

ICAC Report

*Report into corrupt conduct
associated with development proposals
at Rockdale City Council*

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The Hon Dr Meredith Burgmann MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon John Murray MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Madam President
Mr Speaker

In accordance with section 74 of the Independent Commission Against Corruption Act 1988 (as amended), I am pleased to present the Commission's report on its investigation relating to Rockdale City Council.

I presided at the public hearings in this investigation and my findings and recommendations are contained in the report.

I draw your attention to the recommendation that the report be made public immediately in accordance with section 78(2) of the Independent Commission Against Corruption Act.

Yours sincerely



Irene Moss AO
Commissioner

CONTENTS

EXECUTIVE SUMMARY	1
CHAPTER 1 — INTRODUCTION	3
What is this report about?	3
Why did the ICAC investigate?	3
How did the ICAC investigate?	3
The hearings	4
Outcomes	5
Legislative changes	5
Note on transcription of evidence	6
Section 78(2) recommendation	6
The council	7
CHAPTER 2 — ROCKDALE CITY COUNCIL AND DEVELOPMENT APPLICATIONS	7
Development applications	8
Conduct of councillors	8
CHAPTER 3 — 2-4 PARKER STREET, ROCKDALE	10
Dosan Pty Ltd	11
Findings of fact	11
Corrupt conduct?	12
Section 74A(2) statement	12
CHAPTER 4 — THE TAILOR SITE - BRIBERY	14
Chartofillis	17
Assessing Chartofillis' evidence	18
McCormick	19
Communications of 3 March	22
Communications on 4 March	23
Communications of 11 March	24
The 21st Anniversary Dