and conduct when deciding when and how to enforce policies, procedures and the EPA Act.

The Commission is satisfied that Mr Oxley's pro-development enthusiasm was well-understood within the DAC Division and that much of the conduct set out above was known to Ms Morgan and others in the DAC Division and not only had the potential to adversely affect their exercise of official functions but, in the case of Ms Morgan, did so.

Thirdly, Mr Oxley's failure to take action in response to information brought to his attention that Ms Morgan had a conflict of interest (the conduct outlined in (b) and (c) above), clearly had the effect of allowing her corrupt conduct to continue.

Much of Mr Oxley's conduct, as outlined above, had the potential to lead other Council officers to conclude that adherence to Council policies and procedures and sound planning was, at best, optional and where they conflicted with personally desired outcomes could be ignored with impunity. His pro-development

enthusiasm, which he made known to Council officers, had the potential to adversely affect the rule of law and the integrity of the planning system.

The Commission is satisfied that Mr Oxley's conduct set out above increased the likelihood of corrupt conduct occurring and was therefore "conduct liable to allow, encourage or cause the occurrence of corrupt conduct".

Section 74A(2) statement

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

In light of the fact that Mr Oxley is no longer employed by the Council, the Commission is not of the opinion that consideration should be given to any of the matters referred to in section 74A(2)(b) and (c) of the ICAC Act.

© ICAC

Chapter 8: Conduct of Joe Scimone

This chapter examines Mr Scimone's relationship and dealings with Messrs Vellar and Tabak, his knowledge of Ms Morgan's relationships with them and his failure to report that knowledge as required by the Council's Code of Conduct. This chapter also examines Mr Scimone's role in reducing section 94 contributions payable by Mr Tabak's company in relation to the Victoria Square development.

His dealings in 2007 with Ray Younan and Gerald Carroll are addressed in Chapter 11 of this report. A number of further issues relating to Mr Scimone, including issues associated with his appointment as Council's Group Manager, Sustainability are examined in Chapter 13 of this report.

Mr Scimone's official responsibilities and obligations

Mr Scimone is an engineer. He commenced employment with the Council in 1984 and was the Manager, Engineering Services from 1992 until January 2006. In February 2006 he was appointed by Mr Oxley to act in the position of Group Manager, Sustainability. He held that position until he was made redundant in February 2007. In this position he had managerial responsibility for three divisions of the Council, including the DAC Division, and was responsible for controlling and directing staff within those divisions, including Ms Morgan and Mr Gilbert.

Mr Scimone was under a statutory duty pursuant to section 439(1) of the LG Act, to "act honestly and exercise a reasonable degree of care and diligence" in carrying out his official functions. He was required to comply with the Council's Code of Conduct. Pursuant to clause 12 of the 2004 Code of Conduct he was required to report "any instances of possible corruption [or] maladministration". Pursuant to clauses 10.1 and 10.3 of the Model Code of Conduct and 2005 Code of Conduct, which he was under an additional statutory duty to comply with pursuant to section 440(5) of the LG Act from 1 January 2005 onwards, he was obliged to report "any instances of suspected corrupt conduct [or] maladministration" and "suspected breaches of the code of conduct".

The Commission is satisfied that, at all relevant times, Mr Scimone was aware of his official responsibilities and the provisions of the Council's Code of Conduct.

Mr Scimone as a witness

The Commission found Mr Scimone to be an unconvincing witness who was prepared to say whatever he thought would best serve his own interests.

Mr Scimone's relationship with Messrs Vellar and Tabak

Between 2003 and 2005 Mr Scimone was a member of the Table of Knowledge. He regularly met for coffee with its other members, including Messrs Tabak and Vellar. He was often present when Ms Morgan attended such gatherings in 2004.

Mr Scimone has been "a close personal friend" of Mr Tabak for around 10 years. He and Mr Vellar were also friends for many years until late 2004 or early 2005, when their relationship deteriorated because of issues relating to Ms Morgan.

Mr Scimone, who prior to the public inquiry was a prominent member of the Australian Labor Party (ALP) and had close relationships with Wollongong City Councillors who were also members of the ALP, regularly had lunches at restaurants with Mr Tabak and Mr Vellar (during the period of their friendship). Mr Tabak said that he had "more than half a dozen" lunches with Mr Scimone at which Wollongong City Councillors also attended and they discussed Council projects, such as projects relating to Council-owned land in respect of which Mr Tabak or companies he controlled had submitted expressions of interest. Mr Vellar also testified that he probably enlisted Mr Scimone's assistance for the purpose of "lobbying" ALP Councillors, but Mr Scimone denied this.

In 2003 Mr Scimone purchased a unit for $575,000 from Perform Developments Pty Ltd ("Perform"), a company controlled and half-owned by Mr Tabak, in a development called Wave Apartments. Ms Morgan told the Commission that in 2004 either Mr Tabak or Mr Scimone told her that Mr Tabak had sold the unit to Mr Scimone for less than its market value. However, Messrs Tabak and Scimone both denied that the sale price was below the market rate and the Commission did not find any convincing evidence to refute their claims. Accordingly, the Commission is not satisfied that either Mr Scimone or Mr Tabak engaged in any impropriety in relation to this particular transaction.

© ICAC

In 2005 and 2006 Mr Scimone was personally involved in negotiations or assessments of proposals or applications submitted to the Council by Perform (one of which is discussed further below). Shortly after he ceased employment at the Council in February 2007 Mr Scimone was engaged by Perform to act on its behalf in negotiations with the Council in relation to a matter (a $30 to $40 million proposed public-private partnership relating to the Bank Street car park). He had previously participated in negotiations on behalf of the Council in relation to this matter.

As discussed further below, in 2006 Mr Tabak gave Mr Scimone a watch costing $10,000, which Mr Scimone failed to disclose to the Council or record on his pecuniary interests return.

Mr Scimone's relationship with Ms Morgan

Mr Scimone and Ms Morgan had a close friendship for a few years until late 2004. During this period they lunched together at restaurants and he was her confidant. Their evidence, coupled with emails between them, establishes that in 2004 and 2005 Mr Scimone also professed to be in love with Ms Morgan and he actively pursued a sexual relationship with her, but she declined his propositions.

Mr Scimone's knowledge of Ms Morgan's relationships with developers

The evidence of Ms Morgan, Mr Vellar, Mr Tabak and Mr Scimone himself, coupled with emails between Ms Morgan and Mr Scimone, establishes that in mid-2004 Mr Scimone was aware that Ms Morgan was in sexual relationships with both Mr Tabak and Mr Vellar. In addition, at some point he became aware or came to suspect that Mr Vellar and Ms Morgan had taken a trip to China together (they did so in October 2005) and that he had given her "expensive handbags" (Mr Vellar gave her at least four handbags between mid-2004 and mid-2005).

In mid-2004 Mr Scimone was aware that Ms Morgan was responsible for assessing the DA for Victoria Square (which was lodged on 9 July 2004 and approved by her on 1 October 2004). At around that time he was also aware that she was considering purchasing a unit 'off the plan' in that development.

At a compulsory examination on 28 September 2007 Mr Scimone told the Commission that he had known the Quattro DA (which was lodged on 22 September 2004 and approved on 18 August 2005) was a "development by one of Frank Vellar's companies" and that Ms Morgan was working on it. At the public inquiry, however, Mr Scimone claimed that he could not recall if he knew in 2004 that Ms Morgan had been appointed to assess the Quattro DA. The Commission is satisfied that he did know, particularly in light of the fact that he was a friend of Mr Vellar for a period of around two years (late 2002 to late 2004) during which the proposed development was being considered by the Council and he was still a confidant of Ms Morgan at around the time she was assigned to assess this particular matter (in July 2004).

In mid-2004 Mr Scimone was also aware that Ms Morgan was planning to establish her own consultancy business and was determined to do whatever was necessary to secure Messrs Tabak and Vellar, among others, as clients. Mr Scimone and Ms Morgan both conceded that this is what she was referring in the email she sent to him on 15 June 2004 containing the following text (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.*

On 6 July 2004 Ms Morgan sent Mr Scimone an email in which she wrote (as it appears in the original): "play smart. don't play stupid, NEVER, EVER FOR WHAT EVER REASON … so long as EVERYBODY plays this game they will WIN". On 7 July 2004 she sent him another email in which she wrote "why are you so sure it's a when not an if that people will be caught". On 24 March 2005 he sent her an email in which he advised her to "deny, deny, deny!" if she encountered trouble.

In September 2006 the Commission lawfully intercepted a telephone conversation between Mr Vellar and another member of the Table of Knowledge (who is a mutual friend of Messrs Vellar, Tabak and Scimone) during which Mr Vellar stated that Mr Scimone had "the ability to take more than just himself down" and expressed great fear that if he "actually names names and … throws phone numbers out there" he could "bring everybody else unstuck". The Commission considers it more likely than not that Mr Vellar was referring to, *inter alia*, Mr Scimone's knowledge of improper and illegal conduct relating to Ms Morgan's assessment of DAs relating to Messrs Vellar and Tabak.

In 2006, when he was acting as Group Manager, Sustainability Mr Scimone became aware that Ms Morgan was responsible for assessing the Pavilion DA and an application to modify the conditions of consent relating to Victoria Square.

In light of the evidence referred to above, the Commission is satisfied that throughout the period from mid-2004 until his employment with the Council ceased in early 2007 Mr Scimone was aware of possible corrupt conduct and maladministration by Ms Morgan and breaches of the Council's Code of Conduct by her.

Mr Scimone's failure to report Ms Morgan

At no stage did Mr Scimone report his knowledge or suspicions relating to Ms Morgan's relationships with, and conduct concerning, Messrs Tabak and Vellar to the Council or an appropriate Council officer. After initially claiming that he could not recall whether he was aware, at relevant times, of his reporting obligations under the Code of Conduct, he conceded that as a manager he did not need a code of conduct to know that he should report suspected corruption or maladministration.

When asked why he did not do so he claimed that he did not believe it was his responsibility to report matters relating to her when she did not work in a division he was responsible for (i.e. before February 2006) and asserted: "I thought it was someone else's responsibility – the manager of the planning department that she worked for". He further stated: "I didn't think it was any of my business to report it, who she did or didn't have sexual relationships with". The Commission rejects this assertion.

The Commission is satisfied that throughout the period between mid-2004 and early 2007 Mr Scimone was fully aware of his obligation to report his knowledge and suspicions relating to Ms Morgan to the Council and he deliberately failed to do so because of his personal affection for her and friendship with Messrs Tabak and Vellar.

Modification to the Victoria Square section 94 contributions

An application was lodged with the Council on behalf of Perform on 25 May 2006 to reduce the section 94 contributions payable in respect of Victoria Square (around $220,000), in return for constructing a car park on Council-owned land immediately opposite that development (which had a significant shortfall of car parking spaces) on the basis that it would involve "provision of a material public benefit" within the meaning of section 94(5) of the EPA Act ("the application"). The application was referred to the DAC Division, for which Mr Scimone, as acting Group Manager, Sustainability had managerial responsibility, and allocated to Ms Morgan and Zoran Sarin, the Council's Section 94 Planning Coordinator, to assess.

Mr Tabak had a discussion with Mr Scimone about the application at some time either before or after it was submitted and before it was determined.

Shortly before 23 May 2006 (on which date Mr Scimone went overseas until 4 July 2006), Mr Tabak gave Mr Scimone a watch costing $10,000. Mr Scimone did not disclose his receipt of the watch to any other Council officer, or record it in the Council's Gifts Register (even though he had previously recorded numerous gifts of much lesser value in it) or record it (as he was obliged to under the LG Act) in the 2005–06 pecuniary interest return he completed on 21 July 2006.

At a compulsory examination on 16 January 2008 Mr Tabak was asked if he had "ever offered [Mr Scimone] any type of gift or benefit or payment" and he replied "no". He was subsequently asked "Are you sure?" and he replied "positive". After the gift of the watch was drawn to his attention, Mr Tabak informed the Commission (through a letter written on his behalf by his solicitor) that he did not mention it at the compulsory examination because he misunderstood the question and thought it only referred to whether Mr Scimone ever sought a gift. The Commission rejects this explanation.

Mr Tabak, through his solicitor, claimed that he gave Mr Scimone the watch "as a gift from one friend to another" and did so because Mr Scimone was "going through a very tough time" and he (Mr Tabak) "was concerned for his health".

At the public inquiry Mr Scimone explained he received the watch: "… at a time when I was going through extreme stress and anxiety and depression and I was going overseas and it was a gift I thought between friends". He also stated that, after returning from overseas, he "forgot" to disclose the watch to the Council. It was later submitted by his solicitor that he was on prescription medication throughout the relevant period.

In June 2006 (when Mr Scimone was overseas) five Council officers, including Ms Morgan and Mr Sarin, met to discuss the application and agreed that the Council should not support it for a number of reasons, including that it had not been established that the car park would constitute a "material public benefit".

© ICAC

On 14 August 2006 Mr Scimone convened a meeting to further discuss the application attended by, *inter alia*, Ms Morgan, Mr Sarin, Mr Gilbert and himself. Ms Morgan and Messrs Sarin and Gilbert, each of whom had extensive knowledge and experience in relation to the issue at hand, gave evidence that at the meeting they opposed the application, but were "overruled" by Mr Scimone who favoured it. This evidence was supported by a contemporaneous handwritten diary entry and a typed file note prepared by Ms Morgan. Mr Sarin said that Mr Scimone directed him to prepare a report recommending the application be approved. Mr Scimone, who had no planning qualifications or other pertinent knowledge, admitted that he supported the application, but denied that he overruled the planning staff or directed Mr Sarin to prepare a report recommending that it be approved. Mr Scimone did not read the applicable Contributions Plan in assessing the application and there is no record of any reasons he had for supporting the application. The Commission finds the evidence of Ms Morgan and Messrs Sarin and Gilbert more convincing in relation to this matter.

On 16 August 2006 Mr Sarin submitted a report to Mr Oxley relating to the application which outlined the basic facts without containing a specific recommendation or identifying any opposition to the application. The report stated that the anticipated cost of constructing the car park was $125,000.

On 21 August 2006 Mr Oxley approved the application and Mr Sarin's report, with Mr Oxley's endorsement, was returned to Mr Scimone, who gave it to Mr Gilbert to "action". The Council subsequently decided that, based on figures provided by Perform, the "agreed value" of the car park was $200,000.68. Perform constructed the car park and the section 94 contributions payable in respect of Victoria Square were reduced by $200,000.68.

Mr Scimone never declared an actual, potential or reasonably perceived conflict of interest arising from his close friendship and other dealings with Mr Tabak, or made any other relevant written disclosures to the Council. When asked if he believed that he should have revealed his friendship with Mr Tabak to Mr Sarin he replied "I don't believe the friendship … was material to the discussion". The Commission is satisfied that Mr Scimone had an obvious conflict of interest in relation to this matter and wilfully breached the Council's Code of Conduct by failing to disclose and avoid it. In light of his relationship and dealings with Mr Tabak he should not have had any involvement in the assessment or determination of the application.

Having considered all of the relevant evidence, including that relating to Mr Tabak referred to in Chapter 3 of this report, the Commission is satisfied that Mr Tabak gave Mr Scimone the watch as an inducement for him to ensure that the application was approved and that Mr Scimone accepted the watch knowing that it was given for such a purpose. The Commission is also satisfied that Mr Scimone subsequently overruled planning staff and directed Mr Sarin to prepare a report recommending that the application be approved, without any genuine belief that it should have been approved, because of his receipt of the watch from, and friendship with, Mr Tabak.

Findings of fact

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

1. Between mid-2004 and early 2007 Mr Scimone was aware of possible corrupt conduct and maladministration by Ms Morgan and suspected breaches of the Council's Code of Conduct by her relating to her relationships and dealings with Messrs Tabak and Vellar.

2. Between mid-2004 and early 2007 Mr Scimone was aware that he was under a positive obligation to report his knowledge and suspicions relating to Ms Morgan's relationships and dealings with Messrs Tabak and Vellar to the Council but deliberately failed to do so because of his personal affection for her and his friendship with Messrs Tabak and Vellar.

3. Shortly before 23 May 2006 Mr Tabak gave Mr Scimone a watch costing $10,000 as an inducement for him to ensure that an imminent application to the Council on behalf of Perform Developments Pty Ltd, a company controlled and half-owned by Mr Tabak, for the reduction of section 94 contributions payable in respect of Victoria Square, was approved. Mr Scimone accepted the watch knowing or believing it was given for such a purpose.

© ICAC

4. In August 2006 Mr Scimone overruled planning staff, who opposed the application referred to above, and directed Mr Sarin to prepare a report recommending that the application be approved, when he (Mr Scimone) did not have a genuine belief that it should have been approved. Mr Scimone did so because of his receipt of the watch from, and friendship with, Mr Tabak. In exercising his official functions in relation to this matter Mr Scimone wilfully failed to disclose his friendship with Mr Tabak and his receipt of the watch from him, when he knew that he was obliged to.

Corrupt conduct

Mr Scimone

The Commission finds that Mr Scimone engaged in corrupt conduct on the basis that:

(i) his conduct set out in finding of fact 2 is conduct of a public official that:

- constitutes or involves the dishonest or partial exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; and
- could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act, and reasonable grounds for dismissing a public official, within the meaning of section 9(1)(c) of the ICAC Act;

(ii) his conduct set out in finding of fact 3 is conduct of a public official that:

- could adversely affect the exercise of official functions by a public official or public authority, and could also involve matters of a similar nature to bribery, within the meaning of sections 8(2)(b) and (x) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, a criminal offence of corruptly receiving a benefit contrary to section 249B(1) of the Crimes Act, could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act; and could constitute or involve reasonable grounds for dismissing a public official, within the meaning of section 9(1)(c) of the ICAC Act;

(iii) his conduct set out in finding of fact 4 is conduct of a public official that:

- constitutes or involves the dishonest or partial exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; adversely affects the exercise of official functions by a public official or public authority, and could also involve official misconduct, within the meaning of section 8(2)(a) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the common law offence of misconduct in public office, could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act and could constitute or involve reasonable grounds for dismissing a public official, within the meaning of section 9(1)(c) of the ICAC Act.

Mr Tabak

The Commission finds that Mr Tabak engaged in corrupt conduct on the basis that his conduct set out in finding of fact 3 is conduct of a person that:

- could adversely affect the honest or impartial exercise of official functions by a public official, within the meaning of section 8(1)(a) of the ICAC Act; could adversely affect the exercise of official functions by a public official or public authority, and could also involve matters of a similar nature to bribery, within the meaning of sections 8(2)(b) and (x) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the criminal offence of corruptly giving or offering benefits contrary to section 249B(2) of the Crimes Act.

© ICAC

Section 74A(2) statements

Mr Scimone

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Scimone for the criminal offence of corruptly receiving a benefit, contrary to section 249B(1) of the Crimes Act, in relation to his conduct set out in finding of fact 3.

As Mr Scimone is no longer employed by Council it is not necessary to make any statement in relation to any of the matters referred to in sections 74A(2)(b) and (c) of the ICAC Act.

Mr Tabak

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Tabak for the criminal offence of corruptly giving a benefit, contrary to section 249B(2) of the Crimes Act, in relation to his conduct set out in finding of fact 3.

Chapter 9: Dealings between Val Zanotto and Frank Vellar

This chapter examines the relationship and dealings between former Wollongong City Councillor Valerio ("Val") Zanotto and Mr Vellar, particularly Mr Zanotto's conduct between 2005 and 2007 in relation to the Pavilion DA (referred to in Chapter 5 of this report) and his provision to Mr Vellar of confidential Council information relating to the proposed rezoning of land known as the Hills Trucks Sales site in 2006.

Mr Zanotto's dealings with Ray Younan and Gerald Carroll are examined in Chapter 11.

Mr Zanotto's official obligations

Mr Zanotto was a Councillor from March 2004 until all civic offices of the Council were declared vacant on 4 March 2008 following the recommendation from the Commission contained in Part One of this report. He was also the Chairman of the Council's Governance and Audit Committee which, among other things, had oversight responsibility for the Council's Code of Conduct.

Pursuant to the Model Code of Conduct and the 2005 Code of Conduct, which as a Councillor he was under a statutory duty to comply with from 1 January 2005 onwards under section 440(5) of the LG Act , Mr Zanotto was obliged to avoid, or at least disclose "promptly, fully and in writing", any actual, potential or reasonably perceived conflict of interest, including any conflict arising because of "a friendship" or "interest of a financial nature". Pursuant to each of those Codes he was also subject to the following restrictions in relation to the use and release of Council information:

> 9.7 *You must: …*
>
> - *not use confidential information for any non-official purpose;*
> - *only release confidential information if you have authority to do so; …*
> - *only release other information in accordance with established council policies and procedures and in compliance with relevant legislation;*
> - *not use council information for personal purposes …*
>
> 9.9 *You must not use confidential information gained through your official position for the purpose of securing a private benefit for yourself or any other person.*
>
> 9.10 *You must not seek or obtain, either directly or indirectly, any financial benefit or other improper advantage for yourself, or any other person or body, from any information to which you had access in the exercise of your official functions or duties by virtue of your office or position.*

At a compulsory examination on 21 January 2008 Mr Zanotto claimed that he had "never read" the Council's Code of Conduct until recently and was generally not familiar with it. However, Council records show that:

- Mr Zanotto attended training sessions or briefing forums on the Council's Code of Conduct on 5 April 2004, 21 February 2005, 10 April 2006 and 19 June 2006, including sessions or forums at which provisions relating to conflicts of interest and the use and release of Council information were specifically discussed;
- Mr Zanotto attended formal meetings of the Full Council on 7 April 2004, 28 June 2004 and 28 February 2005 at which the Council's Code of Conduct was discussed and/or formally adopted;
- Mr Zanotto received copies of the Council's Code of Conduct, including the Model Code and 2005 Code of Conduct, on numerous occasions between 2004 and 2006 and copies were also readily available on the Council's intranet;
- on 14 April 2005 Mr Zanotto signed a declaration acknowledging that he had received, and "read [his] obligations under", the 2005 Code of Conduct; and
- on 6 March 2006 all Councillors, including Mr Zanotto, were sent a circular specifically reminding them of the provisions relating to the use and release of Council information in clause 9.7 of the 2005 Code of Conduct (a copy of which was attached to the circular).

The Commission is satisfied that Mr Zanotto was aware of his official obligations in relation to conflicts of interest and the use and release of Council information.

Mr Zanotto's relationship and dealings with Mr Vellar

Messrs Zanotto and Vellar have known each other for most of their lives because Mr Zanotto's late father had a close friendship and business relationship with Mr Vellar's father and uncle. After Mr Zanotto became a Councillor in March 2004 Mr Vellar pursued a closer relationship with him and by mid-2004 they were "friends". Their friendship steadily grew closer from that point until early 2007, when it ceased as a result of issues arising from the Commission's investigation (referred to in Chapter 11 of this report).

In mid-2005 Mr Zanotto sold his funeral business and decided to pursue an occupation as a "property investor". From that time onwards his relationship with Mr Vellar, in addition to constituting a friendship, encompassed a range of actual or proposed business and financial dealings. In particular:

- Mr Zanotto often requested and received free advice from Mr Vellar relating to the actual and proposed purchase, development and/or sale of properties;
- Messrs Vellar and Zanotto often put proposals, orally and in writing, to each other for the joint purchase and development of particular properties, although no such purchases ultimately proceeded;
- in September 2005 Mr Vellar sent Mr Zanotto a "business plan" for the establishment of a retirement living operation, with Mr Zanotto to be involved as an "equity holder, consultant, General Manager etc.", in which it was stated "personal enrichment to both of us will be enormous". Mr Zanotto considered the proposal for a number of months until it lapsed;
- between late 2005 and late 2007 Mr Vellar permitted Mr Zanotto to store a shipping container full of business records on industrial premises he owned without charging any fee; and
- Mr Zanotto said that in mid-2006 Mr Vellar sought a $500,000 loan from him for the purported purchase of a property. Mr Zanotto considered this amount too high, but on 17 August 2006 he (through a "family company") lent him $150,000 for six months at an interest rate of 8% per annum. The loan was unsecured and the loan agreement was a document, prepared by Mr Vellar himself, comprised of two sentences. Mr Zanotto testified that he agreed to make the loan to Mr Vellar because he felt under an "obligation to help him out" as Mr Vellar's father and uncle were friends of his late father and one of them had lent money to his father 30 or 40 years ago.

In light of these dealings between Messrs Zanotto and Vellar, coupled with their friendship from mid-2004 and Mr Zanotto's sense of "obligation" towards Mr Vellar, the Commission is satisfied that from the beginning of 2005 onwards the relationship between the two men gave rise to an obvious conflict of interest in relation to the exercise by Mr Zanotto of official Council functions affecting Mr Vellar. The Commission is further satisfied that Mr Zanotto was aware of this conflict.

Mr Zanotto did not disclose his friendship with Mr Vellar, or any of the aforementioned dealings between them, to the Council or any other Council officer. The evidence demonstrates that Mr Zanotto deliberately sought to conceal the nature and extent of his relationship and dealings with Mr Vellar. In particular:

- Mr Zanotto testified that the agreement for the $150,000 loan to Mr Vellar, which is in Mr Zanotto's name and is signed by him in a personal capacity, "was actually supposed to be in the name of [his] wife" and said that the only reason it was not was because Mr Vellar mistakenly put his name on it. Mr Zanotto explained one of the reasons for wanting the loan agreement in his wife's name as follows: "I didn't want my name connected … I thought it would have been more appropriate in her name because I didn't want [Mr Vellar] to drag me down … in any way";
- in February 2006 Mr Zanotto changed the name under which Mr Vellar was listed in his email address book to "Franco Magnagatti", which had the consequence of concealing that Mr Vellar was the recipient of emails sent by him. Mr Zanotto claimed that he merely did this as a joke because "Magnagatti" (meaning "eats cats") is a slang term for inhabitants of the province in Italy where Mr Vellar's family came from;

- in 2006 Mr Zanotto also had Mr Vellar listed in a mobile phone/BlackBerry issued to him by the Council under the word "Gatto" (meaning "cat" in Italian), with the consequence that that word instead of Mr Vellar's name would appear on the display screen whenever calls or messages were sent to or received from Mr Vellar. During a telephone conversation on 8 November 2006 Mr Zanotto told Mr Vellar about this in the following terms: "You know what I put in … my council phone – I've got to be careful using this 'cause I don't want your number appearing too much … 'cause they go through the … phone um, bills … But ah, you know what I've got you on … in my phone? … 'Gatto' ". When Mr Zanotto was asked at the public inquiry why he said these things during the telephone conversation, he replied: "I really can't answer that … I couldn't tell you";
- during a further telephone conversation between the two men on 8 November 2006 Mr Zanotto stated: "Who were you with before? You were with people and you fucken mentioned my name"; and Mr Vellar replied: "Nah it's alright I was well away from them hearing anything". When asked at the public inquiry why he was concerned about Mr Vellar mentioning his name in conversations with other people, Mr Zanotto stated: "I did not want to create the impression that [Mr Vellar] was my best mate and that we were always talking which wasn't the case".

False or misleading responses to the Commission by Messrs Vellar and Zanotto

On 26 March 2007 the Commission issued a notice to Mr Zanotto under sections 21 and 22 of the ICAC Act requiring him to provide a statement of information identifying details of a range of aspects of his past relationship and dealings with Mr Vellar and also to produce relevant documents or records, including copies of any correspondence or emails between himself and Mr Vellar. Mr Zanotto responded by letter dated 11 April 2007 in which he claimed that he could not find any relevant documents. The letter contained statements significantly understating the true nature and extent of his relationship and dealings with Mr Vellar. Mr Zanotto eventually admitted that a number of these statements were knowingly false or misleading. The circumstances relating to the preparation of his letter of 11 April 2007 are examined in Chapter 11 of this report.

On 26 March 2007 the Commission issued a notice to Mr Vellar under section 22 of the ICAC Act requiring him to produce a range of documents or records relating to dealings with, *inter alia*, Mr Zanotto. He failed to produce highly relevant material, including his copy of the agreement for the $150,000 loan from Mr Zanotto and associated documents.

In June 2007 the Commission issued another notice to Mr Vellar under section 22 of the ICAC Act. He responded by producing a statement signed by himself on 15 June 2007 purporting to "state [his] relationship with", *inter alia*, Mr Zanotto. The statement was misleading in that it failed to refer to his $150,000 loan from Mr Zanotto and other relevant dealings between the two men.

Messrs Zanotto and Vellar offered various excuses for why they provided false, misleading or otherwise inadequate responses to the notices issued to them by the Commission. The Commission is satisfied that the overriding reason was that they intended to mislead the Commission in the hope of preventing detection of the true nature of their relationship.

Mr Zanotto's conduct in relation to the Pavilion DA

In December 2004 Pavilion Enterprises Pty Ltd ("Pavilion Enterprises"), a company owned and controlled by Mr Vellar, submitted a DA to the Council for the proposed redevelopment of the North Beach Bathers' Pavilion.

At a meeting of the full Council on 23 May 2005 a petition signed by 779 residents who opposed Mr Vellar's proposal was tabled and a motion was moved that the proposed redevelopment be reviewed with a view to it being drastically scaled-back because of concerns raised by the NSW Heritage Office. At the public inquiry Mr Zanotto admitted that he knew Mr Vellar was the applicant when he opposed the motion and "led the debate" against it, including describing the conduct of the Heritage Office as "absolutely disgraceful" and labelling the motion "a time-wasting exercise". The motion was subsequently defeated with Mr Zanotto and the other ALP Councillors, with whom Mr Zanotto caucused in relation to the motion prior to the meeting, voting against it.

Messrs Vellar and Zanotto admitted that prior to the meeting Mr Vellar personally contacted Mr Zanotto and "asked for his political support" and "assistance in the debate". Even though another Councillor absented herself from the debate and from voting on the motion, indicating she wished to avoid any perceived conflict

of interest, Mr Zanotto did not declare any conflict of interest or otherwise disclose his friendship with Mr Vellar at the meeting.

In mid-August 2006, about the time Mr Zanotto made the $150,000 loan to Mr Vellar, Mr Zanotto forwarded to Mr Vellar (under the name "Franco Magnagatti") three emails relating to the Pavilion DA he received in his capacity as Councillor. The first email was sent to all Councillors by a resident who opposed the proposed development and attached to it was a copy of a letter of complaint to the Minister for Planning. Mr Zanotto promptly forwarded the email and attachment to Mr Vellar with the message "fyi, confidential". The second email was an internal Council response to the first email by one of the other Councillors and the third email was a response to the author of the first email by a Council officer. Mr Zanotto forwarded both of these to Mr Vellar without any messages.

Mr Zanotto claimed that he believed that he was entitled to forward the three emails to Mr Vellar because he considered it "in the interests of the people of Wollongong" to do so. He conceded that he was not aware of any actual authority he had to do so and he did not seek to ascertain whether he had such authority. In March, April and June 2006 Mr Zanotto had attended briefing forums or received material specifically drawing his attention to the provisions of the Council's Code of Conduct restricting the release of Council information.

Mr Zanotto further claimed that he did not think that any of the three emails were confidential and did not seek to hide the fact that he had forwarded them to Mr Vellar. He was unable to provide an explanation as to why he wrote "fyi, confidential" when he forwarded the first email. Mr Zanotto admitted that one of his reasons for forwarding the emails to Mr Vellar was because "he was a friend" and he conceded that he probably would not have forwarded them to an applicant who was not a friend.

On 19 February and 19 March 2007 Mr Zanotto attended two further meetings of the full Council at which reports from Council officers relating to the Pavilion DA were presented proposing, *inter alia*, that the Council spend an additional $600,000 on infrastructure relating to the proposed development instead of Mr Vellar having to spend that money. The recommendations in the reports presented at each meeting were favourable to Mr Vellar. At the first meeting it was resolved that the matter be deferred pending a further report. At the second meeting the further report was tabled and the recommendations in it were adopted. Mr Zanotto voted at both meetings, "as per [his] caucus colleagues", without declaring any conflict of interest or disclosing any aspect of his relationship with Mr Vellar. At the time of each meeting the $150,000 loan from Mr Zanotto to Mr Vellar had not been repaid and was overdue.

Mr Zanotto testified that he thought it was acceptable for him to vote at the two meetings without disclosing his relationship with Mr Vellar because the Council was not making a final decision about whether to approve or reject the Pavilion DA. He claimed that if such a decision had been under consideration at either of the meetings he "would've got up and said 'I am a friend … of Mr Vellar's … I think it is more appropriate that I remove myself from voting on this' ". The Commission does not believe or accept this claim.

Having regard to all of the evidence referred to in this chapter and additional evidence referred to in Chapter 11, the Commission is satisfied that at all relevant times in relation to the Pavilion DA Mr Zanotto had, and was aware that he had, an obvious conflict of interest arising from his relationship and dealings with Mr Vellar and he deliberately concealed that conflict from the Council when he was aware that he was under a positive duty to disclose it. The Commission is further satisfied that Mr Zanotto forwarded the three emails to Mr Vellar in August 2006, knowing it was contrary to the Council's Code of Conduct to do so, as a favour to Mr Vellar because of his friendship with him.

Mr Vellar's 'tip-off' about the proposed rezoning of the Hills Trucks Sales site

On 5 November 2004 the Council resolved to prepare a new Local Environmental Plan (LEP) to replace the existing *Wollongong Local Environmental Plan 1990* ("WLEP 1990"). Over the next two years a number of planning studies were commissioned, which culminated in the preparation by Council officers of *Draft Wollongong Local Environmental Plan 2007* ("Draft WLEP 2007") in late 2006. During this two-year period it was widely known that the Council was considering proposed zoning changes throughout Wollongong, but specific details of proposed changes to particular sites were not publicly available until shortly before a formal Council meeting on 6 November 2006 at which Draft WLEP 2007 was tabled.

Land situated at 117–119 Princess Highway and 1–3 McGrath Street, Fairy Meadow, known as the "Hills Trucks Sales site" was zoned "4(a) Light Industrial" under WLEP 1990. This meant that it was generally restricted to industrial or manufacturing uses not impacting on the amenity of the surrounding area. Between 2004 and 2006 there were a number of specific submissions to the Council to have the site rezoned, but none succeeded.

© ICAC

One of the studies commissioned by the Council to assist it in preparing Draft WLEP 2007 was called the Wollongong Employment Lands Study (WELS). In May 2006 the Council engaged a property consulting firm, Hill PDA, to undertake this study for the purpose of examining particular parcels of land and making specific recommendations about changes to the existing zoning. In carrying out this study Hill PDA consulted relevant Government stakeholders, but did not consult individual landowners.

In September and early October 2006 Hill PDA provided draft versions of the results of its study, in the form of a report entitled "Wollongong Local Government Area Employment Lands Strategy" ("the WELS report"), to relevant Council officers, including David Green, Land Use Planning Manager, Strategic Planning. The final version of the WELS report was received by the Council on 13 October 2006. Each version of the report included a section entitled "Precinct 15b – Mt Ousley Industrial Area", containing recommendations that certain (but not all) land in that precinct, including the Hills Trucks Sales site (although not mentioned by name), be rezoned from "4(a) Light Industrial" under WLEP 1990 to "Enterprise Corridor – Zone B6", a new flexible zoning permitting a larger range of uses. These recommendations were incorporated into Draft WLEP 2007.

The Commission received unchallenged evidence from Mr Green that:

> *The WELS report was not made available to the public until on or around 27 October 2006 when a copy of it was distributed as part of the Business Papers for the meeting of the Environment and Planning Committee scheduled for 6 November 2006. Prior to that date the report was confidential in the sense that it was an internal Council document with limited internal distribution, but the report was not specifically marked "Confidential". A small number of external stakeholders had seen or received copies of the report prior to 27 October 2006, but the report was certainly not available to the public generally before then …*
>
> *Prior to the release of the WELS report to the public generally on or around 27 October 2006, information about the proposed zoning changes contained in it would have been of value to prospective purchasers of properties affected by the proposed changes. In particular, it would have been valuable for any prospective purchaser of the Hills Trucks Sales Site to have advance knowledge of whether the WELS report recommended that the zoning of that site be changed from "4(a) Light Industrial" to "Enterprise Corridor – Zone B6" as such a change would increase the market value of the property … Any prospective purchaser with such advance knowledge would have an unfair advantage over other persons without such knowledge.*

At 11.30 am on 5 October 2006 Fay Steward, the Council's then Manager, Strategic Planning, and Mr Green held a briefing session with Mr Zanotto and another Councillor during which they informed them of, *inter alia*, the recommendation in the draft WELS report to rezone the part of the Mt Ousley Industrial Area, in which the Hills Trucks Sales site is located, to "B6 Enterprise Corridor".

At 4.23 pm on 5 October 2006 Mr Vellar made a telephone call to his project manager, Tessa Tohmey, and asked her to ascertain what uses were permitted under the "6B [*sic*] Enterprise Zone". At 4.51 pm that day they had a further conversation and she asked him what site he had in mind. Mr Vellar replied "I'm talking Princes Highway, Fairy Meadow" and said that he would talk to her "in detail" the following day, before stating:

> *A little birdy flew past … and told me something … But I won't tell you the birdy because I don't know what breed it is … I'll just tell you what may or may not be happening.*

Mr Vellar told the Commission that Mr Zanotto "rang [him] at the conclusion of a meeting" and informed him of the contents of a discussion he had had with Ms Steward and another Councillor or Council officer, relating to the proposed rezoning of a strip of land encompassing the Hills Trucks Sales site. He unconvincingly claimed that he could not recall whether the person he referred to as the "little birdy" in his telephone conversation with Ms Tohmey on 5 October 2006 was Mr Zanotto. When asked who else it could be, he replied "I don't know". Mr Vellar stated that at the time he received the information from Mr Zanotto he "already knew that a potential rezone [was] being looked at" by the Council.

Mr Zanotto admitted that he passed information about the possible rezoning to Mr Vellar, although he stated that he may not have mentioned the site by name. He also initially admitted that at this time he and Mr Vellar were discussing the possibility of jointly purchasing the site. He subsequently claimed that he believed that they may have only entered into such discussions afterwards. Mr Zanotto ultimately conceded "that the contents of this report should not have been made available by [him] as a Councillor to Mr Vellar as a potential developer", but he unconvincingly claimed that he did not realise this at the time.

On 14 October 2006 Messrs Vellar and Zanotto had a telephone conversation in which they referred to a sales brochure relating to the Hills Trucks Sales site

Mr Vellar had previously given Mr Zanotto. Mr Vellar asked for the brochure back, stating "I gotta do some homework on it". On 26 October 2006 they had a further conversation about possibly purchasing the site, during which Mr Zanotto asked a range of questions about the site, requested further information from Mr Vellar and stated "I think we need to sit down and work out what would go there, and what we could do … and what sort of money we'd be looking at". It is clear that between 14 and 26 October 2006 Mr Zanotto was actively considering jointly purchasing the site with Mr Vellar. Mr Zanotto told the Commission that Mr Vellar was particularly interested in them jointly purchasing the site "for a bargain".

At 5.00 pm on 16 October a Councillor Briefing Forum was held at which copies of an internal memo, which included the final WELS report as an attachment, were distributed. The memo was addressed to, *inter alia*, "All Councillors" and stated that the proposals in the WELS report would be recommended for adoption at the next meeting of the Council's Environment and Planning Committee, which was scheduled for 6 November 2006. Mr Zanotto did not attend this Forum, but Mr Green, who did attend, stated that it is likely that after the Forum a copy of the memo (including the attached WELS report) would have been left for Mr Zanotto in his pigeonhole at the Council. Mr Zanotto testified that he remembered receiving a copy of the memo and report, but could not recall when or under what circumstances.

At 12.03 pm on 17 October 2006 Mr Vellar telephoned one of his employees, Nicole Kay, and told her that land in Fairy Meadow was going to be rezoned to "6B [*sic*] Enterprise Zone", before stating:

> *I'm getting the, um I'm getting the hot, hot copy, um, in about an hour's time …*
>
> *I feel more confident than I have ever been, um simply because of the zone and being tipped off at the right time I know – I know what – what can and can't be achieved on there and the whole purpose of that enterprise zone is to open up and allow retail to occur …*
>
> *I'm getting the ah, the document in about an hour's time. I spoke to someone this morning in Council …*
>
> *I would be happy um when I have the document in my hand today …*
>
> [W]*e've got to be extremely careful that this doesn't become common knowledge to too many people or else he's – the individual that's helped me is gonna become exposed immediately …*
>
> *… I'm supremely confident …*

At the public inquiry Mr Vellar unconvincingly claimed that he did not know why he said he had been "tipped off at the right time" during this conversation and did not recall who at the Council might have tipped him off. He conceded that it may have been Mr Zanotto and he did not identify anyone else it could have been. It is noted that in his telephone conversation Mr Vellar referred to the person who tipped him off as a "he". The Commission found no evidence that Ms Morgan was privy to confidential information about the proposed rezoning of the Hills Trucks Sales site at relevant times.

When Commission officers executed search warrants at Mr Vellar's business premises in early December 2006 they located a copy of the section of the WELS report containing the recommendations relating to the proposed rezoning of the strip of land in the Mt Ousley Industrial Area in which the Hills Trucks Sales site is located. The document had the words "Recommendations by WCC [Wollongong City Council] Consultant" handwritten by Mr Vellar at the top of the first page. At the public inquiry Mr Vellar conceded that this might be the "hot copy" document referred to in his telephone conversation with Ms Kay. He unconvincingly claimed that he could not recall receiving the document. When asked whether Mr Zanotto gave him the "hot copy" document, he replied "I don't know". He did not identify any other person who might have given him such a document.

Mr Zanotto was asked during his testimony whether he gave Mr Vellar extracts of the WELS report "prior to the report being made available to the public" and he stated, "I certainly don't remember it". He was further asked whether he denied doing so and he replied, "I don't know".

At 3.50 pm on 17 October 2006, apparently after Mr Vellar had received the "hot copy" document, he telephoned Ms Kay again and said:

> *… the site at Fairy Meadow there, can you get a hold of this Marnie* [the real estate agent acting for the vendor of the Hills Truck Sales site] *and hit her between the eyes – unconditional offer what she will accept …*
>
> *Totally, totally unconditional, um, three month delayed settlement that's all we're seeking, no other conditions, because that's when I'll get a couple of million in from, from somewhere else.*

Mr Vellar testified that he "vaguely" recollected having a discussion with Mr Zanotto about him "putting in a couple of million dollars" towards the proposed purchase of the Hills Trucks Sales site. He also admitted that he subsequently made a $4.8 million offer for the property at a time when Mr Zanotto was considering,

but had not yet made a final decision about, being a joint purchaser and contributing half of the purchase price. Documents show that Mr Vellar's offer was initially made orally on or around 20 October 2006 and that a written offer was subsequently submitted on 14 November 2006.

It will be recalled that in two telephone conversations between Mr Zanotto and Mr Vellar on 8 November 2006, Mr Zanotto expressed concerns about other people knowing about his dealings with Mr Vellar. Mr Zanotto conceded that it was "possible" that at that time he "didn't want anybody to know that as a Councillor [he was] dealing with … Mr Vellar [about the] possible purchase of the Hills Trucks site".

Mr Vellar testified that some time after he made the $4.8 million offer for the purchase of the Hills Trucks Sales site Mr Zanotto "withdrew and removed himself because of his Councillor relationship, his ambitions to become Lord Mayor". In late December 2006, by which time Messrs Vellar and Zanotto were aware of the Commission's investigation relating to them, Mr Vellar effectively withdrew his offer for the property and the proposed purchase did not proceed.

Assessment of the evidence

The Commission considers both Messrs Vellar and Zanotto to have been uncooperative and unreliable witnesses in relation to the matters referred to in this chapter and is not prepared to place significant weight on any self-serving testimony they provided which was not corroborated by independent evidence. In light of the objective evidence, and the matters referred to in previous sections of this chapter and in Chapter 11 of this report, the Commission is satisfied that Messrs Vellar and Zanotto deliberately sought to use confidential Council information relating to the proposed rezoning of the Hills Trucks Sales site for the purpose of seeking a financial benefit for themselves.

Findings of fact

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

1. In relation to the development application submitted to the Council by Pavilion Enterprises Pty Ltd, a company owned and controlled by Mr Vellar, for the proposed redevelopment of the North Beach Bathers' Pavilion, Mr Zanotto deliberately:

   (a) participated in debates and voted on motions at meetings of the full Council on 23 May 2005, 19 February 2007 and 19 March 2007, while concealing an obvious conflict of interest arising from his relationship and/or dealings with Mr Vellar, knowing that he was breaching his obligations under the Council's Code of Conduct; and

   (b) improperly forwarded to Mr Vellar in August 2006 three emails received in his capacity as Councillor, knowing that he was not authorised to do so and that it was contrary to the Council's Code of Conduct.

2. On 5 October 2006 and 17 October 2006 Mr Zanotto deliberately released to Mr Vellar confidential Council information relating to the proposed rezoning of the Hills Trucks Sales site, knowing that he was not authorised to release it, for the purpose of financially benefiting himself and Mr Vellar.

3. On 5 October 2006 and 17 October 2006 Mr Vellar received from Mr Zanotto information relating to the proposed rezoning of the Hills Trucks Sales site which Mr Vellar knew to be confidential Council information which Mr Zanotto was not authorised to release and which information Mr Vellar intended to use for the purpose of financially benefiting himself and Mr Zanotto.

Corrupt conduct

Mr Zanotto

The Commission finds that Mr Zanotto engaged in corrupt conduct on the basis that:

(i) his conduct set out in finding of fact 1(a) is conduct of a public official that:

- constitutes or involves the dishonest exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; and
- could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act.

(ii) his conduct set out in finding of fact 1(b) is conduct of a public official that:

- involves the misuse of information or material acquired in the course of his official functions, within the meaning of section 8(1)(d) of the ICAC Act; and
- could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act.

(iii) his conduct set out in finding of fact 2 is conduct of a public official that:

- constitutes or involves the dishonest exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; and involves the misuse of information acquired in the course of his official functions, within the meaning of section 8(1)(d) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the common law offence of misconduct in public office; and could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act.

Mr Vellar

The Commission finds that Mr Vellar engaged in corrupt conduct on the basis that his conduct set out in finding of fact 3 is conduct that:

- could adversely affect the honest or impartial exercise of official functions by a public official, within the meaning of section 8(1)(a) of the ICAC Act; could adversely affect the exercise of official functions by a public official or public authority, and could also involve a conspiracy to commit official misconduct, within the meaning of sections 8(2)(a) and (y) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act, the criminal offences of aiding and abetting the common law offence of misconduct in public office and conspiring to commit the common law offence of misconduct in public office.

Section 74A(2) statement

In relation to the matters referred to in this chapter of the report, the Commission considers Mr Zanotto and Mr Vellar to be affected persons and makes the following statements pursuant to section 74A(2) of the ICAC Act.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Zanotto for the following offences:

- the common law offence of misconduct in public office in relation to his conduct set out in finding of fact 2;
- wilfully making a false statement to, or attempting to mislead, the Commission contrary to section 80(c) of the ICAC Act in relation to the written statement of information dated 11 April 2007 he provided to the Commission in response to a notice issued to him under section 22 of the ICAC Act.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Vellar for the following offences:

- aiding and abetting the common law offence of misconduct in public office in relation to his conduct set out in finding of fact 3; and
- wilfully making a false statement to, or attempting to mislead, the Commission contrary to section 80(c) of the ICAC Act in relation to the description of his relationship with Mr Zanotto in the written statement dated 15 June 2007 he provided to the Commission in response to a notice issued to him under section 22 of the ICAC Act.

© ICAC

Chapter 10: Conduct of Kiril Jonovski, Zeki Esen and Frank Gigliotti

This chapter examines an allegation that Kiril Jonovski, Zeki Esen and Frank Gigliotti solicited a bribe of $20,000 from Mr Vellar at a meeting on 18 October 2006 relating to the Pavilion DA (referred to in Chapter 5 of this report) and their failure to disclose their directorships of a company in their 2006–07 pecuniary interest returns in accordance with their statutory obligations as Councillors.

Messrs Jonovksi, Esen and Gigliotti were Wollongong City Councillors until all civic offices of the Council were declared vacant on 4 March 2008 following the recommendation from the Commission contained in Part One of this report. Mr Jonovski had been a Councillor since 1999 and was also the Deputy Lord Mayor. Messrs Esen and Gigliotti had been Councillors since 2004. The three of them and four other Councillors, including Mr Zanotto, were members of the Australian Labor Party (ALP) and together they comprised a seven-member ALP caucus, which had the potential to control the 13-member Council.

Background to the meeting with Mr Vellar on 18 October 2006

In mid-2006 the NSW Heritage Office endorsed guidelines for a redesign of the proposal originally submitted by Mr Vellar to the Council for the redevelopment of the Pavilion. It was contended by Mr Vellar that the guidelines, if adopted, would result in additional construction costs of over $1 million and reduce the rental returns from the development.

In late September and early October 2006 Messrs Vellar and Oxley met and "cut a deal" whereby the Council would agree "to spend a million dollars in infrastructure" relating to the Pavilion, instead of Mr Vellar having to spend that money or construct the infrastructure himself, if Mr Vellar proceeded with the redevelopment in accordance with the Heritage Office's guidelines. The deal struck with Mr Oxley was in-principle only and was required to be formally approved by the full Council.

The available evidence, including testimony from Mr Vellar and the content of telephone conversations referred to later in this chapter, establishes to the Commission's satisfaction that on 18 October 2006 Mr Vellar met Messrs Jonovski, Esen and Gigliotti at the Flame Tree Café in Wollongong "to lobby for support of the Pavilion", including the deal he had struck with Mr Oxley. The meeting lasted for over an hour, apparently commencing shortly before 10.00 am and concluding shortly after 11.00 am. Mr Vellar showed the Councillors plans and drawings of the proposed redesign of the development reflecting the Heritage Office's guidelines.

Mr Vellar's bribery allegation

At 11.14 am on 18 October 2006, shortly after the conclusion of the meeting, Mr Vellar telephoned his wife and made a clear allegation that a bribe in the form of a political donation had been solicited from him, although he did not mention any of the Councillors by name and he was somewhat guarded in what he said. His allegation was expressed to his wife in the following terms:

> [For] *the first time in my life I have been, ah, put into a position of ah, of yes or no in terms of a, a bribe … And I'm not going to talk over the phone too much, but "you give me this and we'll approve that" …*
>
> *I said "Excuse me I am not accustomed to this style of business. I will have a think about it". And got up and walked away …*
>
> *And I mean they're talking like, you know, 20 plus … and it doesn't – it doesn't go to them. You know where it goes to? … It goes to their political, ah – political slush fund for them individually …*
>
> *But then it becomes by giving it through the backdoor they don't have to declare it you see. It doesn't go on the, on the register as a donation …*
>
> *Anyway first time, first time in my life have I been – normally it's done really discreetly. First time in my time that, ah, not one but two of them hit me up for it.*

When Mr Vellar was initially questioned at the public inquiry about the meeting (before he was aware that the Commission had recorded his telephone conversation with his wife and before that recording was played to him) he was less than candid and provided a version of events less emphatic than that recounted by him to his wife during their telephone conversation. In particular, Mr Vellar specifically denied that he was asked for "a

© ICAC

bribe" or "for what [he] thought might be a bribe", but he immediately qualified or contradicted those denials by stating that:

- when he asked for the Councillors' support they said "you know, you might have to do other things" and requested a "political donation", saying words to the effect of "when our campaign comes up, don't forget about us"; and
- he formed the view that "more than a political donation was being asked for" because of the "mannerism" in which the request was made and the words used.

Mr Vellar said that all three Councillors spoke about a political donation, with Messrs Jonovski and Gigliotti speaking more than Mr Esen, and he could not recall exactly what was said by each of them. He generally thought that "one spoke for all" and at no stage did any one of them seek to distance himself from anything said by either of the other two.

Mr Vellar was questioned about the meeting on two further occasions at the public inquiry, after the tape recording of his conversation with his wife was played. He claimed that the recording had refreshed his memory and he provided a more detailed account of what occurred at the meeting which may be summarised as follows:

- all three Councillors requested a future political donation on separate occasions and a figure of $20,000 was mentioned but he could not recall who mentioned it;
- he regarded the Councillors' requests as conveying "that if [he] gave political donations, they would therefore support [his] proposal" for the Pavilion and he interpreted their requests as asking for a bribe. He added: "I know what was said. I know all three were talking … I know what was put to me";
- Messrs Jonovski and Gigliotti spoke more than Mr Esen during the meeting, but he considered that "one spoke for all"; and
- the version of events he provided to his wife during their telephone conversation on 18 October 2006 was truthful and accurate.

In light of the Commission's findings elsewhere in this report that Mr Vellar had engaged in corrupt conduct and been untruthful in relation to other matters, the Commission treated his allegation against the three Councillors with caution.

The Councillors' responses to Mr Vellar's allegation

The evidence establishes that between mid 2006 and early 2007 Mr Vellar met with Messrs Jonovski, Esen and Gigliotti at the Flame Tree Café on two occasions (18 October 2006 and in February or March 2007) and Mr Vellar also met with Mr Jonovski by himself at that location on 15 November 2006.

In March 2007 the Commission issued notices under section 21 of the ICAC Act to the three Councillors requiring them to identify "any kind of meeting" they had had with Mr Vellar "for any purpose" (other than "an official Council meeting"). In April 2007 they provided written statements in which each of them failed to identify the meeting at the Flame Tree Café on 18 October 2006, yet all of them referred to the meeting there in February or March 2007. Mr Jonovski also referred to his meeting there in late 2006 (although he stated that to the best of his recollection it was in December 2006).

In January 2008, shortly before the public inquiry, the Commission invited each of the three Councillors to review their written statements and voluntarily correct any errors. Messrs Jonovski and Esen did not respond. Mr Gigliotti responded by stating that his written statement is "correct as I know it" and, in answer to a more specific request, stated "I do not recall any meeting with Mr Vellar during October 2006".

On 20 February 2008 the Commission played the tape-recording of the lawfully intercepted telephone conversation between Mr Vellar and his wife at the public inquiry.

Mr Vellar testified that the conversation related to a meeting he had with Messrs Jonovski, Esen and Gigliotti at the Flame Tree Café on 18 October 2006 and provided details of the meeting. Each of the three Councillors became aware of this on the day it occurred and, accordingly, had ample time to seek to refresh their memories and consider what evidence to provide before they were subsequently required to testify.

On 29 February 2008, nine days later, each of the three Councillors testified at the public inquiry for the first time.

Mr Jonovski categorically denied having had any meeting with Mr Vellar in October 2006 or having ever asked Mr Vellar for any kind of payment or donation.

Mr Esen categorically denied having had any meeting with Mr Vellar in October 2006 at the Flame Tree Café or having ever asked Mr Vellar for any kind of payment or donation.

© ICAC

Mr Gigliotti stated that he had no recollection of, and did not believe that he had, any meeting with Mr Vellar in October 2006 and denied having ever asked Mr Vellar for any kind of payment.

After hearing this evidence the Commission played recordings of a number of telephone conversations between Mr Vellar and other persons, including Messrs Jonovski and Esen, which (along with the telephone conversation with his wife previously referred to) supported his claim that he met the three Councillors at the Flame Tree Café on 18 October 2006. Those calls were as follows:

- on 6 October 2006 Mr Vellar telephoned Noreen Hay MP, State Member for Wollongong, and discussed his desire to obtain the support of Messrs Jonovski, Esen and Gigliotti for the deal he had struck with Mr Oxley relating to the Pavilion;
- on 18 October 2006 at 9.09 am Messrs Vellar and Jonovski had a telephone conversation during which they arranged to meet at the Flame Tree Café in about half an hour;
- on 18 October 2006 at 9.37 am Messrs Vellar and Esen had a telephone conversation during which Mr Esen agreed to join Messrs Vellar and Jonovski at the Flame Tree Café in a couple of minutes;
- on 18 October 2006 at 11.12 am Mr Vellar telephoned Ms Morgan and told her he had had a meeting with Messrs Jonovski, Esen and Gigliotti for one hour and 15 minutes; and
- on 18 October 2006 at 12.04 pm Mr Vellar telephoned Mr Zanotto and told him he had met with Messrs Jonovski and Esen, with Mr Gigliotti also turning up.

In addition, telephone call charge records indicate that on 18 October 2006 Mr Gigliotti telephoned Mr Esen at 9.52 am (at which time it appears from the calls referred to above that Messrs Vellar, Jonovski and Esen were at the Flame Tree Café) and Mr Jonovski telephoned Mr Gigliotti at 2.20 pm and 6.08 pm. These records also show that there were numerous telephone calls between the three Councillors in the days preceding and following 18 October 2006.

On 3 March 2008 Messrs Jonovski, Esen and Gigliotti were recalled to the public inquiry.

Mr Jonovksi claimed that listening to the telephone conversations had jolted his memory and he admitted that he did have a meeting at the Flame Tree Café on 18 October 2006 with Mr Vellar and Mr Esen, but he denied that anyone solicited a bribe or discussed political donations. He stated that he could not recall whether Mr Gigliotti was also at the meeting and he claimed that he did not previously recollect the meeting because "it was a non-event".

Mr Esen claimed that listening to the telephone conversations had jogged his memory and he admitted that he did have a meeting at the Flame Tree Café on 18 October 2006 with Mr Vellar and Messrs Jonovski and Gigliotti, but he denied that he solicited a bribe or that anyone requested a political donation. He claimed that the errors in the statement he provided to the Commission in April 2007 and his previous testimony were caused solely by "confusion" on his part.

Mr Gigliotti maintained that he had no memory of meeting with Mr Vellar in October 2006 and denied that the written statement he provided to the Commission in April 2007 was false.

In light of the overall evidence, the Commission is satisfied that Mr Vellar met with all three Councillors at the Flame Tree Café on 18 October 2006, with Mr Gigliotti probably not present at the outset but subsequently joining the meeting and actively participating in the discussions.

Resolution of the competing claims

The Commission considers Mr Vellar's evidence as to what was said at the meeting to be more convincing and persuasive in all respects than that of Messrs Jonovski, Esen and Gigliotti for the following reasons:

- The recording of the telephone conversation between Mr Vellar and his wife on 18 October 2006 is the only contemporaneous record of the content of the meeting. The conversation occurred very shortly after the meeting and Mr Vellar had no apparent motive to provide a false version of events to his wife in relation to this matter.
- Mr Vellar's testimony was not self-serving and in relation to this particular matter he was a convincing and believable witness.
- Mr Vellar was the only witness who initially gave accurate evidence about the meeting having occurred.
- In April 2007 Messrs Jonovski, Esen and Gigliotti provided statements to the Commission in which they each falsely represented that they did not have any meeting with Mr Vellar in October 2006.

- During their testimony on 29 February 2008 Messrs Jonovski and Esen each falsely denied that they had any meeting with Mr Vellar at the Flame Tree Café in October 2006.
- During his testimony on 29 February 2008 and 3 March 2008 Mr Gigliotti unconvincingly, and in the Commission's opinion falsely, claimed that he had no recollection of having had a meeting with Mr Vellar in October 2006. It is noted that Mr Gigliotti testified before the Commission in relation to a separate investigation on 19 September and 5 November 2007 and the Commission concluded that it "had no confidence in the truth or accuracy of anything he said".[3] The Commission had even less confidence in the truth or accuracy of anything Mr Gigliotti said in relation to the current investigation.
- None of the three Councillors was a convincing or believable witness.
- The Commission considers it more likely than not that the three Councillors prepared their written statements in April 2007, and concocted the evidence they provided at the public inquiry, as part of an orchestrated attempt to deceive the Commission and is satisfied that their conduct reflects a consciousness of guilt in relation to the meeting with Mr Vellar on 18 October 2006.

Was any payment made?

Mr Vellar denied that he actually made any donation to any of the Councillors. There was evidence, however, that a donation of $20,000 was made to Noreen Hay MP, State Member for Wollongong, on 24 October 2006, shortly after the meeting on 18 October 2006. This donation had not been initially declared by Ms Hay in her return to the Election Funding Authority (EFA). Although the donation was made by a company apparently not associated with Mr Vellar the Commission decided to investigate further to determine whether there was any link.

Ms Hay submitted an amended return to the EFA as a significant number of donations had been omitted from the first return. The largest of the donations that was not initially reported was an amount of $20,000 received from Glen Alpine Properties Pty Ltd ("Glen Alpine") on 24 October 2006.

The managing director of Glen Alpine, Peter Bega, told the Commission that he had known Ms Hay for a number of years and respected her on a political and business level. Ms Hay confirmed that Mr Bega was a long-term friend. Mr Bega said he had made the donation because the business could afford it at the time. Glen Alpine had no current work on the south coast. The donation was recorded in the financial records of Glen Alpine and in the deposit book maintained by Ms Hay.

Although there was evidence of telephone contacts between Mr Bega and Ms Hay there was no evidence of any contact between Mr Bega and any of Messrs Vellar, Jonovski, Gigliotti and Esen. The Commission also reviewed the payment records of companies associated with Mr Vellar. There were no recorded payments to the ALP or to Glen Alpine in those records.

The Commission is satisfied that the donation from Glen Alpine was just that and that it was coincidence that it took place at around the same time as the meeting between Mr Vellar and the three Councillors.

Non-disclosure of directorships in pecuniary interest returns

Under Part 2 of Chapter 14 of the LG Act and Part 8 of the *Local Government (General) Regulation 2005* ("the LG Regulation") councillors are under a statutory duty to complete an annual return (generally referred to as a "pecuniary interest return") containing disclosures of, *inter alia*, any "position (whether remunerated or not)" held in any corporation during the relevant "return period". Councillors, except in their first year in office, must complete such returns between 1 July and 30 September each year in respect of the previous financial year (i.e. the 12-month period from 1 July of the previous year to 30 June of the current year).

Section 449(1A) of the LG Act provides that: "A person must not lodge a return that the person knows or ought reasonably to know is false or misleading in a material particular". A contravention of this section constitutes "misbehaviour", as defined in section 440F of the LG Act, which constitutes grounds for various forms of disciplinary action under Chapter 14 of the LG Act.

On 24 May 2007 a company named Quattro Employment Services Pty Ltd (QES) was incorporated and Messrs Jonovski, Esen and Gigliotti, along with Mr Scimone, became its sole directors. On that day Mr Gigliotti also became its sole secretary. Mr

3 *Report on an investigation into allegation of bribery relating to Wollongong City Council*, Independent Commission Against Corruption, Sydney, December 2007, p.17.

© ICAC

Gigliotti testified that the company was named Quattro (meaning "four" in Italian) "because there were four of us … setting it up" and was intended to facilitate the employment of migrant workers, but it "never traded". The Commission found no evidence to refute these claims. However, it is apparent that as at 3 September 2007 it was still intended that the company would trade because according to Mr Gigliotti's diary there was a scheduled meeting of the three Councillors and Mr Scimone on that date "re Bank Account for [QES]".

At the time QES was incorporated Mr Scimone had recently been made redundant from the Council and was the principal of a private consulting business, JS Consulting Services Pty Ltd, which represented developers in dealings with the Council. In particular, on the actual day that QES was incorporated, and the four men became directors, Mr Scimone made representations to the Council on behalf of two development companies connected to Mr Tabak relating to a proposed $30 to $40 million public-private partnership with the Council concerning the "Bank Street car park". Mr Scimone's representations included recommending a future "[p]resentation/briefing to Councillors on [the] proposal". The proposal could not be advanced without Council approval.

If the Council or other Councillors had become aware that Messrs Jonovski, Esen, Gigliotti and Scimone were the sole directors in a company, the ability of the three Councillors to vote at Council meetings in relation to matters concerning or affecting development companies represented by Mr Scimone, particularly in relation to the "Bank Street car park" proposal, may have been jeopardised.

Between July and September 2007 Messrs Jonovski, Esen and Gigliotti completed pecuniary interest returns for the "return period" of 1 July 2006 to 30 June 2007. Each of them failed to disclose his position(s) with QES. At the public inquiry they gave the following testimony in relation to their non-disclosures:

1. Mr Gigliotti conceded that he became a director and the secretary of QES in May 2007 and that he was required to disclose positions he held in companies during the period from 1 July 2006 to 30 June 2007, but claimed that "at the time" he was filling out his return he asked Barry Cook, an Administration Manager at the Council, whether he was required to disclose his positions with QES and Mr Cook told him, "No, because it didn't fall into that 12-month period. That it would roll over into the next declaration".
2. Mr Esen similarly stated that when he was filling out his return he asked Mr Cook whether he should disclose his position with QES and Mr Cook said: "It's a year [in] advance, so, next time around Zek, that's when you're going to have to fill it in … You don't have to do it, don't worry about it".
3. Mr Jonovski stated that he did not speak to Mr Cook, but remarked: "Mr Gigliotti asked [Mr Cook] and there is no need for me to ask and Mr Esen obviously asked, there's no need for me to ask whether I should do because I would probably be given the same answer". In subsequent written submissions on his behalf, it was clarified that Mr Jonovski's position was that "he relied on the responses that Barry Cook had *earlier* given to Esen and Gigliotti, that is, that it was not necessary to make the formal disclosure until the following year" (emphasis added).

The Commission rejects the explanations offered by the three Councillors, and is satisfied that each of them deliberately omitted to disclose his position(s) with QES, for the following reasons:

- Mr Cook told the Commission that: (i) he did not have any responsibilities at the Council in relation to pecuniary interest returns; (ii) he did not believe that he "had a conversation with any of Council's Councillors about the matter of pecuniary interest returns or what should be included in such a document"; and (iii) if he had been asked by a Councillor whether to declare an interest as a director of a company he would have advised the Councillor to seek advice elsewhere or, if pressed for a response, would have "informed the person that they should declare their interest as a director". The Commission accepts this evidence.
- The explanation put forward by Mr Jonovski (that he relied on "earlier" advice given by Mr Cook to Messrs Gigliotti and Esen) is also inconsistent with the fact that he completed his return on 10 July 2007, whereas Mr Gigliotti completed his on 5 August 2007 and Mr Esen completed his on 25 September 2007, and Messrs Gigliotti and Esen represented that they were given the advice by Mr Cook when they were filling out their returns.

- The returns filled out by each of the three Councillors clearly identified that disclosures were required in relation to any position held in a company during the period from 1 July 2006 to 30 June 2007. In particular, the section on the front page of the return signed by each Councillor stated, immediately above the place for each Councillor's signature, that disclosures were required "in respect of the period from *1 July 2006* to *30 June 2007* (Return Period)" (original emphasis) and there was a specific part of the return headed "Interests and Positions in Corporations", which required disclosure of any position held in a corporation "at any time during the return period". In this part of their returns Messrs Jonovski and Esen each wrote "Nil" and Mr Gigliotti disclosed his directorship in a separate, unrelated company. Accordingly, it is apparent that none of the Councillors simply overlooked this particular part of the return.
- None of the three Councillors was a convincing or believable witness.
- The Commission considers it more likely than not that the three Councillors concocted the evidence they provided at the public inquiry in relation to this matter as part of an orchestrated attempt to deceive the Commission and is satisfied that their conduct reflects a consciousness of guilt in relation to the non-disclosures in their returns.

Findings of fact

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

1. On 18 October 2006 Messrs Jonovski, Esen and Gigliotti met with Mr Vellar at the Flame Tree Café in Wollongong and jointly solicited from him a future payment of $20,000 as a condition of, or inducement for, exercising their official Council functions in favour of Mr Vellar's proposals relating to the proposed redevelopment of the North Beach Bathers' Pavilion. Mr Vellar did not agree to make such a payment.
2. Between July and September 2007 Messrs Jonovski, Esen and Gigliotti each deliberately completed and lodged returns, pursuant to Part 2 of Chapter 14 of the LG Act and Part 8 of the LG Regulation, that were false or misleading in a material particular because they omitted disclosures of their positions as directors (and, in relation to Mr Gigliotti, his additional position as the secretary) of Quattro Employment Services Pty Ltd.

Corrupt conduct

The Commission finds that Messrs Jonovski, Esen and Gigliotti engaged in corrupt conduct on the basis that:

(i) the conduct of each of them set out in finding of fact 1 is conduct that:

- could adversely affect the honest or impartial exercise of official functions by a public official, within the meaning of section 8(1)(a) of the ICAC Act; and could adversely affect the exercise of official functions by a public official or public authority, and could also involve matters of a similar nature to bribery, within the meaning of sections 8(2)(b) and (x) of the ICAC Act; and
- could constitute or involve, within the meaning of section 9(1)(a) of the ICAC Act the criminal offence of corruptly soliciting a benefit contrary to section 249B(1) of the Crimes Act;

(ii) the conduct of each of them set out in finding of fact 2 is conduct of a public official that:

- constitutes or involves the dishonest exercise of official functions within the meaning of section 8(1)(b) of the ICAC Act; and
- could constitute or involve a disciplinary offence, within the meaning of section 9(1)(b) of the ICAC Act.

Section 74A(2) statements

In relation to the matters referred to in this chapter of the report, the Commission considers Messrs Janovski, Esen and Gigliotti to be affected persons and makes the following statements pursuant to section 74A(2) of the ICAC Act.

© ICAC

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of each of Messrs Jonovski, Esen and Gigliotti for the following criminal offences:

(i) corruptly soliciting a benefit, contrary to section 249B(1) of the Crimes Act, in relation to the conduct set out in finding of fact 1;

(ii) wilfully making a false statement to, or attempting to mislead, the Commission contrary to section 80(c) of the ICAC Act in relation to the written statements each provided to the Commission in April 2007, in response to notices issued under section 21 of the ICAC Act, in which they failed to refer to the meeting they had with Mr Vellar at the Flame Tree Café on 18 October 2006 (the Commission has not expressed any opinion in relation to the offence under section 82 of the ICAC Act as that offence is a summary offence and the six-month period within which any prosecution for that offence had to commence has expired); and

(iii) knowingly giving evidence at the public inquiry that is false or misleading in a material particular, contrary to section 87 of the ICAC Act, in relation to: (a) the meeting they had with Mr Vellar at the Flame Tree Café on 18 October 2006; and (b) the reasons why they failed to disclose their positions in Quattro Employment Services Pty Ltd in their 2006-07 pecuniary interest returns.

© ICAC

Chapter 11: Conduct involving Ray Younan and Gerald Carroll

This chapter examines the conduct of Ray Younan and Gerald Carroll who falsely represented that they knew, or actually were, Commission officers, had detailed knowledge of the Commission's investigation, and that, in return for payments they, or corrupt Commission officers they knew, could influence or affect the outcome of the Commission's investigation.

Their false representations were accepted by Ms Morgan and Messrs Vellar, Zanotto, Scimone, Gigliotti and Lou Tasich (a developer who was the subject of a separate Commission investigation in 2007 and finding of corrupt conduct) who, between them, paid substantial sums of money to Messrs Younan and Carroll in the belief that by so doing their interests in relation to the Commission's investigation would be favourably affected. In particular, Mr Vellar paid $120,000, Ms Morgan paid $50,000, Mr Zanotto paid $120,000, Mr Scimone paid $30,000, Mr Tasich paid $20,000 and Mr Gigliotti provided a case of whiskey valued at $500. Mr Zanotto said he gave Mr Younan a further $53,000 (which he said was a loan) and which he said was repaid. Mr Zanotto said he also authorised Mr Younan to collect and temporarily retain a sum of $154,000, which he said was a debt owing by Mr Vellar to him. He said Mr Younan collected the money but did not repay him (apart from $12,000).

Messrs Younan and/or Carroll also encouraged Ms Morgan and Messrs Vellar, Zanotto and Gigliotti to provide false or misleading statements, or fabricated documents, to the Commission.

Messrs Younan and Carroll have each denied ever representing that either of them was, or knew, a Commission officer or could influence, or affect the outcome of, an investigation by the Commission. All of the persons who made payments to Mr Younan have denied engaging in corrupt conduct and claimed that they made the payments, solely or primarily, to avoid the publicity of a Commission investigation or because they were threatened.

Background and credibility of Messrs Younan and Carroll

Mr Younan has an extensive criminal history, including convictions for larceny, drug offences and money laundering. Mr Carroll (also known as "Jazz" or "Gerry") has been convicted of dozens of fraud-related offences. The two men first met in prison in 1999. Since shortly after Mr Carroll was released from prison in 2000, at which time Mr Younan was no longer incarcerated, the two men have had a close relationship with almost-daily contact. In 2007 they had telephone conversations "around three times a day".

Messrs Younan and Carroll each testified at two compulsory examinations (the second in January 2008) and Mr Carroll also testified at the public inquiry. Mr Younan failed to appear at the public inquiry. On every occasion Messrs Younan and Carroll testified they provided versions of events that were inherently implausible and inconsistent with, or contradicted by, objective evidence, as well as the testimony of numerous other witnesses, including each other. The Commission found both of them to be untruthful witnesses who did not make a genuine attempt to honestly answer questions and generally said whatever they thought would best serve their own interests.

The specific allegations and evidence against Messrs Younan and Carroll, and each of the persons who dealt with them, are examined below.

Dealings with Mr Vellar

Mr Vellar testified that on 27 December 2006, a few weeks after the Commission's investigation became known to him and the general public in Wollongong because of the execution of search warrants and resulting media coverage, he received a telephone call from an associate, George Paradisis, who asked him to meet "to see someone about assisting [him] with a problem". Mr Vellar said that they met later that day and Mr Paradisis introduced him to Mr Younan for the first time. He stated that he met him again on 28 and 29 December 2006 and that during those three meetings Mr Younan:

- said "you're in a bit of trouble and I can help you" and represented that he "knew everything about" Mr Vellar and Ms Morgan, including that they were in a sexual relationship and that she had approved some of his DAs;
- claimed that he was "extremely well connected" and "had contacts within the police force, within ICAC" and other government agencies; and

- implied that for a payment he could "fix things up" and "make things go away".

Mr Vellar told the Commission that in early January 2007 he and Ms Morgan met with Messrs Younan and Carroll at McDonalds in Campbelltown and events along the following lines occurred:

- he was introduced to Mr Carroll for the first time and told that he was a very senior ASIO officer;
- he and Mr Carroll had a conversation in the carpark during which Mr Carroll represented that he knew a lot about Mr Vellar and the Commission's investigation relating to him and said words to the effect of: "Mr Vellar, you should be in fucking gaol with what you have done, and Ms Morgan … should be in fucking gaol too … You were sleeping with her, she – she was on the take by many other developers";
- Mr Carroll said that if he (Mr Vellar) did not pay money to Mr Younan the Commission's investigation would become "worse" for him;
- at various times Messrs Carroll and Younan both represented to him that the money was needed to "pay off" corrupt Commission officers; and
- Mr Younan, in Mr Carroll's absence, requested a payment of $200,000 in respect of Mr Vellar and a separate payment of $60,000 in respect of Ms Morgan.

Mr Vellar claimed that he initially refused to pay $200,000 and did not agree to pay a lesser amount, but that demands for payments were constantly made during 2007 by Messrs Younan and Carroll in person or by telephone. He claimed that Messrs Younan and Carroll represented to him that the Commission had incriminating evidence against him in a file and that corrupt Commission officers would destroy that evidence or the entire file for money.

Mr Vellar's evidence about Messrs Younan and Carroll soliciting payments from him is supported by the content of lawfully recorded telephone conversations which clearly show that the two men conspired to make false representations to Mr Vellar for the purpose of inducing him to make payments to them.

Banking records show that between January and September 2007 Mr Vellar paid Mr Younan $120,000. He also said he paid Mr Younan $154,000 in respect of a debt allegedly owing by him to Mr Zanotto (referred to in the section entitled "Dealings with Mr Zanotto" below). Mr Vellar admitted that he made these payments to Mr Younan believing he (Mr Younan) could sort out problems with the Commission and that he would give the money to corrupt Commission officers investigating him. However, he maintained that he had not engaged in corrupt conduct and claimed that he made the payments under duress and out of fear and intimidation because of various threats made by Messrs Younan and Carroll to harm or kill himself, his family and Ms Morgan. The Commission does not accept that Mr Vellar was intimidated or in fear for the following reasons:

- Evidence of the nature of the relationship between Messrs Vellar and Younan was, in the Commission's opinion, irreconcilable with the claim. For example: during telephone conversations Messrs Vellar and Younan spoke in very friendly terms, without a hint of hostility, and Mr Vellar encouraged Mr Younan to contact Ms Morgan; Mr Vellar admitted that he attended Mr Younan's home on social occasions "probably half a dozen times" and once brought his wife and children with him; Mr Vellar pursued with Mr Younan what he believed to be legitimate business opportunities in the Middle East, including meeting Mr Younan overseas on four or five occasions; and Mr Vellar and his wife travelled overseas with Mr Younan on one occasion.
- Mr Vellar used a solicitor, James Lahood, recommended to him by Mr Younan; he introduced Mr Younan to Ms Morgan, with whom he claimed to be in love, and Mr Zanotto, a close friend at the time; and he deceived Ms Morgan about the nature and extent of his dealings with Mr Younan.
- Mr Vellar was unable to convincingly explain why he did not report the alleged threats to the police. He only informed the Commission of them when compelled to do so more than a year after they were allegedly first made.
- During a telephone conversation on 17 October 2007 Messrs Vellar and Carroll spoke in friendly terms and, even though Mr Carroll sought money, there was no hint of threats or hostility from him towards Mr Vellar or any other person.
- Throughout the course of its investigation, which included extensive surveillance, the Commission found no evidence that Messrs Younan or Carroll threatened any person it was investigating, apart from the belated, unpersuasive and self-serving testimony of persons who paid money to them.

Mr Younan admitted that he received payments from Mr Vellar but claimed that they related to legitimate business dealings. In January 2008, in response to a notice issued by the Commission under section 22 of the ICAC Act, Mr Younan produced a single-page document entitled "Full Agreement Between Raymond Younan and Frank Vellar", purportedly signed by both men on 16 July 2006. It provided that Mr Vellar agrees to pay Mr Younan $200,000 for identifying business opportunities in the Middle East ("the agreement"). The agreement, which is reproduced on the following page (Figure 1), is not witnessed, contains major typographical errors and is largely incomprehensible.

At a compulsory examination on 14 January 2008 Mr Younan claimed that:

- he and Mr Vellar signed the agreement in each other's presence in Wollongong on 16 July 2006, but he could not name any person in Australia who could verify that the two of them had any dealings with each other in mid-2006;
- any payments he received from Mr Vellar were pursuant to this agreement, even though the agreement states "monies payable only when a contract is awarded to [Mr Vellar]" and he conceded that no such contracts have been awarded;
- he had received payments from Mr Vellar exceeding $20,000, but could not recall or even estimate the total amount;
- he introduced Mr Vellar to Mr Carroll as "a friend" and Mr Carroll has been with him on occasions he met Mr Vellar, but he did not involve Mr Carroll in his dealings with Mr Vellar and he is not aware of Mr Carroll ever asking Mr Vellar for money either for himself or Mr Younan;
- Mr Vellar told him he was under investigation by the Commission and, in response, he (Mr Younan) recommended that Mr Vellar use a solicitor named James Lahood and took him to meet Mr Lahood, but he has not otherwise assisted or offered to assist Mr Vellar in relation to the Commission's investigation; and
- he never represented to Mr Vellar or anyone else that he had any connection with the Commission or Commission officers.

Much of Mr Younan's testimony was demonstrably false, including being refuted by telephone conversations lawfully intercepted by the Commission and played at the public inquiry. In particular, overseas travel movement records show that on 16 July 2006, the date the agreement between him and Mr Vellar was purportedly signed by both of them in Wollongong, Mr Vellar was in Australia while Mr Younan was overseas. Mr Vellar ultimately admitted that this document was a fabrication. He testified that it was prepared by Mr Younan and signed by them in late 2007 "to cover and conceal" the payments he made to Mr Younan. Mr Vellar admitted that at the time he produced the document to the Commission in December 2007 he knew it was "false", "misleading" and "a forgery". He claimed that he had no intention of misleading the Commission even though he conceded that he did not inform the Commission that the document was false and misleading when he produced it.

Mr Carroll provided a fanciful and, in the Commission's opinion, untruthful version of events relating to his contact with Mr Vellar, claiming that:

- he believed that Mr Younan had a business which involved referring persons in need of legal advice to lawyers, including Mr Lahood, in return for a fee and he occasionally performed "a support role" for Mr Younan, including by falsely representing to such persons that he was part of a "legal team", in the hope of receiving a payment from Mr Younan;
- at the request of Mr Younan, he attended at least three meetings between Messrs Younan and Mr Vellar, and also spoke to Mr Vellar over the telephone and sent him text messages, having, he claimed, "little understanding" of the nature of the dealings between Messrs Younan and Vellar;
- he generally thought that the dealings between Messrs Younan and Vellar related to Mr Younan's legal referral business or some overseas business deals;
- at the request of Mr Younan, but without asking why, he made false representations to Mr Vellar, such as using a public telephone to send Mr Vellar a text message purporting to be from a woman with whom he was having an extramarital affair;
- at the request of Mr Younan, he asked Mr Vellar for a $70,000 or $80,000 loan for both himself and Mr Younan, even though he barely knew Mr Vellar; and
- he never knowingly represented that he had any connection with the Commission or Commission officers and he had been "manipulated" by Mr Younan.

© ICAC

Figure 1

FULL AGREEMENT BETWEEN RAYMOND YOUNAN AND FRANK VELLAR

This agreement is between Raymond Younan and Franco Vellar and is to commence from today's date 16 July 2006. It is for an initial period of two years. Frank Vellar agrees to pay the sum of AUD$200,00.00 to Raymond Younan for him to conduct the phiyibility studies into Frank Vellar becoming an active particular in the area of constructions in Bahrain, Dubai and Lebanon.

For his part, Raymond Younan will investigate both through Government Connect and current known associates, both the likely hood of new constructions contract being issued and new areas of develop being approved for construction. As we in identifying the above, Raymond Younan will also attempt to identify the likely hood of contracts being awarded to the company, and the circumstances that would insure our rapid acceptance into the constructions scene in the above mentioned countries,

The fees described above is inclusive of all costs incurred by Raymond Younan in the endeavour.

Signature of Raymond Younan Date: 16/7/06.

Signature of Frank Vellar Date: 16/7/06

CONDITIONS NOTED

- MONIES PAYABLE ONLY WHEN A CONTRACT IS AWARDED TO OUR FIRM.
- HOTEL COSTS PAYABLE BY VELLAR DURING THE TWO YEAR TERM FOR VELLAR PURPOSES ONLY – PART PHONE COSTS ALSO PAYABLE

7

© ICAC

In relation to the matters examined in this section of the chapter the Commission rejects the evidence of Messrs Younan and Carroll. It rejects Mr Vellar's claim that he was subject to duress or intimidation of the type alleged. The Commission is satisfied that the sole or overriding reason why Mr Vellar paid $120,000 to Mr Younan was because he mistakenly believed that Messrs Younan and Carroll could bribe corrupt Commission officers investigating him, and he intended them to do so.

Dealings with Ms Morgan

Ms Morgan's testimony about her dealings with Messrs Younan and Carroll may be summarised as follows:

- At the beginning of January 2007 Mr Vellar told her Mr Younan claimed to know everything about the Commission's investigation and "… Ray knows people at ICAC and they can make sure the problem goes away for you".
- In early January 2007 she and Mr Vellar met Mr Younan at McDonalds in Campbelltown and Mr Carroll turned up, but he refused to meet her. While Messrs Vellar and Carroll talked, she spoke to Mr Younan and he represented that Mr Carroll "was from ICAC" and "could make [her] problems with ICAC go away".
- A few days later she met with Messrs Younan and Carroll by herself at a café in Appin and they represented to her that: Mr Carroll was an "ICAC officer"; the Commission had a "file" on her called "Sex for favours" containing incriminating evidence against her; things could be "done at ICAC to get rid of anything that could be at all incriminating against [her]"; and Mr Carroll "could rewrite the report at ICAC so [she] wasn't made out to be corrupt". After these discussions Mr Carroll said "Well, are we going to go ahead?", Mr Younan replied "yep", Mr Carroll left the meeting and Mr Younan asked for $100,000 to do the things previously referred to.
- She recounted the meeting to Mr Vellar and told him that she did not have $100,000. A few days later Mr Vellar said he had spoken to Messrs Younan and/or Carroll and been told that they would accept $50,000. She later received a telephone call from Mr Younan and he asked for $50,000. In late January 2007 she withdrew $50,000 in cash from her bank account and that same day she met with Mr Younan by herself and gave him the full amount (banking records show that she withdrew $50,000 on 31 January 2007). Mr Younan took the money and said he would clean the slate and later told her that her file at the Commission was now "all clean".
- In February or March 2007 Mr Younan asked her to arrange for him to meet Mr Tabak and she contacted him and arranged for the three of them to meet at the café in Appin. At the meeting Mr Younan: represented to Mr Tabak that he was connected with the Commission's investigation; stated that her file at the Commission was now "all clean" and now contained no evidence of their sexual relationship; and told Mr Tabak to deny their sexual relationship and not say anything bad about her to the Commission. At the meeting Messrs Younan and Tabak also spoke amongst themselves, in her absence, for a period of time.
- Mr Younan asked her to arrange for him to meet Michael Kollaras, to basically say the same things to him as he did to Mr Tabak, and she tried but was unable to persuade Mr Kollaras to meet with Mr Younan. Mr Younan also asked her to arrange meetings with Messrs Oxley and Scimone but she declined, saying that she did not know Mr Oxley well enough and thought she would not be able to convince Mr Scimone to meet with him.
- Mr Younan told her that she needed a solicitor and took her to see Mr Lahood, but he declined to act for her because of a conflict of interest arising from his representation of Mr Vellar. Mr Lahood referred her to another solicitor, who represented her for a brief period, but she stopped using him because Mr Younan said that he did not like or trust him. Mr Younan then took her to see a different solicitor and a barrister and she agreed to use their services.

- In March and May 2007, when she received notices issued under section 21 of the ICAC Act, she showed them to Mr Younan and he told her to provide written statements to the Commission that were false or misleading and she did so (these notices and her responses are referred to in Chapters 3, 4 and 5 of this report), knowing that they were false or misleading.

Ms Morgan's evidence in relation to the matters referred to above is supported by the testimony of Messrs Vellar and Tabak and is consistent with the evidence referred to in all other sections of this chapter.

Ms Morgan claimed that she paid the $50,000 to Mr Younan, and provided the false or misleading statements to the Commission, under duress and out of fear because of various threats made by Messrs Younan and Carroll to harm or kill her and her child. The Commission does not accept this claim. It is not supported by any objective evidence and, in the Commission's opinion, is inconsistent with various aspects of her conduct, such as her willingness to meet by herself with Messrs Younan and Carroll, introducing or seeking to introduce Mr Younan to other persons, using lawyers recommended by him and failing to report any such threats to the police (she only informed the Commission of them when compelled to do so more than a year after they were allegedly first made).

Mr Younan provided a contradictory version of events relating to his contact with Ms Morgan. He initially stated that Mr Vellar introduced her to him and he did not speak to her on that occasion and could not recall if he ever met her again in Mr Vellar's absence or the presence of any other person. He then stated that on one occasion he "brought her to a lawyer" in Mr Vellar's absence, because she asked him if he knew a good lawyer, and claimed that that was the only occasion he personally dealt with her and that he had no other reason to meet her without Mr Vellar. When specifically pressed, he then admitted to further meetings (including in Mr Vellar's absence) with her and third persons, including a different lawyer, Mr Carroll and Mr Tabak. He provided fanciful explanations for his various interactions with her and unconvincingly denied ever seeking or receiving any money from her or discussing the Commission's investigation with her. The Commission regards his testimony as untruthful and does not accept it.

At a compulsory examination on 17 January 2008 Mr Carroll testified that Mr Younan asked him to meet Ms Morgan without telling him why. He agreed to do so without asking why. The three of them subsequently met at a café in Appin at some time in 2007 and had a general talk about her relationship with Mr Vellar. He subsequently provided a different version of events at the public inquiry, claiming that when Mr Younan asked him to meet her he said that she needed legal advice and that the purpose of the meeting was to refer her to a lawyer. When asked if he had held himself out to be a Commission officer, he replied: "Not to the best of my memory".

The Commission rejects the evidence of Messrs Younan and Carroll and, apart from her claims of threats and duress, accepts the evidence of Ms Morgan. In particular, the Commission is satisfied that the sole or overriding reason why Ms Morgan paid $50,000 to Mr Younan was because she mistakenly believed, and intended, that he would pay off corrupt Commission officers who were investigating her and the sole or overriding reason why she provided false or misleading statements to the Commission was to seek to avoid the detection or exposure of corrupt conduct she had engaged in.

Dealings with Mr Zanotto

Mr Zanotto's evidence about his dealings with Messrs Younan and Carroll may be summarised as follows:

- In December 2006, shortly after the Commission executed search warrants at Mr Vellar's premises, Mr Vellar told him that the Commission had seized copies of emails he had sent to Mr Vellar (the three emails relating to the Pavilion DA referred to in Chapter 9 of this report) and that he "could be in a lot of trouble".
- In late January 2007, by which time Mr Zanotto knew he was under investigation by the Commission because a search warrant had been executed at his home, Mr Vellar told him that the Commission "was a corrupt organisation" and there were "people … from ICAC" who had already helped him out and had had him "exonerated". Mr Vellar recommended that he meet these people and he ultimately agreed to do so, believing that they would be "corrupt ICAC officers".

© ICAC

- He subsequently met Mr Vellar on a Sunday night at a service station and was introduced to Mr Younan. The three of them sat in Mr Younan's car and Mr Younan said he was a contractor for the government and he did some work for the Commission, that Mr Zanotto was an innocent party caught up in the Commission's investigation, that he (Mr Younan) had helped out Mr Vellar and that he could also help Mr Zanotto. Mr Younan then said he would telephone a senior Commission officer named "Gerry" and, with the phone on loudspeaker, called a person who answered by that name who represented that he worked for the Commission and said words to the effect of: "I think we should help Val because he seems a pretty good person, and we know that he's caught up with something he shouldn't be". Mr Younan then spoke about the Commission's investigation and told him that even though he was innocent his public profile could be damaged by it, before saying: "I'm going to give you a call in a few days, I want to work some things out with … some of my men". By the end of this meeting he thought that both Mr Younan and "Gerry" were corrupt.

- A few days later Mr Younan telephoned him and said: "We can help you but it's going to cost you, it will cost $120,000. There's four of us and [that's] $30,000 each". He promptly recounted this conversation to Mr Vellar, who recommended that he try to negotiate a lesser amount to pay. He subsequently spoke to Mr Younan and said that $120,000 was "just too much" and Mr Younan told him to pay something so Gerry could "clear everything and get rid of everything".

- In mid-February 2007 he made one or two initial payments to Mr Younan of around $30,000 to $50,000. In late February 2007 Mr Younan asked him to meet Gerry at a café in Appin and he agreed to do so. The three of them met and had a conversation during which Gerry "clearly represent[ed] himself as someone working for ICAC" and said that all of the material seized from Mr Zanotto's house by the Commission could be returned within two weeks. Mr Zanotto recognised Gerry's voice as the same voice he had heard over the loudspeaker when he first met Mr Younan in his car (and he subsequently positively identified Gerry as Mr Carroll). After hearing this he felt reassured and he paid Mr Younan further instalments until the total amount of money he had paid was $120,000.

- Mr Younan subsequently invited him and his wife to his house "on numerous occasions" for social purposes and he twice went there by himself. On one such occasion Mr Younan told him that Mr Carroll was going through a divorce and needed $53,000 or he would "lose his house". Mr Younan said: "Can you help? You'll get it back within a month" and he agreed to lend the money because by this stage he had "some confidence" in Mr Younan and thought he was "very fair dinkum". On 23 March 2007 he gave Mr Younan a cheque for $53,000, without creating any document to evidence the loan or record its conditions, and a month later Mr Younan repaid the full amount with an additional $1,000 in interest.

- In April 2007 Mr Younan told him that Mr Vellar was not going to pay back the $150,000 he lent him in August 2006 (referred to in Chapter 9 of this report), but claimed that Mr Carroll had "intercepted money that has come from China" for Vellar and said "if you sign [the loan] over … to me, I can ensure that you get the funds, otherwise you're never going to get the money". He subsequently signed documents authorising Mr Younan to collect the debt from Mr Vellar, which was $154,000 (including interest), and retain the money for 30 days. Mr Younan collected the full amount from Mr Vellar, but only repaid $12,000 to him.

- In late March 2007, when he received a notice issued under sections 21 and 22 of the ICAC Act, he showed it to Mr Younan who told him to provide a written response to the Commission that was false or misleading (this notice and his response are referred to in Chapter 9 of this report) and he did so.

Mr Zanotto's testimony in relation to the matters referred to above is consistent with the evidence referred to in all other sections of this chapter and is also strongly supported by the content of a telephone conversation between him and Mr Younan on 17 October 2007 during which Mr Zanotto complained that "since February" he had "paid and paid and paid" and stated "give me all my money back and let me go to ICAC and to gaol".

Mr Zanotto ultimately admitted that at the time he paid each instalment of the $120,000 to Mr Younan, in February and March 2007, he believed that the money would go to "corrupt ICAC officers" who would make the investigation into him "go away" or otherwise "exonerate" him. However, he maintained that he had not engaged in any corrupt conduct and claimed that he made the payments under duress and out of "fear

for [his] family's safety" because Mr Carroll had made a death threat over the telephone during the first meeting he had with Mr Younan in his car. The Commission does not accept this claim. It is not supported by any objective evidence and, in the Commission's opinion, is irreconcilable with various aspects of his conduct, particularly his willingness to: visit Mr Younan's home by himself for social purposes; lend $53,000 to Mr Carroll; authorise Mr Younan to collect and temporarily retain the $154,000 debt allegedly owed to him by Mr Vellar; and use a solicitor recommended by Mr Younan. In addition, Mr Zanotto was unable to convincingly explain why he failed to report any threat against him or his family to the police and his claim of duress is inconsistent with the content of the telephone conversation between him and Mr Younan on 17 October 2007.

Mr Zanotto also claimed that he relied on legal advice from Mr Lahood when he settled and signed the statement (containing false or misleading information dictated by Mr Younan) he provided to the Commission in response to the notice issued to him in late March 2007. The Commission rejects this claim, at least insofar as it is sought to in any way exculpate Mr Zanotto, who was fully aware that his statement was false or misleading and willingly provided it to the Commission.

Mr Younan provided fanciful testimony about dealings with Mr Zanotto, claiming that in 2007 Mr Zanotto lent him "about $180,000" for a business deal in Nigeria pursuant to a purely "verbal agreement", with no set interest rate or date for repayment. His testimony was contradictory and inconsistent with the evidence of Messrs Vellar and Carroll and the content of the telephone conversation between him and Mr Zanotto on 17 October 2007.

Mr Carroll provided equally unpersuasive testimony about his contact with Mr Zanotto, claiming that he met him once at the request of Mr Younan, who asked him to falsely represent that they "had a good team of lawyers [they] could refer him to" as part of Mr Younan's legal referral business.

The Commission rejects the evidence of Messrs Younan and Carroll, which it regards as untruthful. It generally accepts Mr Zanotto's evidence, but rejects his claim that he was subject to duress or intimidation of the type alleged. The Commission is satisfied that the sole or overriding reason why Mr Zanotto paid $120,000 to Mr Younan was because he mistakenly believed that Messrs Younan and Carroll could bribe corrupt Commission officers investigating him and he intended that they do so. The Commission also rejects Mr Zanotto's claim that he relied on legal advice in settling the false or misleading statement he provided to the Commission.

Dealings with Mr Tabak

Mr Tabak's testimony about his dealing with Mr Younan (he denied having any dealings with Mr Carroll) may be summarised as follows:

In early 2007 Ms Morgan telephoned him and asked him to meet her at a café in Appin and he agreed to do so. When he arrived she was sitting with Mr Younan and he joined them. Mr Younan told him "he was working … with ICAC officers", he was helping Ms Morgan, "he had friends in ICAC" that could make his and Ms Morgan's files "go away" and "Michael and Tass Kollaras were going down". Ms Morgan kept saying "Glen, he knows everything" and he assumed that she was referring to their sexual relationship. Mr Younan did not ask him for any money, but he sensed that such a request was "coming". He left the meeting without saying much and then "put a block" on his phone so Mr Younan could not call him. He did not hear from Mr Younan again. He promptly recounted these events to Michael Kollaras.

Mr Tabak's testimony is supported by Ms Morgan's testimony and is consistent with the evidence referred to in all other sections of this chapter.

Mr Younan gave inconsistent and unconvincing testimony about his contact with Mr Tabak, ultimately claiming that Ms Morgan asked him to meet Mr Tabak to tell him to leave her alone and he did so, in her presence. Mr Carroll denied knowing Mr Tabak.

Accordingly, in relation to the matters examined in this section of the report the Commission rejects the evidence of Mr Younan and accepts the evidence of Mr Tabak.

Dealings with Michael Kollaras

Michael Kollaras's testimony about actual or proposed contact with Messrs Younan and Carroll may be summarised as follows:

- In May 2007, after Mr Tabak had told him about his meeting with Mr Younan and Ms Morgan, Ms Morgan came to his office and said words to the effect of: "I've got some problems and they know about … everybody at the table [Table of Knowledge] … ICAC will be investigating you guys". He dismissed her concerns and she left.

© ICAC

- In early June 2007 he received a telephone call from a male person claiming to be a journalist from the *Daily Telegraph* who said words to the effect of "there is an ICAC investigation and you and your mates are going to be investigated" and referred to sexual relationships with Ms Morgan. He asked the person for his name and the person stuttered, so he assumed that it "was a bluff" and promptly reported the matter to the Commission.

Mr Carroll ultimately admitted to the Commission that he telephoned Michael Kollaras and falsely represented that he was a journalist from the *Daily Telegraph* and falsely claimed that he was writing a story about a sexual relationship with a woman. He said that he did it because Mr Younan asked him to and he thought that Mr Younan was sitting next to him at the time he made the telephone call.

Mr Younan initially admitted that he asked Ms Morgan to arrange for Michael Kollaras to meet him (as testified by Ms Morgan), but then claimed that it was Ms Morgan who wanted him to meet with Michael Kollaras and stated that it never eventuated. He denied ever having asked Mr Carroll to telephone Michael Kollaras and pretend to be a journalist and claimed that he was not aware of Mr Carroll having ever told anyone that he was a journalist.

The Commission is satisfied that the telephone call received by Michael Kollaras was made by Mr Carroll at the request of Mr Younan for the purpose of seeking to pressure him into agreeing to meet with one or both of them so they could solicit a payment from him under the false pretence that they were or knew corrupt Commission officers who could advance his interests in relation to an investigation involving Ms Morgan.

Dealings with Messrs Gigliotti, Scimone and Tasich

In September and October 2007 the Commission, in addition to conducting the current investigation, was investigating an allegation that Lou Tasich, a developer, offered a $30,000 bribe to a Council officer named Peter Coyte, which he rejected, and a counter-allegation that Mr Coyte solicited bribes from Mr Tasich, which he refused to give ("the second investigation"). Messrs Gigliotti and Scimone knew they were subjects of the current investigation and Mr Gigliotti was also a relevant witness in relation to the second investigation because he initially claimed that Mr Tasich had admitted to him that he did offer a bribe to Mr Coyte.

The evidence of Messrs Gigliotti, Scimone and Tasich relating to their dealings with Messrs Younan and Carroll may be summarised as follows:

- On 22 September 2007 Mr Gigliotti received a telephone call from an associate, Robert Gizzi, who told him that a man connected to the ICAC investigation needed to see him urgently. He subsequently met Mr Gizzi at the Panorama Hotel at Bulli Tops and they met with Mr Younan. Mr Younan represented that he worked for the Commission and claimed that he could "get all reference to [Mr Gigliotti] taken out" of the Commission's investigation. He also said he could clear Mr Scimone and asked Mr Gigliotti to arrange for himself and Mr Scimone to meet him again and said he would introduce them to "the top guy in the ICAC investigation". Mr Gigliotti met Mr Scimone later that night and said: "There's this guy Ray and his mate … and they're from ICAC and they want to meet with you … He's helped other people out and he wants to help us out".
- On 24 September 2007 Messrs Gigliotti and Scimone met Mr Younan at the Panorama Hotel and a few minutes later Mr Carroll arrived, introducing himself as Gerry and saying that his nickname was "Jazz". There was then a discussion during which Mr Younan said to Mr Scimone that the Commission had been investigating him, including tapping his phone, for 18 months and that Gerry was a senior investigator with the Commission who could "make it go away". After that initial discussion Mr Gigliotti left and Mr Younan told Mr Scimone that his Commission file could be "all cleaned up" for $40,000, with $30,000 payable now and $10,000 "when it was all done".

© ICAC

- Even though he claimed that he had not done anything else wrong, Mr Scimone said he agreed to pay the money because he believed that Mr Carroll was a Commission officer, he believed that Mr Younan could make good on his promise, he had recently endured "trial by media" in relation to another matter and he was scared. Straight after the meeting on 24 September 2007 he went to the bank and withdrew $10,000 in cash and $20,000 in the form of a bank cheque made payable to "Ray Younan" (banking records confirm this) and he returned to the Panorama Hotel and gave them both to Mr Younan in the carpark. Over the ensuing days Mr Younan often telephoned him seeking the remaining $10,000, but he did not give it to him.
- In late September 2007 Mr Younan asked Mr Gigliotti to arrange for him to meet Mr Tasich. Mr Gigliotti telephoned Mr Tasich and told him that "someone from ICAC wanted to meet with him" and Mr Tasich agreed to meet. A day or so later Messrs Gigliotti and Tasich met Mr Younan who said words to the effect of: "I have access to people in ICAC. I know that you are being set up … There is collusion [involving] ICAC". Mr Younan also recommended to Mr Tasich that he use Mr Lahood as a solicitor. After Mr Tasich left the meeting Mr Younan telephoned him and they arranged to meet at a café in Campbelltown. Mr Younan arrived and said words to the effect of: "I know the person from ICAC who is heading the investigation into the corruption in Wollongong Council. These people … have the power to make things much worse. If you want you can meet him". Mr Tasich agreed and Mr Younan said that he would organise a meeting with "Gerry". Later that day they met with Mr Carroll and Mr Younan introduced him as Gerry. Mr Carroll held up a file and said "This is your file" to Mr Tasich. He then said to Mr Younan "Have you discussed the terms?" and Mr Younan replied "Leave it to me". Mr Carroll then left and Mr Younan said to Mr Tasich "It's up to you to co-operate. These guys have the power to do anything". Mr Tasich asked how much he wanted and Mr Younan said $40,000. Mr Tasich then negotiated to pay only $20,000 and later that day, shortly after meeting Mr Lahood and agreeing to be represented by him, he met with both Messrs Younan and Carroll and paid them $20,000 in cash.
- Mr Tasich claimed that he paid the money to Messrs Younan and Carroll, believing that they were Commission officers, because he felt threatened and intimidated by them and feared that if he did not they would "create problems for [him] with ICAC".
- On 9 October 2007 Mr Gigliotti received a notice from the Commission issued under sections 21 and 22 of the ICAC Act requiring him to produce a statement of information and produce documents relating to the allegations against Mr Tasich. He then provided a copy of it to Mr Younan, who said that Mr Carroll would draft a response for him. On 17 October 2007 Mr Gigliotti met Messrs Younan and Carroll and Mr Carroll provided him with a sheet of paper containing the wording for a proposed covering letter for Mr Gigliotti to send to the Commission with his formal response to the notice. Mr Carroll told Mr Gigliotti to copy out the wording on a separate piece of paper, saying "all is taken care of", and he did so and then sent a letter to the Commission containing that wording. The letter falsely represented that Mr Coyte had told Mr Gigliotti that he (Mr Coyte) had solicited a bribe from Mr Tasich. Mr Gigliotti admitted that the statement in the letter was false, but claimed that he only realised that it was false after he had sent it to the Commission.
- After Mr Gigliotti sent the false letter to the Commission, Mr Younan requested that he buy a case of whiskey for Mr Carroll as "a present" and Mr Gigliotti agreed to do so. That day he purchased a case of Chivas Regal whiskey for $500.40 and gave it to Mr Younan on the understanding that he would provide it to Mr Carroll, suspecting that he was a corrupt Commission officer and knowing it was improper to do so.

The evidence of Messrs Gigliotti, Scimone and Tasich is generally consistent and is supported by the content of telephone conversations and video surveillance recorded by the Commission and played at the public inquiry.

Messrs Younan and Carroll provided inconsistent, fanciful and, in the Commission's opinion, untruthful versions of events relating to their dealings with Messrs Gigliotti, Scimone and Tasich. For example, Mr Younan claimed that they initiated contact with him and that Mr Tasich paid him $10,000 in cash simply for referring him to Mr Lahood, while Mr Carroll provided wavering testimony that was contradicted by video surveillance

© ICAC

footage. The Commission is not prepared to place any weight on the testimony provided by either of them in relation to these matters.

Messrs Gigliotti, Scimone and Tasich each effectively claimed that they were innocent of any corrupt conduct and made their payments to Messrs Younan and/or Carroll because they felt threatened, even though none of them testified that any threats of violence were made against them, or feared that the Commission's investigation might result in unwarranted adverse outcomes for them, such as negative publicity. The Commission found these claims to be unconvincing and rejects them. Common sense suggests that the payments were made in an attempt to avoid the detection and exposure of corrupt conduct each of them had previously engaged in. Such conduct is set out in Chapters 8 and 10 of this report and the Commission's *Report on an investigation into allegations of bribery at Wollongong City Council* (20 December 2007).

In addition, the Commission is satisfied that when Mr Gigliotti submitted his letter of 17 October 2007 to the Commission he knew that it was false and that Mr Carroll also knew the wording he provided to Mr Gigliotti was false.

Sources of information known to Messrs Younan and Carroll

Messrs Younan and Carroll possessed a significant amount of knowledge of some matters being investigated by the Commission. For example, from a relatively early stage they were aware that Ms Morgan had sexual relationships with developers while assessing their DAs. It is apparent that this matter was the subject of widespread rumours in Wollongong, some fuelled by members of the Table of Knowledge themselves, particularly after the Commission executed search warrants (including at Mr Vellar's and Ms Morgan's home premises and the Council's premises) and these were widely reported in the media in early December 2006. It is likely that such rumours and media reports were the initial source of information used by Messrs Younan and Carroll to convince Mr Vellar and Ms Morgan that they were privy to the Commission's investigation when they first approached them in late December 2006 and early 2007. Thereafter Messrs Younan and Carroll regularly obtained further relevant information, including documents, from the persons under investigation by the Commission who were foolish enough to deal with them, particularly Mr Vellar, Ms Morgan, Mr Zanotto and Mr Gigliotti.

While Messrs Younan and Carroll were able to obtain information about the matters being investigated by the Commission through the means referred to above, it is readily apparent that they had little knowledge of the investigation itself. For example, they were not aware that they themselves were under investigation, including being under physical surveillance and having their telephone conversations lawfully intercepted. There is no evidence that Messrs Younan and Carroll had inside knowledge of any aspect of the Commission's investigation.

Findings of fact

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

1. Between December 2006 and October 2007 Mr Younan and Mr Carroll, acting in concert as part of an orchestrated plan:

   (a) falsely represented to persons under investigation by the Commission (Mr Vellar, Ms Morgan, Mr Zanotto, Mr Gigliotti, Mr Scimone and Mr Tasich) that they were, or acted on behalf of, Commission officers and had detailed knowledge of the Commission's investigation;

   (b) falsely represented to such persons that in return for payments they, or corrupt Commission officers they knew, would act improperly in relation to the Commission's investigation, including by closing the investigation, ensuring certain persons were not subjected to further investigation or adverse findings by the Commission, and fabricating or destroying evidence;

   (c) solicited payments from such persons, as inducements or rewards for Commission officers they represented as being corrupt, to improperly advance their interests in relation to the Commission's investigation; and

   (d) actively encouraged at least some of these persons to provide false or misleading statements and fabricated documents to the Commission with the intention of deceiving the Commission and hindering its investigation.

© ICAC

2. In furtherance of the conduct set out in finding of fact 1, Mr Younan and Mr Carroll jointly solicited and received:

   (a) $120,000 from Mr Vellar between January and September 2007;

   (b) $50,000 from Ms Morgan in January 2007;

   (c) $120,000 from Mr Zanotto in February and March 2007;

   (d) $30,000 from Mr Scimone in September 2007;

   (e) $20,000 from Mr Tasich in late September or early October 2007; and

   (f) a case of whiskey costing $500.40 from Mr Gigliotti in October 2007.

3. Mr Vellar, Ms Morgan, Mr Zanotto, Mr Scimone, Mr Tasich and Mr Gigliotti made the relevant payments set out in finding of fact 2:

   (a) as inducements for persons they believed to be corrupt Commission officers to improperly affect the Commission's investigation in their favour;

   (b) to avoid the detection or exposure of corrupt conduct they had previously engaged in; and

   (c) without having their free will overborne by threats or intimidation.

Section 74A(2) statement

In relation to the matters referred to in this chapter of the report, the Commission considers Messrs Younan, Carroll, Vellar, Zanotto, Scimone, Tasich and Gigliotti and Ms Morgan to be affected persons and makes the following statements pursuant to section 74A(2) of the ICAC Act.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Younan for the following offences:

(i) obtaining money or a valuable thing by making false or misleading statements contrary to section 178BB of the Crimes Act, obtaining property, including money, by false pretences contrary to section 179 of the Crimes Act; corruptly soliciting and receiving a benefit contrary to section 249B(1) of the Crimes Act; and conspiring (with Mr Carroll), contrary to the common law, to commit each of the above offences, in respect of his conduct set out in finding of fact 1;

(ii) corruptly soliciting and/or receiving benefits, contrary to section 249B(1) of the Crimes Act, in respect of his conduct set out in findings of fact 1 and 2;

(iii) knowingly giving evidence that is false or misleading in material particulars at his compulsory examinations on 1 November 2007 and 14 January 2008; and

(iv) wilfully fabricating a document produced to the Commission, contrary to section 88(3) of the ICAC Act, in respect of the document entitled "Full Agreement Between Raymond Younan and Frank Vellar" he produced to the Commission on 2 January 2008.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Carroll for the following offences:

(i) obtaining money or a valuable thing by making false or misleading statements contrary to section 178BB of the Crimes Act, obtaining property, including money, by false pretences contrary to section 179 of the Crimes Act; corruptly soliciting and receiving a benefit contrary to 249B(1) of the Crimes Act; and conspiring (with Mr Younan), contrary to the common law, to commit each of the above offences, in respect of his conduct set out in findings of fact 1 and 2;

(ii) corruptly soliciting and/or receiving benefits, contrary to section 249B(1) of the Crimes Act, in respect of his conduct set out in finding of fact 2;

(iii) knowingly giving evidence that is false or misleading in material particulars at his compulsory examinations on 1 November 2007 and 17 January 2008 and at the public inquiry on 4 March 2008; and

© ICAC

(iv) wilfully making a false statement to, or attempting to mislead, the Commission, contrary to section 80(c) of the ICAC Act, in respect of the letter dated 17 October 2007 produced to the Commission on that date by Mr Gigliotti, which was drafted by Mr Carroll.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of each of Mr Vellar, Ms Morgan and Messrs Zanotto, Scimone, Tasich and Gigliotti for the offence of corruptly giving a benefit to an agent contrary to section 249B(2) of the Crimes Act in respect of their conduct set out in finding of fact 3.

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Vellar for the offence of wilfully fabricating a document produced to the Commission, contrary to section 88(3) of the ICAC Act, in respect of the document entitled "Full Agreement Between Raymond Younan and Frank Vellar" he produced to the Commission on 18 December 2007.

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Gigliotti for the offence of wilfully making a false statement to, or attempting to mislead, the Commission, contrary to section 80(c) of the ICAC Act, in respect of the letter dated 17 October 2007 he produced to the Commission on that date.

© ICAC

Chapter 12: Mr Gigliotti's statutory declaration of 11 July 2008

This chapter deals with an allegation made by Frank Gigliotti in a statutory declaration of 11 July 2008 that in mid-January 2008 he informed a Commission officer, David Lusty, of a meeting he had with Frank Vellar and Noreen Hay MP and that the Commission failed to make reference to that information in its public inquiry because it implicated a member of the NSW Parliament.

For reasons set out later in this chapter, the Commission rejects Mr Gigliotti's evidence that he told Mr Lusty about the meeting and has found that no such conversation ever occurred.

How the allegation came to the Commission's attention

The Commission first became aware of the statutory declaration when excerpts were published in the *Illawarra Mercury* newspaper on Friday 25 July 2008. The Commission had no record of any information provided by Mr Gigliotti concerning the alleged meeting with Mr Vellar and Ms Hay. Mr Lusty denied having the alleged conversation with Mr Gigliotti concerning a meeting between Mr Gigliotti, Mr Vellar and Ms Hay.

In order to obtain further information the Commission issued Mr Gigliotti with a notice under section 22 of the ICAC Act requiring him to produce a copy of the statutory declaration and any records made by him of relevant conversations with Mr Lusty. He provided a copy of the statutory declaration but did not have any records of relevant conversations with Mr Lusty.

Given the serious nature of the allegations, the Commission decided to take evidence from Mr Gigliotti and his solicitor, Matteo Russoniello. Both gave evidence in compulsory examinations. The transcripts of the compulsory examinations have now been made public.

The meeting

Before examining the alleged conversation with Mr Lusty it is relevant to set out Mr Gigliotti's account of the alleged meeting involving Ms Hay and Mr Vellar.

Details of the alleged meeting are set out in paragraphs 4 to 12 of Mr Gigliotti's statutory declaration. The relevant paragraphs are as follows:

> (4) *… in 2007 I had received a phone call by Noreen Hay NSW Labor MP and asked by her "Frank, are you around today and free to pop in for a chat?" I replied: "Yes what time?" Noreen said: "Can you pop in now?" Noreen didn't tell me what the meeting was about or her reasons for wanting me to pop in to her Wollongong Office. We arranged that I would call in shortly because I was already in town and close to her office.*
>
> (5) *When I arrived I was greeted by Kylie Martin, Noreen's secretary, and led into Noreen's office. I was surprised to see Frank Vellar there because Noreen had not mentioned to me that he would be there and I felt very uncomfortable and apprehensive because Frank Vellar had a development proposal that had recently been rejected by me and Council. I think it was the night before this meeting that Council had declined Vellar's application for a Public Private Partnership for the Bathers Pavilion on Cliff Rd, Wollongong. I was annoyed that Noreen would invite me to speak to her and not tell me that Frank Vellar was attending, especially under the circumstances at the time.*
>
> (6) *Noreen said to me "Did you guys pass a resolution at the Council meeting against Frank's application for the Bathers Pavilion?"*
>
> (7) *I answered: "yes, we did."*
>
> (8) *Then Frank Vellar said: "Frank we need you to put in a rescission motion calling on Council to rescind the previous motion for the Bathers Pavilion PPP." I had voted against this proposal because I knew the community did not want this development nor did they want part ownership of the Bathers Pavilion to go to a private developer.*
>
> (9) *It became very clear to me that the reason that Noreen had asked me to "pop in" to see her was to act on behalf of Frank. I was very uncomfortable with this request and I felt a lot of pressure because of Noreen's influence in the ALP. I had never associated with him and did not have any personal dealings or meetings with him. I never called him and I did not like Frank Vellar.*

(10) I said "No mate, I'm not doing it. Why don't you ask your mate Val?". I was referring to Val Zanotto who had an association with Frank Vellar up until recently; when they had a falling out in Jan 07 regarding Ray Younan.

(11) Frank asked "Can you call Val?" and Noreen said "Yes I think that would be better". So I called Val and said to him "I'm with Frank Vellar. Frank wants to know if you would consider putting in a rescission motion for the Bathers Pavilion?" Val said "No".

(12) At the completion of the call I told Noreen Hay and Frank Vellar "Val said No; then said look I have to go I've got work to do".

When Mr Gigliotti gave evidence in the compulsory examination on 1 August 2008 he said that the account of the meeting outlined in the above paragraphs of his statutory declaration was a full and accurate account of what had occurred at the meeting.

Mr Gigliotti said the meeting occurred some time in February 2007.

Mr Gigliotti initially claimed that he thought it improper for Mr Vellar to have asked him to consider a rescission motion. Subsequently he doubted whether "improper" was the correct word to use but claimed that he felt uncomfortable about being asked by Mr Vellar to pass a rescission motion and that he had been asked to do so in front of Ms Hay who had been a friend of his for some time. He agreed that at no time did Ms Hay ask him to consider a rescission motion or that he had not said anything during the meeting about feeling uncomfortable. He said that he was not suggesting that Ms Hay had done anything improper.

In paragraph 20 of his statutory declaration Mr Gigliotti complained that the Commission had not included a lot of his evidence in the public inquiry because some of it "implicated" a State Member of Parliament. In his evidence to the Commission on 1 August 2008 Mr Gigliotti confirmed that the only evidence he claimed the Commission had not dealt with during the course of its public inquiry was evidence relating to the meeting in Ms Hay's office in February 2007. When asked what it was about the meeting that "implicated" a State Member of Parliament he replied, "the fact that it was in her office."

The details of the meeting contained in paragraphs 4 to 12 of Mr Gigliotti's statutory declaration and his evidence to the Commission on 1 August 2008 concerning that meeting do not identify any impropriety on the part of any person. The Commission therefore determined that it was not necessary to seek any account of the alleged meeting either from Mr Vellar or Ms Hay.

The alleged disclosure to a Commission officer

Paragraph 2 of Mr Gigliotti's statutory declaration is in the following terms:

(2) In mid-January 2008 I called David Lusty from the ICAC after he had a conversation with my solicitor and said to him "Tell Frank to come clean on Noreen Hay".

Mr Lusty is a Principal Lawyer who was the case lawyer for this investigation. The allegation is that Mr Lusty told Mr Gigliotti's solicitor, Mr Russoniello, to tell Mr Gigliotti to "come clean" on Noreen Hay and that following that conversation Mr Gigliotti contacted Mr Lusty and told him about the meeting in Ms Hay's office.

Mr Lusty has denied having the alleged conversation with Mr Gigliotti's solicitor or having any conversation with Mr Gigliotti in which Mr Gigliotti mentioned a meeting between himself, Mr Vellar and Ms Hay.

At the commencement of his evidence to the Commission on 1 August 2008 Mr Gigliotti was given an opportunity to correct any errors or inaccuracies in the statutory declaration. He said he was not aware of any and claimed the statutory declaration was a truthful and accurate account of the events related therein.

Mr Gigliotti claimed the conversation with Mr Russoniello referred to in paragraph 2 of the statutory declaration occurred in January 2008.

Mr Russoniello had previously given evidence on this matter to the Commission in a compulsory examination. He had been overseas from Christmas Day 2007 until 29 or 30 January 2008. He had then remained absent from his office until Monday 4 February 2008. He told the Commission he had no discussions with Mr Lusty while he was on leave from his office. He had no recollection of any discussion with Mr Lusty in which Mr Lusty said words to the effect "tell Frank to come clean on Noreen Hay". He agreed that if Mr Lusty had said such a thing to him he would have recalled. He did not believe he made any statement to Mr Gigliotti to the effect that Mr Lusty wanted Mr Gigliotti to "come clean on Noreen Hay". Mr Russoniello was a reliable witness whose evidence is accepted by the Commission.

After being made aware of Mr Russoniello's evidence, Mr Gigliotti claimed that the alleged conversation with Mr Russoniello must have occurred some time after 4 February 2008. This is despite him having previously claimed that his statutory declaration was a full and accurate account of events. The Commission is satisfied that Mr Gigliotti's claim that the conversation occurred

after 4 February 2008 was a recent invention of his to cover the fact that the conversation could not have occurred prior to that date.

There is a considerable body of other evidence which contradicts Mr Gigliotti's claim that he told Mr Lusty about the meeting in Ms Hay's office, or indeed, that there had been any such meeting.

On 26 March 2007 Mr Gigliotti was served with a Commission notice issued under section 21 of the ICAC Act ("the section 21 notice") requiring him to attend and produce a statement of information. In particular, he was required to provide a statement answering the following questions:

> *Since 1 March 2004 have you: had any kind of meeting with Mr Vellar for any purpose* other than *an official Council meeting at which you were both present; visited any residence of his; or been visited by him at any residence of yours? If so, in relation to each meeting or visit identify:*
>
> *(a) the date (or approximate date) and place of the meeting or visit;*
>
> *(b) the nature of, and reason for, the meeting or visit;*
>
> *(c) the name(s) of any other person(s) present at the meeting or visit …*

Mr Gigliotti provided a signed statement in response to this request on 10 April 2007. His response identified a meeting with Mr Vellar on either 7 or 8 March 2007. He did not identify any other meeting or any meeting at which both Mr Vellar and Ms Hay had been present.

In his evidence to the Commission on 1 August 2008 Mr Gigliotti said the meeting referred to in his statutory declaration was a different meeting to that referred to in his 10 April 2007 response to the section 21 notice.

If a meeting had occurred between Mr Gigliotti, Mr Vellar and Ms Hay in February 2007, then details of that meeting should have been disclosed in Mr Gigliotti's response to his section 21 notice. Mr Gigliotti was unable to explain why, if there had been such a meeting, he had not disclosed it in his response, other than to claim that he may have misread the notice. The Commission rejects this explanation. The questions in the section 21 notice requiring Mr Gigliotti's response are quite clear in requiring him to disclose details of any meeting with Mr Vellar since 1 March 2004 and to nominate all others present at any such meeting. If, as Mr Gigliotti claimed, he felt uncomfortable about the meeting which occurred in Ms Hay's office in February 2007, then it is unlikely that he would have forgotten or overlooked the meeting when preparing his response to the section 21 notice only a few weeks later. The Commission is satisfied that the reason no such meeting was referred to in Mr Gigliotti's response to the section 21 notice is either that no such meeting occurred or that Mr Gigliotti knowingly omitted mention of the meeting in his section 21 response.

There are a number of email communications between Mr Lusty, Mr Russoniello and Mr Gigliotti in early 2008 which lend further support to the contention that no such conversations as those alleged by Mr Gigliotti in paragraph 2 of his statutory declaration in fact occurred.

The first is an email dated 7 January 2008 from Mr Lusty to Mr Russoniello and Mr Gigliotti. It notes that Mr Gigliotti is a person of interest in the Commission's investigation and that he is likely to be required to give evidence at a compulsory examination or public inquiry, " … particularly about certain dealings between him and Frank Vellar …". Mr Gigliotti is specifically asked to consider his response of 10 April 2007 to the section 21 notice for the purpose of correcting any errors and to provide "… other relevant information he has about corrupt conduct involving other persons". There is no mention in the email of Ms Hay.

Mr Gigliotti recalled receiving the email and agreed that it asked him to correct any errors in his response to the section 21 notice. He claimed, however, that he did not contact the Commission to advise it of his meeting in Ms Hay's office "because it hadn't entered my mind." He agreed that up until 7 January 2008 he had had no discussion with Mr Lusty concerning Ms Hay.

The next email is dated 25 January 2008 from Mr Lusty to Mr Gigliotti and Mr Russoniello. It refers to Mr Lusty's previous email of 7 January 2008 and notes that no response had been received by the Commission. Mr Gigliotti agreed that he had received this email and that he had not had any conversation with Mr Lusty between 7 and 25 January 2008.

The third email is from Mr Gigliotti to Mr Lusty of 25 January 2008 in response to Mr Lusty's previous email of that date. The email advises that "no response has been given to date as (Mr Gigliotti's solicitor) is still on leave and won't be back until 4 Feb."

The fourth email is dated 29 January 2008 and is from Mr Lusty to Mr Gigliotti. There is nothing in the email about any Commission interest in Ms Hay. The email reinforces the Commission's interest in having Mr Gigliotti check the accuracy of his section 21 response "… and, in particular, trying to recall the circumstances of all meetings you had with Mr Vellar …".

Mr Gigliotti responded to this email by a further email on 30 January 2008 to Mr Lusty. There is no mention in this email of any meeting in Ms Hay's office. The email however contains the following statement:

© ICAC

> *I would like to state the responses I gave to you in regards* [to the section 21 notice] *dated 10/4/07 are correct as I know it …*

The emails demonstrate that Mr Gigliotti had ample opportunity to provide details, in early 2008, concerning any meeting he had with Mr Vellar in Ms Hay's office but failed to do so. It is quite clear from the emails that there had been no discussion with Mr Lusty in mid-January 2008 concerning any such meeting.

Mr Gigliotti also had ample opportunity to mention the meeting in Ms Hay's office both at the public inquiry and later. He did not do so.

Mr Gigliotti gave evidence at the Commission's public inquiry in February and March 2008. On neither occasion did he identify any meeting with Mr Vellar in Ms Hay's office.

In his evidence on 3 March 2008 he was taken to his response to the section 21 notice and again asserted that the response was, subject to one qualification, correct. That qualification was that the meeting he had nominated with Mr Vellar could have occurred in February 2007 rather than March 2007. However, he clearly asserted that every other statement in the response was correct. When questioned about this evidence at the August 2008 compulsory examination Mr Gigliotti was not able to offer any real explanation as to why he had not mentioned the meeting in Ms Hay's office in his evidence at the public inquiry.

Mr Gigliotti also had the opportunity of mentioning the meeting in submissions prepared on his behalf in response to those of Counsel Assisting the Commission. He did not do so. Once again he was not able to offer any satisfactory reason for why he had not done so.

The statutory declaration was sworn over four months after the last day of the Commission's public inquiry. Mr Gigliotti claimed that he prepared the statutory declaration after a discussion with Vicki Curran, a former Wollongong City Council employee. Having prepared the statutory declaration he emailed a copy to her on the understanding that it would not be published until after the Commission's report on its investigation was published. He understood it would be provided to Sylvia Hale MP who apparently had some interest in the Commission's investigation with particular reference to allegations made by Ray Younan. Mr Gigliotti denied providing the statutory declaration to the *Illawarra Mercury*.

If, as he claimed, Mr Gigliotti was concerned at the apparent failure of the Commission to consider or otherwise deal with the alleged meeting in Ms Hay's office, he could have raised the matter with the Commission at any stage during or after the public inquiry. Instead, he prepared a statutory declaration which, on his evidence, he wished withheld from publication until after the Commission's investigation report was published. The Commission is satisfied that the assertion in the statutory declaration that the Commission withheld evidence from the public inquiry is an attempt on his part to deflect possible criticism of him in the Commission's investigation report by attempting to claim the Commission's investigation was flawed.

Findings

The Commission rejects Mr Gigliotti's assertion that he had any conversation with Mr Lusty concerning a meeting between himself, Mr Vellar and Ms Hay. The Commission finds that no such conversation occurred.

It is not necessary to determine whether any such meeting occurred. Even on Mr Gigliotti's evidence, nothing improper occurred at the meeting nor did Ms Hay or anyone else do or say anything which could possibly constitute corrupt conduct for the purposes of the ICAC Act.

Section 74A(2) statement

In relation to the matters referred to in this chapter of the report, the Commission considers Mr Gigliotti to be an affected person and makes the following statement pursuant to section 74A(2) of the ICAC Act.

Mr Gigliotti's statutory declaration of 11 July 2008 is made under the *Statutory Declarations Act 1959*. It is an offence under section 11 of that Act to intentionally make a false statement in a statutory declaration. The offence is punishable by a term of imprisonment of up to four years.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Gigliotti for an offence under section 11 of the *Statutory Declarations Act 1959* in relation to intentionally making a false statement that he told a Commission officer about a meeting between himself, Mr Vellar and Ms Hay.

© ICAC

Chapter 13: Corruption prevention issues

This chapter addresses the detail of the Council's processes for determining development applications. It examines the misuse of *State Environmental Planning Policy No. 1* ("SEPP 1") and the strategic planning process and canvasses some of the failures of controls intended to prevent improper decisions. The chapter also assesses some of the broader patterns of behaviour and leadership within Council that caused or were conducive to corrupt conduct. It also briefly examines the confidential and valuable information that was misused by Ms Morgan and Mr Zanotto in furtherance of individual developers' interests.

Context

Council officials with planning responsibilities occupying five distinct tiers within Council's organisational structure engaged in corrupt conduct:

- Beth Morgan, a senior town planner;
- her superior, John Gilbert, the Manager of Development Assessment and Compliance;
- Mr Gilbert's superior, Joe Scimone, Acting Group Manager, Sustainability;
- Mr Scimone's superior, Rod Oxley, General Manager; and
- four Councillors, Val Zanotto, Frank Gigliotti, Kiril Jonovski and Zeki Esen.[4]

It is not uncommon to find cases where multiple layers of management fail to detect corrupt conduct or mismanage known corruption risks, but to establish actual corrupt conduct within five levels of a NSW public sector organisation is without precedent.

The operating environment in which development applications were lodged and assessed at Council was characterised by:

- valuable land close to the CBD of a large coastal regional city;
- a number of relatively frequent major development applicants with recurring contact with town planning staff, the General Manager and Councillors;
- a relative shortage of town planning staff and managers able to determine a large volume of DAs, some of which were complex;
- a Local Environmental Plan that was out of date;
- an inappropriate and unlawful reliance on SEPP 1 to authorise significant departures from development standards in relation to height and floor space ratios;
- a General Manager with a strong pro-development philosophy which he allowed to prevail over his duty to ensure that DAs were being assessed and processed according to law; and
- a Council that could not or would not require the General Manager to account for decisions taken with respect to major development applications.

In a properly functioning council, having senior management and councillors at arms-length from planner-developer negotiations creates a firewall that helps to stop the spread of corruption. If the developer is able to corrupt the planner, the independence of the manager and councillors as the authorising and policy-setting body should limit the effect of the corruption. In Wollongong the Council's internal firewalls against corrupt conduct were largely undermined or ignored by Mr Oxley, creating a straightforward opportunity for corrupt developers to influence the DA assessment process from start to finish.

External oversight is a key line of defence in preventing and detecting corruption within an organisation. When corruption is widespread and affects the highest levels of management, external bodies are often the only realistic hope for limiting its effect. In hindsight, it is possible the Department of Planning[5] (then DIPNR)

4 All civic offices in relation to the Council were declared vacant on 4 March 2008. For ease of reference, the former Councillors are referred to as Councillor (Cr) throughout this chapter.

5 At the time of the conduct the subject of this investigation, the Department of Infrastructure, Planning and Natural Resources had responsibility for the planning functions now carried out by the Department of Planning.

© ICAC

could have played such a role particularly through its entitlement to withhold concurrence for SEPP 1 dispensations.

The Department also could have been more active in obliging the Council to record and report its SEPP 1 decisions, which was an extant but unenforced requirement. The completion of such records and their scrutiny by the Department may have given an earlier indication of the abuse of SEPP 1 in approvals granted by the Council.

Planning systems at Wollongong City Council

To an outsider, the NSW planning system is characterised by two somewhat contradictory features: regulatory complexity and wide discretion. On one hand it is agreed that the planning system is highly complex. Decision-makers are required to take a large number of matters into consideration when determining DAs.[6] These matters can be highly technical and require an understanding of a diverse range of fields.

On the other hand, despite the abundance of written statutory and policy direction, individual decision-makers have wide-ranging discretion. Generally speaking, the NSW planning system allows a DA to be approved even it fails to strictly comply with the 'rules' set out in relevant laws and policies, or to be refused even if it does comply.

These features mean that it is possible for two well-qualified town planners, both acting in good faith, to disagree about the merits of a particular DA. It follows that if one of these planners is acting in bad faith, the resulting disagreement is unremarkable and would not necessarily be seen as an indicator of improper conduct.

Exploitation of discretion under State Environmental Planning Policy No. 1

For the Victoria Square and Quattro DAs to have been considered, the applicants were required to lodge objections made under SEPP 1. The Commission's expert evidence was that "any reasonable person" would determine that these objections were not well-founded. However, the DAs (and therefore the SEPP 1 objections) were approved by Ms Morgan with the agreement of some of her superiors. While the Council and its senior management cannot necessarily be blamed for being unaware of Ms Morgan's corrupt relationships, they can be criticised for allowing the discretion afforded by SEPP 1 to be misused.

In respect of SEPP 1, the Commission makes the following recommendations directed at Council and the Department of Planning.

To limit the potential for misuse of SEPP 1:

RECOMMENDATION 1

That for at least two years after the election of a new Wollongong City Council, the Director General of the Department of Planning revokes Wollongong City Council's assumed concurrence for the use of SEPP 1 (or its equivalent) to determine departures from development standards of more than 10%.

To improve internal and external oversight of SEPP 1 determinations:

RECOMMENDATION 2

That Wollongong City Council publish a register of DA determinations (including approvals and refusals) that rely on SEPP 1 (or its equivalent) on its website.

RECOMMENDATION 3

That when advertising or notifying development applications, Wollongong City Council disclose whether the application is accompanied by a SEPP 1 objection (or its equivalent).

To deter future misuse and better allow the Department of Planning to oversee how SEPP 1 is used throughout NSW:

RECOMMENDATION 4

That the Director General of the Department of Planning actively uses the power to revoke or modify his or her assumed concurrence to prevent abuse of SEPP 1 (or its equivalent) by all consent authorities.

6 For instance, in relation to the Quattro development, the Council identified to the Commission 30 different plans, policies or other documents that could have informed the determination process.

© ICAC

RECOMMENDATION 5

That the NSW Department of Planning monitor and enforce the requirements for all consent authorities to keep records of their assessment of all development applications which seek a variation to development standards.

SEPP 1 came into force in October 1980. Its stated objective is to provide:

> *flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the* [Environmental Planning and Assessment] *Act*.[7]

Essentially, SEPP 1 allows a consent authority to consent to a DA even though prescribed standards in a relevant environmental planning instrument (usually numerical standards such as height and floor space ratios) are not met.

In response to a question without notice in regard to an unrelated DA before Wollongong City Council, on 16 November 2005 the Minister for Planning said:

> *State environmental planning policy No. 1 is not intended to be a shortcut to rezoning.*

The approvals of both Quattro and Victoria Square were *de facto* rezonings and Ms Morgan's determination of the SEPP 1 objections was deficient both in terms of the way the decision was made and the decision itself.

Both the Quattro and Victoria Square DAs greatly exceeded the relevant floor space ratio (FSR) standard in the *Wollongong Local Environmental Plan 1990* (WLEP 1990) of 1.5:1. The approved DAs for Quattro and Victoria Square exceeded the allowable FSR by 183% and 107% respectively. Quattro and Victoria Square also exceeded the relevant 11-metre height limit set out in *Illawarra Regional Environmental Plan No. 1* ("IREP 1") by 336% and 182% respectively.

	Quattro	Victoria Square
FSR permitted in WLEP 1990	1.5:1	1.5:1
Approved FSR	4.25:1	3.11:1
Height permitted in IREP 1	11m	11m
Approved height	48m	31m

In September 2005, shortly after the approval of Quattro, the Department of Planning alerted the Minister to the "...perceived misuse of SEPP 1 by Council and a lack of accountability for Council decisions". In a memo to the Minister dated 29 September 2005, the Department noted "...three large sites outside the City Centre Core involving large variations to height and/or floor space ratio under SEPP 1 which have recently been approved by Council". One of these sites was Quattro.

Subsequent enquiries of the Council by the Department revealed that Quattro and Victoria Square were just two of 13 developments approved by Council in the previous year that exceeded height and FSR standards by more than 10%. As a result, on 13 December 2005, the Director General of the Department revoked his assumed concurrence for the use of SEPP 1 to approve variations to development standards of more than that amount by the Council. The Director General's concurrence was similarly revoked for decisions to vary the height limits set out in IREP 1 by more than 10%. The Director General's letter stated, *inter alia*,

> *I am concerned that these variations to individual development applications under SEPP 1 have had the effect of setting new development standards without a strategic planning process having been followed. The use of SEPP 1 in this manner undermines certainty in relation to development outcomes and does not allow an appropriate level of public participation. It is not appropriate for SEPP 1 to be used to change planning policy in this manner.*

The decision taken by the Director General was too late to prevent the approval of Quattro and Victoria Square.

The Department of Planning already has wide powers to prevent a local council from using SEPP 1 to approve DAs. But in the case of the Quattro DA, Ms Morgan, Mr Gilbert and Mr Oxley supported and approved the proposal despite the clear contrary advice by the Department. Had the Department's response to its

7 Clause 3

© ICAC

notification of the Quattro DA been in the form of a direction rather than mere advice, it is likely that some of the corrupt conduct exposed by the Commission would have been avoided. The Commission has therefore recommended that the Director General of the Department use his/her concurrence power more actively. Specifically, concurrence should be withdrawn where the Department is of the view that SEPP 1 is being used, in the Minister's words, as "a short cut to rezoning". This can be done in response to individual DAs brought to its attention (such as Quattro) or where the Department has evidence of a pattern of misuse of SEPP 1.

The Commission recommends that the Department of Planning play an active role in revoking or modifying SEPP 1 concurrence when there is evidence of its abuse, as it did here (albeit belatedly).

On 1 August 2005 (17 days prior to the Quattro approval) independent councillor Cr Carolyn Griffiths moved a motion in relation to SEPP 1. Among other things, the motion sought the establishment of a SEPP 1 register that would contain such details as the reason for the proposed variation from development standards, the extent of the variation expressed as a percentage and the reasons for the Council's determination. The motion also entertained the possibility of putting SEPP 1 objections on public notice when incoming DAs are advertised.

It is unfortunate that Cr Griffiths's motion was rejected and replaced with a diluted Council resolution to merely require a further report to Council concerning the establishment of a SEPP 1 register. The Commission has made recommendations that are intended to give effect to Cr Griffiths's motion (see above). Had Council resolved to adopt the original motion and had Council's management implemented it, then it is possible that the Quattro determination would have received greater scrutiny.

There are, however, five brief points worth making here. Firstly, the weakened version of Cr Griffiths's motion, which became the resolution of Council, was not formally acted upon.[8] The Commission acknowledges that Council, under its new administration, has taken steps to ensure that Council resolutions are acted upon in the future.

Secondly, Council was arguably already required to maintain a register of SEPP 1 decisions pursuant to Department of Planning Circular B1 (which regulates the use of SEPP 1), but was not doing so.[9] Putting that Departmental requirement to one side, Council was not self-monitoring its use of, and compliance with, SEPP 1 and the motion of 1 August 2005 did not elicit any change to this practice.

Thirdly, despite being present at this meeting, Mr Oxley was not prompted to ensure that the imminent Quattro approval was reported to Council or the ward councillors.

Fourthly, Cr Griffiths's motion, which was seconded by her fellow independent councillor Cr Andrew Anthony, was presumably rejected by the seven-member Australian Labor Party (ALP) caucus on Council, of which four members have now been found to be corrupt. This suggests the need for some independent oversight of Council's governance mechanisms. This issue is taken up in more detail later in this chapter.

Fifthly, the Commission can only presume that the ALP caucus voted to dilute Cr Griffiths's motion because there is no record of the actual voting pattern in relation to this particular matter. The Council minutes only show that the amended motion was moved by Cr Jonovski, seconded by Cr Brown and then carried.

Proposed amendments to the the LG Act will require Councils to record how individual councillors and administrators vote on individual planning matters. The proposed (at the time of writing) section 375A of the Act applies. In advance of this amendment, Wollongong City Council has already resolved to record individual voting patterns. A public record of individual votes will also provide potential evidence of improper caucusing, a topic that is discussed later in this chapter.

The role of central agency oversight

On 25 June 2008, the NSW Government's *Environmental Planning and Assessment Amendment Bill 2008* was assented to. Under the new section 96E of the EPA Act 1979, certain objectors will have the right to seek an independent review of some classes of development consent. Certain consents that exceed the applicable development standards relating to height or FSR by more than 25%, will trigger these objector rights.[10]

8 Council has advised the Commission that some initial administrative steps were taken to improve recording of SEPP 1 decisions but that full compliance with the resolution was not achieved.

9 The Commission notes that Circular B1, *State Environmental Planning Policy No.1 – Development Standards* was issued in March 1989 and that the Department has not demanded strict compliance for some time.

10 These criteria are set out in the new clause 285 of the EPA Regulation 2000.

The Commission supports this proposal, which is broadly consistent with its previous recommendations, made in its September 2007 publication, *Corruption risks in NSW development approval processes: Position paper*.[11] Both Quattro and Victoria Square exceeded the relevant height and FSR standards by well over 25%. It is highly likely that a review by a properly constituted panel would have either refused the Quattro and Victoria Square DAs or insisted on substantial reductions in height and FSR.

Alternately, the possibility of an objector-initiated review may have encouraged Messrs Vellar and Tabak to submit less ambitious DAs and Ms Morgan and Mr Gilbert to properly exercise their discretion.

Another important change is underway in relation to the application of SEPP 1. The NSW Government has set a timetable for all NSW local councils to adopt a standardised LEP template which uses common zones, definitions and format. Councils are required to adopt this new "standard instrument" by 2011. Among other things, the standard instrument will oblige councils to include provisions equivalent to those in SEPP 1 within their principal LEP. In effect, clause 4.6 of the standard LEP will replace SEPP 1. The standard instrument still retains the requirement for councils to obtain the Director General's concurrence[12] and councils must also keep a record of assessments made under clause 4.6.

However, the fact remains that SEPP 1 assessments are, and clause 4.6 assessments will be, based on the following criteria:

- *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and*
- *that there are sufficient environmental planning grounds to justify contravening the development standard.*

A corrupt officer acting without proper supervision could easily exploit the latitude afforded by SEPP 1/clause 4.6.

However, as noted above, the Director General, by virtue of his/her concurrence role, does have a legislated duty to ensure that SEPP 1 (or its equivalent) is being used properly. Where there is a material possibility that the Department will investigate or audit the use of SEPP 1 within a council, then the opportunities for engaging in corrupt conduct are reduced.

In an email that Ms Morgan sent in October 2005 to another development applicant (who was unaware of her corrupt conduct), after the Department's post-Quattro enquiries into SEPP 1 had commenced, she wrote,

> *Basically WCC is under a SEPP 1 audit by the Department of Planning … Anyway this is now causing a hell of a lot of grief in here with all SEPP 1's being very very very very closing* [sic] *scrutinized internally as to whether they can be supported. Professionally we are all being very cautious.*

This correspondence clearly shows the desirable effect that Departmental intervention can have. It stands to reason that more frequent and aggressive use of the Department's power to challenge a council's use of its discretion under SEPP 1 is a valuable corruption prevention mechanism.

The Commission does not contend that the Department of Planning ought to have been aware of the nature and extent of what was going on within Council. However, with the benefit of hindsight, it is the case that additional departmental scrutiny, at an earlier point in time, would have prevented or limited the corrupt conduct of Ms Morgan, Mr Vellar and Mr Tabak.

External departmental oversight is of particular importance in the (albeit rare) case where a council is affected by systemic corrupt conduct, including corrupt conduct by senior management and elected councillors.

On 9 May 2008, the Department issued Circular PS 08-003 *Variations to development standards* which reminded local councils of their record-keeping and reporting requirements under clause 4.6 and SEPP 1. This Circular also set out the Department's intention to determine "whether the assumed concurrence is being used as intended". The Department's decision to issue this circular means that there is no need for the Commission to make further specific recommendations in relation to the standard LEP template and clause 4.6. However, the Commission has recommended that the Director General actively use his or her power to revoke or modify assumed consent in cases where there is evidence that it is being misused. Importantly, the threat of departmental intervention will only be credible if the relevant data is collected and scrutinised with a degree of rigour.

In addition, although matters such as height and FSR are listed as "optional" for inclusion in the standard LEP template, the Commission understands that

11 See pp. 46–48.

12 Despite this, the historical practice in NSW has been for the Director General to allow councils to assume his or her concurrence.

© ICAC

the Department of Planning will be insisting that they be included for major centres. This will mean that councils will generally not be able to avoid Departmental oversight by attempting to remove relevant development standards from their LEPs. The Commission agrees that where controls such as FSR and height are required, it is generally preferable that they appear in a council's LEP rather than a Development Control Plan.

In addition to modifying concurrence for the use of SEPP 1, following recent changes to the EPA Act, there is now an additional mechanism that can be used to reduce the potential for corrupt conduct. The new section 23G of the Act creates Joint Regional Planning Panels (JRPPs) to determine certain classes of development to be detailed in a new State Environmental Planning Policy that, at the time of writing, is yet to be finalised. Based on the published advice of the Department of Planning, a development of the size of Quattro would be referred to a JRPP for determination. It is also likely that a development such as the North Beach Bathers' Pavilion would have been a matter for a JRPP. However, based on its submitted cost of $17 million[13], it is possible that the Victoria Square DA would have escaped scrutiny by a JRPP.

A DA such as Victoria Square would, however, now be referred to Council's new Independent Hearing and Assessment Panel (IHAP), which is discussed in more detail below. This is certainly preferable to the system that prevailed at Council. But the potentially important difference between a JRPP and an IHAP is that the former can determine DAs brought before it, whereas the latter is by convention an advisory body only. In the circumstances, the Commission has no confidence that the Wollongong City Council and some of its senior staff would have routinely accepted recommendations made by an IHAP that were adverse to developer interests.

It is envisaged that the relevant local council(s) will be able to appoint two of the five members of each JRPP that is convened. Of course in the environment that prevailed at Wollongong City Council, there is a danger that both the selection of such council-appointed panellists and the manner in which their duties are carried out, could be adversely affected by a corrupt developer, council officer and/or councillor.

For these reasons, the Commission has made two recommendations in relation to JRPPs.

RECOMMENDATION 6

That the NSW Minister for Planning consider expanding the classes of development for which Joint Regional Planning Panels will be the consent authority to include certain categories of development relying on SEPP 1 objections.

RECOMMENDATION 7

That the NSW Minister for Planning consider ways in which Joint Regional Planning Panels can be made resistant to improper influence, such as:

- regularly rotating panel members across different panels
- limiting the tenure of panel members
- drawing panel members on a random basis, or at least in a manner which makes their appointment difficult to predict.

Opportunities for corruption caused by an out-of-date Local Environmental Plan

Council's Local Environmental Plan, WLEP 1990, was outdated and needed to be replaced. While a new LEP was being prepared, the Council established a number of clear policies that dictated how incoming significant DAs should be assessed during this period of transition.

None of the persons adversely named in this report, including the General Manager, who has a statutory duty to implement the decisions of Council, had any proper regard for these policies.

The Commission has made three recommendations:

To create a clearer accountability for the enforcement of Council resolutions:

RECOMMENDATION 8

That Wollongong City Council's internal audit or administrative staff be given responsibility for monitoring compliance with Council resolutions and reporting on non-compliance.

13 This is the estimated cost entered on the development application form, which may not be accurate.

© ICAC

RECOMMENDATION 9

That Wollongong City Council receives regular reports on compliance with its resolutions and that the Council have regard to these reports when evaluating the performance of the General Manager.

To prevent the potential for misuse of draft LEPs and Development Control Plans (DCPs) as a justification for consenting to DAs:

RECOMMENDATION 10

That the Department of Planning consider issuing new advice to NSW councils in relation to the legal status of draft and unadopted Local Environmental Plans and Development Control Plans when determining development applications.

The two main environmental planning instruments that controlled development in the Wollongong city centre were the *Wollongong Local Environmental Plan 1990* ("WLEP 1990") and the *Illawarra Regional Environmental Plan No. 1* ("IREP 1"). These two instruments were in part replaced by the *Wollongong City Centre Local Environmental Plan 2007* ("WCCLEP 2007") which was gazetted on 31 January 2007.

There is broad agreement that WLEP 1990 and IREP 1 were out of date and did not provide for the types of development that Council and the community agreed were appropriate. Even planners unaffected by conflicts of interest, such as Mr Broyd, agreed that departures from WLEP 1990 and IREP 1 were needed.

Moves had been afoot since at least 2001 to produce a new LEP covering the Wollongong city centre. This process was delayed and the new LEP did not eventuate until 2007.

The delay created a policy vacuum in which DAs that exceeded the prevailing (but outdated) development standards needed to be determined according to some other, inchoate standard. Quattro and Victoria Square were just two examples of determinations made by Council that relied on SEPP 1 to overcome this problem.

Had Council been able to finalise a new LEP in a timelier manner, it would have been more difficult for Ms Morgan to engage in the conduct she did.

The process of finalising a new LEP for a major central business district can be extremely time-consuming. However, the EPA Act does permit draft LEPs to be taken into consideration when determining DAs, provided the draft has been placed on public exhibition.[14] The Commission has obtained expert evidence that at the time the Quattro and Victoria Square DAs were lodged, assessed and determined, the draft (and in some cases unadopted) versions of what was to eventually become WCCLEP 2007 ought not to have been matters for consideration. These drafts were given various titles such as the "City Centre Revitalisation Strategy" and "draft DCP 56".

Council had formally adopted a process for dealing with DAs in the city centre that might be affected by the strategic planning process that was underway. In July 2002, Council adopted a new Urban Design Assessment Policy (UDA Policy), which applied to significant developments which exceeded the development controls in WLEP 1990. The UDA Policy was intended to be in force temporarily, while draft DCP 56 was being prepared. The UDA Policy required the applicant to prepare a detailed design study, prior to lodgement of the DA, which was to be submitted to Council, via Council's strategic planning unit and the Central Wollongong Planning Committee (CWPC). The intent of the Policy was to establish an agreed set of design principles prior to lodgement which "may also provide justification for departing from the controls of the Wollongong LEP 1990".

The upshot of the process followed was that as at December 2003 the following parties had, in one form or another, expressed support for restricting the Quattro development (and indeed all relevant DAs) to the limits envisaged in draft DCP 56:

- Council's strategic planning and design staff and the previous Manager of Strategic Planning;
- the Urban Design Advisory Service (an independent consulting service which reviewed Mr Vellar's urban design report on Council's behalf);
- the Department of Planning (then DIPNR);
- the CWPC; and
- the elected Council.

14 Section 79C(1)(a)(ii) of the EPA Act. In addition, relevant case law for NSW has found that decision-makers may go beyond section 79C(1) to also consider matters which relate to the objects of the EPA Act (section 5). See *Carstens v. Pittwater Council* [1999] NSWLEC 249.

© ICAC

In these circumstances, any reasonable person would have thought the task of assessing the submitted Quattro DA to be relatively simple; *viz.* either require it to conform with draft DCP 56 or refuse it.

In respect of the Victoria Square DA, the UDA Policy clearly applied to the DA but was simply not followed. This DA was never forwarded to a strategic planning officer by Ms Morgan, it was not brought to the attention of the CWPC or the Council and no pre-lodgement design standards were ever agreed to.

In both the Quattro and Victoria Square matters the UDA Policy was ignored.

When the Quattro DA was lodged in September 2004, there was no procedure or internal control which triggered a reference back to the relevant Council resolution of 15 December 2003, the CWPC resolution of 4 November 2003, the report of the Manager of Strategic Planning or any other outcome from applying the UDA Policy. Similarly, there was no internal control to prevent Ms Morgan from processing the Victoria Square DA without applying the requirements of the UDA Policy at all. Although it was well understood by all staff that the resolutions and adopted policies of Council had to be implemented, there was not a formal mechanism for enforcing or even monitoring compliance with these requirements. Moreover, informal controls such as managerial oversight or annual performance review also failed.

In the circumstances, the Commission believes that some additional responsibility for overseeing compliance with Council resolutions ought to be vested in Council's administrative staff. Wollongong City Council is large enough to have an existing internal audit function and a number of administrative staff capable of performing this role.

There is a final issue arising from the strategic planning process and the status of draft DCP 56. The Quattro development did in fact, for a brief time, comply with a particular unadopted version of draft DCP 56.

As noted in Chapter 7, Mr Oxley caused draft DCP 56 to be redrafted so that Quattro could be accommodated. Unadopted and unexhibited versions of the draft did allow for a development of the scale of Quattro on that site.[15]

At the time the DA was lodged, only half of the Quattro site fell within the area affected by draft DCP 56 and for the portion that did fall within that area, the envisaged maximum height was six to nine storeys, rather than the 15 that Mr Vellar was seeking. However, the version of draft DCP 56 that was presented to Council on 7 and 29 March 2005 did list Quattro as one of three "significant sites" with height and FSR consistent with Mr Vellar's wishes. On 29 March 2005, Council actually voted to delete all such "significant sites" from the draft.

Of course, the whole purpose of preparing a new DCP or LEP is to regulate and coordinate future development. The gesture extended to Mr Vellar in respect of Quattro had the opposite effect *viz.* individual developments were regulating the preparation of the plan. This turns the strategic planning process on its head.

It should be noted that now that the WCCLEP 2007 has been gazetted, the Council's UDA Policy is obsolete.

Since the events described in this report, the NSW Government has taken steps to accelerate the plan-making process. In particular, a new "Gateway" process under the EPA Act has been introduced which will allow the Department to provide quick advice on proposed LEPs that "are not credible".[16] The effect of this amendment is that local councils will be unable to rely on proposed LEPs that have not passed the Gateway process to approve DAs.[17]

The Commission supports the Gateway process and recommends that this legislative amendment be accompanied by new advice to all local councils setting out the legal status of draft and unadopted LEPs and DCPs in respect of the determination of DAs.

Other failures in Wollongong City Council planning controls

In relation to policy frameworks, it has been noted that:

15 The WCCLEP 2007 that was eventually gazetted allowed an FSR of 2.5:1 (residential) and 3:1 (commercial) and a height of 24 metres on the Quattro site.

16 *Environmental Planning and Assessment Amendment Bill 2008* second reading speech, Minister for Planning, 15 May 2008.

17 In September 2005, the EPA Act was amended to make it clear that draft LEPs were not a matter for consideration under section 79C if the Director General had indefinitely deferred or not approved the making of the LEP.

© ICAC

> *The best written policy will fail without accountable and vigilant management. Remember: official policies specify what the organisation wants to happen; managers determine what actually happens and which rules are obeyed, bent or ignored.*[18]

In addition to the key issues noted above relating to the abuse of SEPP 1 and misuse of the strategic planning process, there were numerous other failures of the checks and balances designed by the Council to ensure or encourage the impartial assessment of DAs.

The Council had a relatively comprehensive suite of policies and procedures relating to both the process of determining DAs and general staff conduct. These policies and procedures were widely available to all staff and in the case of the Code of Conduct there had been an extensive staff awareness campaign.

The Commission has made six recommendations (Recommendations 11 to 16, below) aimed at making it harder for officers in planning roles to act dishonestly.

To reduce the autonomy of individual town planners, increase the chance that favourable conduct is prevented or exposed and reduce the benefit derived from offering gifts and inducements, the Commission intended to recommend that Wollongong City Council establish an Independent Hearing and Assessment Panel (IHAP). The purpose of an IHAP is to provide a professional, depoliticised assessment of controversial DAs in a transparent manner and it is intended to replicate some of the procedural rigour of the Land and Environment Court but with reduced cost. The Commission notes, however, that the Council resolved on 27 May 2008 to establish an IHAP. Under the new criteria adopted by the Council, Quattro, Victoria Square and the North Beach Bathers' Pavilion DAs would all have been matters for IHAP assessment.[19]

Remembering that a number of Council officers were able to corruptly prevent DAs from being scrutinised by the Council, it is important to ensure that significant planning decisions are not improperly withheld from the IHAP. For this reason, Council should articulate clear criteria for determining which matters are referred to the IHAP. Obviously one such criterion would be the presence of a SEPP 1 objection.

RECOMMENDATION 11

That Wollongong City Council determine clear, objective and auditable criteria for deciding which DAs are referred to the IHAP.

The table on the following pages (Figure 2) shows the key controls that were defeated or bypassed in relation to the DAs investigated by the Commission. In each case, adherence to the spirit and letter of the requirement would have helped to prevent the corrupt conduct in question.

As described in the Afterword to this chapter, the Council has already taken steps to strengthen its internal controls and improve compliance with existing policies. In addition, some of the required responses have been rendered unnecessary by a combination of the dismissal of the elected Council, introduction of the WCCLEP 2007 and the NSW Government's recent amendments to the EPA Act.

The Council is fortunate to have a planning division that is large enough to be able to support a separate Preliminary Assessment Unit (PAU) and customer support staff who, among other things, are responsible for registering and scanning incoming DAs. This provides a degree of scope for certain aspects of the DA assessment process to be segregated. For instance, it may be possible for PAU or customer support staff to perform additional tasks such as: initiating certain referrals; identifying applicable policies and Council resolutions (such as the UDA Policy, the IPC Policy or the new IHAP policy); checking that any SEPP 1 objections are in order; drafting certain conditions of consent; and calculating section 94 contributions. For the DAs investigated by the Commission, duties such as these were generally the sole responsibility of Ms Morgan. A modest segregation of her duties would not have necessarily prevented Ms Morgan's corrupt conduct but might have limited its extent or increased the chance that her partiality would have been exposed.

The Commission is not is a position to specify which planning assessment roles could practically be segregated. This decision is best made by Council itself. However, it is recommended that Council consider how that can be achieved without sacrificing efficiency.

Another area where Council's adopted policies were ignored was the levying of section 94 development contributions.

18 *Outside Employment*, Building Capacity Series, Queensland Crime and Misconduct Commission, Brisbane 2007, paraphrasing Internal Control Integrated Framework, Committee of Sponsoring Organisations for the Treadway Commission, Jersey City, 1992.

19 The new section 23I of the EPA Act (assented to on 25 June 2008) along with proposed subordinate legislation establishes a new standard model for IHAPs. Councils that establish IHAPs will be required to adhere to the standard model.

Figure 2

Policy requirement/control	Failure/breach
Design Review Panel	The DRP convened for Quattro was highly critical of the proposal but Ms Morgan wilfully failed to factor this criticism into her evaluation and did not properly bring it to the full attention of her superiors, members of the Informal Planning Conference or the Councillors. For Victoria Square, no DRP was convened at all.
Authorised delegations	At the time, Ms Morgan had no delegation to determine the Quattro DA. However, she effectively did so when she used Mr Gilbert's computer and log-on details to issue consent under his name. Mr Gilbert allowed Ms Morgan to do this without assessing the merits of the DA, as was required. In so doing, he breached the delegations policy.
Section 94 development contributions	In relation to numerous DAs, Ms Morgan consented to 10% discounts in payments made under section 94 of the EPA Act and/or deferral of those payments. She did this in breach of the adopted Contributions Plans, which in the circumstances did not permit these concessions. Her decisions were also contrary to internal expert advice. Mr Oxley also directed that section 94 payments be deferred, again with no regard to the adopted Plans or normal practice.
Internal referrals / tasks	Ms Morgan had the ability to (and did) ignore advice provided by internal experts relating to technical areas such as traffic, landscaping, drainage and heritage. She had discretion to decide which internal referrals would be generated and also had the ability to close referred tasks, even if they had not been completed. In relation to modifications to the Victoria Square DA, Mr Scimone was able to ignore the advice of more experienced (but junior) planning staff and direct that the application be approved.
External referrals	In relation to Victoria Square, Ms Morgan issued the consent before highly relevant advice from the Roads and Traffic Authority was received. The advice was not incorporated into the conditions of consent. In addition, when external agencies or experts such as the Department of Planning (then DIPNR), the Urban Design Advisory Service and the Heritage Office provided advice, it was not considered (let alone adopted) by the relevant decision-makers.

© ICAC

Figure 2 (cont'd)

Policy requirement/control	Failure/breach
Heritage controls/draft Conservation Management Plan	In relation to the North Beach Bathers' Pavilion DA, Ms Morgan and her colleagues ignored the heritage advice contained in a draft Conservation Management Plan (CMP) that had been prepared in respect of the site. Other than Ms Morgan, no other officer or committee was tasked with enforcing the draft CMP. Council and Mr Oxley supported Mr Vellar's DA despite its non-compliance with the draft CMP and the expert advice of the NSW Heritage Office.[20]
Informal Planning Conferences Policy	In respect of Victoria Square, Ms Morgan provided advice to the Ward Councillors that grossly understated the impact of the development so that they would agree to its determination (by her) under delegated authority and to dispensing with an IPC. In relation to Quattro, Ms Morgan did not alert the Ward Councillors and Lord Mayor at all, nor did Mr Gilbert or Mr Oxley.
Allocation of town planners	Mr Gilbert and Mr Oxley allocated the Quattro DA to Ms Morgan at the request of Mr Vellar. Mr Oxley agreed to similar requests by Mr Vellar in relation to other DAs. On other occasions, Ms Morgan was able to allocate herself, or request that she be allocated, to DAs concerning Mr Vellar.
Written DA assessment reports	Ms Morgan did not prepare complete assessment reports which evaluated DAs (and SEPP 1 objections) against the matters for consideration under section 79C(1) of the EPA Act. Council's software system allowed her to issue a letter of consent before such a report was completed. Neither her superiors, internal audit nor any other oversight mechanism detected this. The reports that Ms Morgan did commence were never completed and were not saved to the relevant file.
Central Wollongong Planning Committee	In respect of Quattro, the advice of this Committee, the essence of which was adopted by Council, was ignored by Mr Oxley, Mr Gilbert and Ms Morgan. Non-compliant or controversial DAs such as Victoria Square and the Bathers' Pavilion were not referred to the Committee as required.
Complaint management	When a complaint from a member of the public was made about the Quattro determination, Ms Morgan was assigned to respond. No independent check was made of the concerns raised in the complaint.

20 The Commission notes that in June 2005, the Bathers' Pavilion was gazetted as an item on the State Heritage Register. This decision effectively gave the NSW Heritage Office a veto power over Mr Vellar's DA. The subsequent stand taken by the NSW Heritage Office in opposition to Mr Vellar's design probably prevented further corrupt conduct from occurring in this case.

© ICAC

On 23 July 2008 Council abolished the existing provision in its Contributions Plan that provided for a 10% reduction in contributions, where certain conditions are met. This is a sound decision and in the circumstances there is no need for the Commission to make any recommendations.

However, considerable scope remains for payments to be deferred under the Council's new Contributions Plan, which, it should be noted, is based on the template issued by the Department of Planning in December 2006. For instance, one of the criteria for deferral is "other circumstances considered reasonable by council".

The Commission therefore recommends that the Council only permit developer contributions to be deferred where the explicit approval of the Infrastructure Planning Coordinator and the elected Council (or Administrators) is obtained. The Coordinator has a specialist role within the Council's structure and is organisationally separated from the town planners who interact with development applicants on a frequent basis. Implementing this recommendation will involve the relatively simple step of making it mandatory, rather than optional, to follow the Coordinator's advice.

Finally, before it was dismissed, the Council operated on a ward basis. In addition to the popularly elected Lord Mayor, there were two councillors in each of six geographical wards. The effect of this was that under the IPC Policy, only the two relevant Ward Councillors, plus the Lord Mayor, had to be consulted as to whether the DA could be determined under delegated authority. This meant that for DAs in the CBD of Wollongong (or any area), Ms Morgan had to persuade only three out of 13 Councillors that she should determine the DA.

Because the Council is under administration until 2012, the Commission has decided against making a formal recommendation in relation to the ward structure. However, it is apparent that a greater degree of scrutiny by all of the elected Councillors might have prevented or limited the corrupt conduct in this case.

To improve the transparency of the DA assessment process and increase the chance that partial conduct will be prevented or exposed:

RECOMMENDATION 12

That Wollongong City Council require town planners to complete a standardised DA assessment report prior to issuing any development determination. Compliance with this requirement should be recorded and tied to the regular performance reviews of staff and managers.

To reduce the autonomy of individual town planners:

RECOMMENDATION 13

That Wollongong City Council consider modifying its DA assessment software to mandate completion of certain tasks prior to issuing development determination.

RECOMMENDATION 14

That Wollongong City Council consider the extent to which planning duties can be segregated and allocated to its Preliminary Assessment Unit and/or customer service staff.

RECOMMENDATION 15

That Wollongong City Council require its Infrastructure Planning Coordinator and the Council (or Administrators) to approve any deferral of development contributions.

To reduce the ability of persons with undisclosed conflicts of interest to engage in partial conduct:

RECOMMENDATION 16

That Wollongong City Council allocate incoming development applications to town planners with no regard to the wishes of applicants.

Misuse of information

As part of their regular duties, most councillors and council staff are privy to a large volume of confidential information that, if divulged, would be of considerable value to property developers. Mr Vellar obtained a great deal of Council information that was confidential and/or valuable.

Improper disclosure of internal information is typically quite easy to conceal and it is often counterproductive to put strict controls around the use of internal information. Therefore, the Commission has made two recommendations in relation to misuse of information.

One is directed at releasing confidential planning information as early as possible and reducing the time during which it may be misused:

RECOMMENDATION 17

That internal Wollongong City Council information relating to the possible rezoning of land be released publicly as soon as possible but in accordance with section 66(3) of the EPA Act.

and the other is directed at monitoring staff access to files and thereby increasing the actual and perceived threat that misuse of information will be detected:

RECOMMENDATION 18

That Wollongong City Council examine officers' access to and use of files:

(a) in response to complaints; and

(b) as part of its regular internal audit program.

Ms Morgan and Cr Zanotto each provided Council information and documents to Mr Vellar. Ms Morgan also provided Mr Vellar with information that, while not confidential, would normally be charged for or provided in a less timely manner. The information and documents provided included:

- reports on the likely rezoning of land (in particular, in relation to the Hills Truck Sales site in Fairy Meadow);
- internal legal advice (in particular, in relation to the North Beach Bathers' Pavilion);
- consultants' reports and strategy documents and studies;
- internal emails, file notes and advices (including drafts);
- internal policies;
- details of resignations, staff movements and internal personnel matters;
- plans, maps, and details of zonings and ownership of parcels of land including photographs from Council's land information system;
- details of actual or proposed developments by Mr Vellar's competitors;
- progress updates on Mr Vellar's DAs and the DAs of others;
- copies of letters of complaint received from the public;
- contact details, including mobile phone numbers of Council staff;
- advice on the best time to lodge DAs;
- advice on DAs for which consent was about to lapse (including one DA lodged by Mr Vellar's mother);
- advice on permissible uses within a zone and the application of various planning instruments;
- copies of old development consents.

Ms Morgan also provided advice to Mr Vellar in relation to how to phrase his applications and Statements of Environmental Effects, which concessions to ask for, which officers to approach and which precedents he could cite in order to support his applications. In relation to one of his DAs, Ms Morgan even admonished a colleague, who was managing the determination, for not being responsive enough to Mr Vellar's requirements.

Ignoring its content and commercial value, the sheer volume of the material sent by Ms Morgan to Mr Vellar suggests she spent significant time attending to his interests.

Ms Morgan and Cr Zanotto transmitted some of the confidential information referred to above using their own Council email accounts. The misconduct was therefore relatively simple to detect. Other such information was provided to Mr Vellar by hand as a hard copy or verbally in person or over the telephone. These types of disclosures are extremely difficult to detect and prevent.

The two most damaging information leaks made to Mr Vellar were the disclosure of legal advice relating to the Bathers' Pavilion (by Ms Morgan) and a study detailing the proposed rezoning of the Hills Truck site (by Cr Zanotto). In these respective cases, Ms Morgan and Cr Zanotto were entitled to have this information.

The Commission is not persuaded that improved education, clearer policies or better labelling of confidential information would have prevented these leaks (although such practices are highly desirable in all NSW public agencies). Both Ms Morgan and Cr Zanotto knew that what they were doing was wrong.

The Council's existing document management system is capable of preventing certain documents from being accessed, edited, printed and attached to emails. The Commission is advised that the Council is currently reviewing the manner in which certain classes of document (such as legal advice) can be accessed and transmitted.

For these reasons, the Commission has limited itself to making the two recommendations detailed above (Recommendations 17 and 18) in relation to preventing the misuse of confidential information.

In respect of the first of these recommendations, when a council is proposing to rezone significant areas of land, it generates a number of confidential reports, surveys and studies which contain information about the possibility of significant changes in the value of the land in question. Many such documents are not publicly released until after a Director General's certificate has been issued under section 65 of the EPA Act. However, section 66(3) of that Act does make provision for councils "for the purposes of informing the public generally" to "publicly exhibit any other matter which would be construed or represented as having a similar purpose to a draft local environmental plan". Consequently, if documents such as the "hot, hot copy" that Mr Vellar obtained from Cr Zanotto (see Chapter 9) are made public sooner rather than later, the window in which corrupt conduct can occur is narrowed. The Commission therefore recommends that internal Council information pertaining to the possible rezoning of land be made public as soon as possible but in accordance with section 66(3) of the Act.

In relation to Recommendation 18 above, it is impractical to continuously track the use of internal information throughout an entire council. Potential misuse is particularly hard to detect when a large number of staff and councillors are privy to information and improper disclosure is easy to conceal. However, use of certain electronic information can be practically monitored on a case-by-case basis. The most logical trigger for examining an individual officer's access to information would be in response to a complaint.

For instance, scrutiny of Ms Morgan's access to files would have shown that she was viewing a range of documents that had nothing to do with her assigned work. Council's document management system was capable of providing this information but unfortunately, for reasons explained elsewhere in this report, the complaints against Ms Morgan were never acted on.

The Council's document management system could be used to flag when an officer is accessing documents or files to which s/he is not assigned, which are designated as 'confidential' or 'draft', or which are closed. By themselves, these flags would not necessarily be indicative of misconduct. However, had the Council actually pursued some of the complaints against Ms Morgan, or included her activities as part of an audit, it is likely that at least some suspicious conduct would have been revealed. As it transpired, Ms Morgan did not perceive a credible threat that the information she was passing to Mr Vellar would ever be investigated.

Systemic weaknesses conducive to corrupt conduct

The corrupt conduct within and affecting the Council was systemic as well as serious. A number of senior managers whose responsibility it was to apply and enforce systems of internal control were themselves either corrupt or engaged in behaviour that was conducive to the corrupt conduct of Ms Morgan. In these circumstances, it is necessary for the Commission to consider the broader customs, leadership and governance mechanisms within the Council.

When analysing corrupt conduct, anti-corruption agencies typically recommend that power be shared, thereby reducing risk. A traditional approach addressing Ms Morgan's conduct might include recommendations that the elected councillors take more responsibility for DA determination or that supervisory systems be improved. However, several of the Council's key managers (Messrs Gilbert, Scimone and Oxley) and four of the Councillors (Messrs Zanotto, Jonovski, Gigliotti and Esen) themselves engaged in corrupt conduct. As set out in Chapter 7, the Commission has also found that Mr Oxley engaged in conduct that increased the likelihood of corrupt conduct occurring. Therefore the Commission is not able to conclude that simple modifications to the Council's system of checks and balances would have prevented corrupt conduct in this case. As a result, it is necessary to consider the wider picture.

The conduct of Mr Oxley

Prior to his resignation in May 2007, Mr Oxley had been the Council's General Manager for approximately 19 years. By virtue of his position, experience and style of management, he played a key role in establishing the accepted patterns of behaviour within the planning division.

Had Mr Oxley acted differently, a great deal of the corrupt conduct carried out by other persons mentioned in this report could have been avoided or curtailed.

As Mr Oxley has now left the Council, the Commission has made just one corruption prevention recommendation (Recommendation 19, at the end of this section) in relation to the role of the General Manager.

For reasons set out in Chapter 7, by about mid September 2006 it should have been apparent to Mr Oxley that that there was a likely undisclosed personal relationship between Ms Morgan and Mr Vellar. However, he failed to take any appropriate action.

Mr Oxley had a philosophy of encouraging and promoting development which at times entailed pressuring staff to overlook the statutory "matters for consideration" set out in section 79C(1) of the EPA Act.

This pro-development philosophy meant that the wrong types of conduct were being rewarded and that desirable conduct was ignored or penalised. A planning officer who wished to refuse a DA that was inconsistent with WLEP 1990 or even draft DCP 56 was generally not rewarded at the Council. In fact, under Mr Oxley's leadership, such behaviour was at times actively discouraged.

Although Mr Oxley has now resigned and the Council has been dismissed, it is important that Council's new management be provided with incentives that encourage compliance with the resolutions of Council and promote ethical conduct. The Australian Standard on Fraud and Corruption Control recommends that performance management systems and position descriptions reflect the organisation's desired approach to ethics and the prevention and detection of corruption. The Standard says "Line management needs to be made fully aware that managing fraud and corruption is as much part of their responsibility as managing other types of enterprise risk".[21]

Council's Administrators should decide which types of behaviour they want the new General Manager and senior staff to model to the rest of the organisation. Contracts of employment, position descriptions and performance reviews should be structured so that the desired behaviour is rewarded and undesirable behaviour is discouraged. For instance, had Mr Oxley's annual performance review (and therefore, his salary) depended in part on demonstrated compliance with say, the UDA Policy or the IPC Policy, it is possible he would have obliged his subordinates to take a different course of action in respect of the Victoria Square DA.

The Commission is not in a position to specify precisely how Council's performance management systems should be amended. However, the observable anti-corruption elements that might be capable of being incorporated into a system of performance management could include:

- demonstrated compliance with resolutions of Council and adopted polices intended to improve governance;
- completion of regular corruption risk assessment activities;
- number of identified corruption risks that have been successfully treated (i.e. moved from high(er) to low(er) risk);
- attendance at relevant training sessions;
- satisfactory management of internal and external complaints and protected disclosures; and
- satisfactory response to internal audit recommendations.

Staff surveys of ethical culture can also be used to assess performance. To the extent that other recommendations in this chapter can be practically evaluated or quantified, they can also be aligned to managerial performance and reward.

To better align the conduct of the general manager and senior staff with the ethical stance of the Council and its adopted policy positions, the Commission recommends:

RECOMMENDATION 19

That Wollongong City Council rewrite the position descriptions, contracts and performance agreements of the General Manager and relevant senior managers so that the desired anti-corruption behaviour is defined, recognised and rewarded.

Dealing with internal complaints

Mr Gilbert took no action in response to a number of complaints and queries specifically about Ms Morgan and her relationship with Mr Vellar.

The Commission has made two recommendations (Recommendations 20 and 21, at the end of this section) aimed at improving the management of internal complaints.

21 AS 8001-2008, *Fraud and Corruption Control*, p.28.

© ICAC

At different times, Mr Gilbert fielded queries about Ms Morgan's relationship with Mr Vellar and her partial conduct from five sources: Mr Broyd (who had become aware that Mr Vellar and Ms Morgan had been meeting over coffee in early 2005); Messrs Bryce Short and Mark Biondich (Council planning officers who complained about interference by Ms Morgan in one of Mr Vellar's DAs); Mr Zwicker (who reported his suspicions about a relationship); Mr Oxley (who conveyed rumours regarding the trip to China); and Mr Peter Coyte, Manager, Commercial and Property (who passed on a complaint from a resident about the alleged relationship). This information should have provoked a strong management response from Mr Gilbert.

There is no doubt that by the end of 2004 Mr Gilbert was aware that Mr Vellar and Ms Morgan had been on dinner dates together and had some form of personal relationship.

In the opinion of the Commission, Mr Gilbert's view that Ms Morgan's conflict (to the extent that he knew of it) was not serious enough to warrant her removal from the Quattro DA and his view that this could be justified because Wollongong is "like a small country town", is wrong. But putting that to one side, Mr Gilbert did not: quiz Ms Morgan on the full extent of her relationship with Mr Vellar; require her to make a written disclosure; make a file note of his own; or advise Ms Morgan's then manager, Mr Zwicker, of the conflict. Having decided that she could remain as the assessment officer for Quattro, Mr Gilbert took no steps to ensure that Ms Morgan did not engage in partial conduct. Most importantly, he did not properly check Ms Morgan's proposed letter of consent for Quattro, require her to prepare an assessment report or challenge the merit of the SEPP 1 objection.

His neglect is aggravated by the fact that in late 2004 Mr Gilbert was aware that Mr Vellar had requested that Ms Morgan be appointed as the assessment officer for the Quattro DA.

Mr Gilbert's failure to respond to the concerns raised by Messrs Zwicker, Biondich and Short would have left a general impression among Council staff that Ms Morgan's behaviour was acceptable and that raising concerns in the future about probity issues would be a waste of time.

Public officials are placed in an awkward situation when their superiors or the head of their agency is resistant to bona fide complaints and suggestions for improved governance. This is exacerbated if the superior or agency head is in fact the subject of the complaint or the cause of poor governance. In such circumstances, aggrieved subordinates are likely to remain silent unless they are confident that their complaint will be genuinely considered by an impartial person and that they will not suffer any adverse consequences from having made a complaint.

In NSW, most complainants in this situation are covered by the *Protected Disclosures Act 1994*. At least between 2001 and 2004, Council had an established procedure for making protected disclosures and other types of internal complaint. The queries made by Messrs Short and Biondich and Mr Zwicker to Mr Gilbert could have constituted protected disclosures but were not identified or treated as such.

For this reason, the Commission has recommended that Council appoint and train additional protected disclosure (PD) officers. In order to give internal complainants a number of avenues through which to lodge their concerns, all of Council's functional areas should have access to a PD officer. In addition, the appointed PD officers should be drawn from both managerial and non-managerial staff so that, if necessary, complainants are able to make complaints about the conduct of managers.

From late 2001 to mid-2004, the Council's organisational structure included the position of Internal Ombudsman. The Commission recommends that this position be re-established. The person in this role should also be a PD officer and should enjoy a degree of freedom from managerial direction. For instance, the Internal Ombudsman should have some discretion to report matters and findings directly to the General Manager or Council/Administrators as appropriate.

RECOMMENDATION 20

That Wollongong City Council appoint and train at least 12 new protected disclosure officers and that all Council staff receive training in the *Protected Disclosures Act 1994* and Council's internal reporting system.

This represents approximately one extra protected disclosure officer per 100 Council staff.

RECOMMENDATION 21

That Wollongong City Council re-establish the position of Internal Ombudsman.

Council has advised the Commission that it has already taken steps to give effect to this recommendation, which is commendable.

© ICAC

The resignation of Mr Broyd and promotion of Mr Scimone

Both substantively and symbolically, Mr Broyd's departure from Council had an important effect on corrupt conduct. While employed at the Council, Mr Broyd clashed with Mr Oxley in relation to their respective approaches to planning issues. Mr Broyd advocated a range of measures that, had they been implemented, would have limited the damage done by Ms Morgan's corrupt conduct. For instance, Mr Broyd favoured adherence to draft DCP 56, opposed concessions that were being made for the Quattro DA and wanted the North Beach Bathers' Pavilion to be assessed independently. In each case he was overruled by Mr Oxley. Mr Broyd also had experience in the proper use of SEPP 1.

Following Mr Broyd's departure Mr Oxley assumed his duties for approximately seven months until Mr Scimone was appointed, on an acting basis, to the newly created position of Group Manager, Sustainability in February 2006. The appointment was made by Mr Oxley.

Among other things, this position oversaw the Development Assessment and Compliance Division but not Council's strategic planning functions. Mr Scimone remained in this acting position until he commenced a period of leave in approximately October 2006 from which he did not return. No steps were taken to permanently fill the position until after Mr Scimone was made redundant in early 2007.

Mr Scimone took no action to manage Ms Morgan's conflict of interest, of which he was fully aware.

With the benefit of hindsight, it is clear that Mr Broyd's views should have prevailed and that replacing him with Mr Scimone was a mistake. However, as this mistake cannot be reversed, the Commission makes two recommendations (Recommendations 22 and 23, at the end of this section) to help ensure that staff appointments are made on the basis of merit.

Among his other planning qualifications, Mr Broyd was the President of the NSW Division of the Planning Institute of Australia between 2000 and 2004. Mr Scimone did not have any planning qualifications, had not previously worked in the planning division and his acting position role was not advertised internally or externally. It is also the case that prior to Mr Scimone commencing in his acting role, Mr Oxley was made aware of allegations that Mr Scimone had sexually harassed staff. Mr Oxley told the Commission that he took all matters that might reflect adversely on Mr Scimone's suitability for the position into account but there is no documentary evidence of such a process.

Neither Mr Broyd's departure nor Mr Scimone's direct appointment involved corrupt conduct and Mr Oxley cannot be expected to have foreseen that Mr Scimone would engage in corrupt conduct after being promoted. However, given the previous conflict between Mr Broyd and Mr Oxley, the manner of Mr Scimone's appointment and his lack of planning qualifications, it is difficult to avoid the conclusion that Mr Scimone's appointment was specifically aimed at facilitating Mr Oxley's pro-development agenda.

The *Local Government Act 1993* requires staff appointments to be made on merit (section 349)[22] and vacancies must be advertised (section 348). However, appointments of less than 12 months, such as Mr Scimone's acting role, do not need to be advertised and can be made directly by the General Manager. Although there is an exemption from advertising temporary positions, there is no provision in the Act expressly exempting councils from the requirement to base such appointments on merit. It is arguable that Mr Scimone's acting appointment was not based on merit but it is also highly relevant that Council failed to take steps to fill the position permanently. Had it done so, Mr Scimone's corrupt conduct in respect of the Victoria Square DA might have been avoided.

The new role of Group Manager, Sustainability was approved[23] by Council on 28 November 2005, approximately five months after Mr Broyd's resignation. Mr Scimone's 12-month appointment started in February 2006. That the Act permits 12-month appointments without advertisement is not a valid reason for delaying a permanent appointment. Mr Scimone should only have been acting in the role of Group Manager, Sustainability for as long as was required to fill the position permanently.

Section 337 of the LG Act states that the General Manager may only dismiss or appoint senior staff after consultation with the council. Mr Oxley admitted to the Commission that the Council was only advised of Mr Scimone's appointment after it had commenced. Although it is unlikely that the required consultation would have overturned Mr Scimone's appointment, it might have prompted some public questions from, or of, the Council in relation to the process followed and a timetable for filling the role permanently. What is more, there is no evidence that Mr Oxley's breach of the Act

22 Section 349 states that merit is to be determined according to the nature of the duties of the position and the abilities, qualifications, experience and standard of work performance of applicants.

23 Although the new role was approved at this time, the report to the Council did not indicate that Mr Scimone would be filling it.

© ICAC

was detected, brought to the attention of the Council or subsequently factored into his annual performance review.

In terms of the likely effect that Mr Scimone's appointment had on the performance of the Development Assessment and Compliance unit, three brief points should be made. Firstly, Mr Scimone told the Commission that when he first learned about Ms Morgan's relationship with Mr Vellar in mid-2004, he took no action because he was not responsible for planning matters within Council. The Commission does not accept this argument but in any case, after he did become responsible for planning matters, Mr Scimone took no steps to manage Ms Morgan's conduct, of which he was fully aware. This was at a time when Ms Morgan was assessing Mr Vellar's DA for the North Beach Bathers' Pavilion.

Secondly, the Commission heard evidence from Mr Gilbert that he had received complaints that Mr Scimone was a bully. Mr Gilbert added that "I don't think he [Mr Scimone] fully appreciated the process of planning decision making" and that "It's fairly cut and dry with Mr Scimone. He makes instant decisions". Although the causal relationship between bullying, dysfunctional management and corrupt conduct is unpredictable, it is difficult to avoid the conclusion that Mr Scimone's conduct did little to inspire lawful planning decisions or a professional working environment.

Thirdly, the general effect of having someone occupying the most highly paid planning job within Council, with no planning qualifications and without having been through a competitive appointment process, would have lowered staff trust and morale. This in turn can create an environment in which other forms of aberrant behaviour are tolerated.

RECOMMENDATION 22

That Wollongong City Council take action to fill staff vacancies pursuant to section 348 and section 349 of the *Local Government Act 1993* as soon as is practicable.

RECOMMENDATION 23

That where temporary appointments need to be made pursuant to section 351 of the *Local Government Act 1993*, Wollongong City Council seek internal expressions of interest based on the established position description, unless it is impractical to do so.

Council governance

Overseeing the performance of the general manager is one of the key duties of an elected council.

The Commission has found examples of efforts made by certain Councillors to improve governance and to question individual planning decisions but these were generally unsuccessful. For example, a number of Councillors objected to Mr Vellar's design for the North Beach Bathers' Pavilion and the terms of his proposed lease but were out-voted. Cr Griffiths's unsuccessful motion in relation to SEPP 1, referred to earlier in this chapter, is another example.

It is possible that improved training would have improved the ability and preparedness of Council as a body to better oversee the performance of the General Manager and adherence to policy. The Commission is of the view that if elected councillors are to play a useful role in setting planning policies and assessing individual DAs, they need to be capable of critically analysing reports prepared by planning officers and understanding the legal requirements of the EPA Act and their own adopted LEPs.

In its September 2007 position paper on *Corruption risks in NSW development approval processes*, the Commission recommended that training be provided for all councillors in relation to planning matters and corruption awareness. This paper also pointed to anecdotal evidence that land use planning and control was the area that councillors felt least knowledgeable about.[24] In keeping with this, when the Council's Administrators are replaced by an elected Council,[25] a comprehensive induction and ongoing training program covering these two areas is recommended.

At the relevant times, Council did have an Audit and Governance Committee with at least one external member. On several occasions since 2004, the Committee failed to meet because of a lack of a quorum.

24 Independent Inquiry into the Financial Sustainability of NSW Local Government (Chair: P. Allan AM) Final report: Findings and Recommendations, May 2006, p.313.

25 The Governor's proclamation of 4 March 2008 in which all civic offices at the Council were declared vacant, states that the Administrators are to serve until September 2012.

© ICAC

The Australian National Audit Office's (ANAO) *Better Practice Guide on Public Sector Audit Committees* states that there can be considerable merit in having an organisation's audit committee chaired by an independent member.[26] It also recommends that a number of other external committee members be appointed.[27]

Although the Wollongong City Council was dismissed in March 2008 and replaced with three appointed Administrators, the Commission is of the view that the advice of the ANAO should be adopted. It is possible that an independent chair of the Audit and Governance Committee would have been more concerned by some of the issues raised in this investigation report. An independent chair might have also provided "minority" Councillors who were not members of the ALP caucus with an avenue for expressing their concerns about poor governance. It is also possible that had complaints about the conduct of Ms Morgan and her superiors been directed to the independent members of the Committee, firmer action might have been taken.

The Commission makes the following recommendations to improve the oversight of Council's governance arrangements and better enable individual Councillors or Administrators to raise governance issues:

RECOMMENDATION 24

That in 2012, incoming Wollongong City Councillors receive training in statutory planning responsibilities and corruption awareness.

RECOMMENDATION 25

That Wollongong City Council's Audit and Governance Committee be reconstituted to include additional external membership and an independent chairperson.

The independent chairperson of the Committee should also be a designated Protected Disclosures officer and the Committee itself should oversee compliance with the *Protected Disclosures Act 1994*. The Council's Internal Ombudsman should have direct access to the Committee and the independent chairperson.

Binding caucus votes

A caucus is a closed meeting of a group of persons belonging to the same political party or faction of a political party. During this investigation, a number of the ALP Councillors were asked if they caucused on matters before the Council. Mr Jonovski was asked about this at the public inquiry and told the Commission:

> *We caucus only on policy matters, never caucus on development applications.*

However, Mr Jonovski also indicated in his testimony to the public inquiry at other times that he believed that the ALP Councillors had caucused before various Council meetings about the North Beach Bathers' Pavilion DA.

For example, on 19 February 2007 the Council resolved to, among other things, defer the matter pending a report providing an economic analysis of the development and to ask the Heritage Office to recommission a design for the Pavilion that would meet Council and community expectations. It also resolved to then place the final design on public exhibition. Mr Jonovski was asked if the ALP Councillors caucused on this particular item and he replied, "I believe so, yes".

At its 19 March 2007 meeting, the Council resolved, among other things, not to proceed with a single-storey refurbishment of the Pavilion and to enter into negotiations with the Heritage Office to accommodate increased net lettable (undercover) floor space to improve commercial viability. Mr Jonovski indicated that he believed he caucused on this item as well.

One of the potential dangers of caucusing is demonstrated by the conduct of Crs Jonovski, Esen and Gigliotti. As shown in Chapter 10, they solicited a donation from Mr Vellar in return for promising to act favourably with respect to his proposed Pavilion re-development. As three of the seven ALP councillors, they could have influenced caucus to vote in support of Mr Vellar's interests.

In respect of DA determinations, a binding caucus vote would be inconsistent with the requirements of section 79C(1) of the EPA Act, which sets out a number of matters that have to be taken into consideration in determining a development application. These matters include environmental planning instruments, any submissions, the likely impacts of the development and the public interest.

26 February 2005, p.17.

27 At the time of writing, the Department of Local Government was in the process of drafting new Internal Audit Guidelines for NSW local councils.

© ICAC

Binding caucus votes are not proscribed in the current *Model Code of Conduct for Local Councils in NSW* (issued June 2008). The existing Guidelines to the Model Code (which relate to the previous Model Code that was in place until June 2008), refer to caucus votes in the "Optional better practice" section and state that councils may wish to consider including the following specific provision on caucusing in their codes of conduct:

> *Binding caucus votes on matters is inconsistent with the obligation of each councillor to consider the merits of the matter before them. Political group meetings must not be used to decide how councillors should vote on matters like development applications where there are specific statutory considerations for* each *decision-maker to consider.*[28] (original emphasis)

The Commission has previously recommended to the Department of Local Government (DLG) that the option should be removed and that binding caucus votes for development application decisions should be proscribed in the Model Code itself.[29] Such a provision would not apply to non-binding caucuses (that is, a discussion amongst political colleagues) in relation to development application decisions.

The Council's 2007 Code of Conduct does not include the optional provision prohibiting binding caucus votes on development applications. It is questionable whether such a prohibition, if it had been in place on 18 October 2006, would have dissuaded the three Councillors from soliciting a donation in return for favourable treatment. However, it would have made it more difficult for the Councillors involved to deliver their end of the bargain. This is because the other ALP Councillors would have been able to better exercise their own judgement in relation to the Pavilion DA, rather than being bound by caucus.

At the time of writing, the Guidelines to the Model Code are currently being updated by the Department of Local Government to reflect the new Model Code.[30] Regardless of whether the new Guidelines contain a similar optional provision on binding caucuses in relation to development applications, the Commission recommends that Wollongong City Council amends its code of conduct to include such a prohibition.

In addition, subsection 440(7) of the *Local Government Act 1993* requires all NSW councils to review their code of conduct within 12 months of an election. Given that most councils had elections in September this year, most councils will also be reviewing their codes of conduct. The required reviews present a timely opportunity for councils to consider whether to prohibit binding caucus votes in respect of development applications, if their codes do not already include such a prohibition.

RECOMMENDATION 26

That Wollongong City Council amends its Code of Conduct to include a prohibition on binding caucus votes in relation to development applications.

RECOMMENDATION 27

That all NSW councils consider a prohibition on binding caucus votes in relation to development applications during their next code of conduct review.

AFTERWORD
What Wollongong City Council has done to address corruption

Following a recommendation by the Commission, Wollongong City Council was dismissed by the Governor on 4 March 2008 and replaced by three Administrators. During the course of the Commission's investigation, Messrs Oxley and Gilbert resigned, Mr Scimone was made redundant and Ms Morgan's employment was terminated.

Under its new leadership the Council has fully cooperated with the Commission's investigation and expressed a strong desire to implement a comprehensive range of corruption prevention measures. Upon learning about the allegations against Ms Morgan, Council completed its own internal investigation which led to her dismissal. Council also initiated its own legal action to overturn the Quattro development consent.

Prior to the completion of the Commission's public inquiry conducted in February and March 2008, the Council had introduced a range of reforms including:

- The replacement of existing section 94 Contribution Plans with a single section 94A plan. In June 2007, a further section 94A plan was adopted for the Wollongong city centre.

28 Guidelines for Model Code of Conduct for Local Councils in NSW 2004, pp. 20-21.

29 Letter from ICAC to DLG, September 2006.

30 DLG Circular 08-38, *Revised Model Code of Conduct for Local Councils in NSW*, June 2008, p. 4.

© ICAC

- A new policy on gifts and benefits which provides staff with an online register.
- New policies on internal reporting (including protected disclosures), conflict of interest and use of confidential information, together with online learning training modules for each policy.
- Certain confidential documents are now identified with individual watermarks and are more tightly controlled.
- All Council resolutions are now assigned as a task to a person and tracked in Council's document management system and where applicable, in Council's land information system.
- Awareness sessions covering code of conduct, protected disclosures, gifts and benefits, conflict of interest and use of confidential information have been conducted on a compulsory basis. Previously, attendance at these sessions had been voluntary.
- A "DA Register" which tracks the status of individual DAs via Council's website.
- An annual random audit program of a sample of DA determinations.
- The appointment of independent consultants to assess DAs in which Council itself has a financial interest (such as the Bathers' Pavilion).
- A new system of peer review of certain DAs, which reduces the autonomy of individual town planners and increases the chance that partial conduct will be detected.

Following the public inquiry the Council has also acted to implement a range of reforms, including adoption of a number of recommendations made by the Commission in its 2007 position paper *Corruption risks in NSW development approval processes*. The reforms include:

- In July 2008, the provision for offering a 10% discount in development contributions based on urban consolidation criteria, was abolished. Criteria for permitting the deferral of contributions were tightened.
- A new standard assessment template has been developed for use by all Council planning officers when assessing DAs.
- An Independent Hearing and Assessment Panel has been established.
- The position of Internal Ombudsman (to be termed "Professional Conduct Coordinator") has been reestablished.
- New policies on secondary and post-separation employment are being finalised.
- A new protected disclosures (PD) toolkit has been developed, new PD and referral officers have been appointed and training for all staff has been scheduled.
- A Departures Report (which includes SEPP 1 variations and all departures from development standards contained within relevant planning instruments) is being developed and will be published on the Council's website.
- A review of the Fraud and Corruption policy (incorporating a staff awareness survey) is being prepared by the Council's internal auditors.
- Separate Audit and Governance Committees have been reestablished and their terms of reference have been adopted by the Council.
- A full review of the delegations register has been completed. The register is published on the Council's website.
- Corruption prevention training for staff in key leadership roles is being organised, in conjunction with the Commission.

Finally, it is worth noting that a number of the Council's existing internal controls were of assistance to the Commission during the course of the investigation. The Council's information technology systems were able to capture and sort a large volume of emails that were sent by persons under investigation and which establish Ms Morgan's corrupt conduct. Council's system for tracking and workflow of development applications, called "Pathway" was also useful in terms of forcing Ms Morgan to leave an electronic record of the exact date and time of many of her decisions.

© ICAC

Appendix 1: The role of the Commission

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

The Commission can also investigate the conduct of persons who are not public officials but whose conduct adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority. The Commission may make findings of fact and form opinions based on those facts as to whether any particular person, even though not a public official, has engaged in corrupt conduct.

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

The Commission was created in response to community and Parliamentary concerns about corruption which had been revealed in, *inter alia*, various parts of the public service, causing a consequent downturn in community confidence in the integrity of that service. It is recognised that corruption in the public service not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The principal functions of the Commission, as specified in section 13 of the ICAC Act, include investigating any circumstances which in the Commission's opinion imply that corrupt conduct, or conduct liable to allow or encourage corrupt conduct, or conduct connected with corrupt conduct, may have occurred, and co-operating with public authorities and public officials in reviewing practices and procedures to reduce the likelihood of the occurrence of corrupt conduct.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

© ICAC

Appendix 2: Corrupt conduct defined and the relevant standard of proof

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

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

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

Section 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection.

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

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

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

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

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

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

© ICAC

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

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

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

See also *Rejfek v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution, Queensland, 1977* (McGregor J) and the *Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

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

© ICAC

ICAC

Independent
Commission
Against
Corruption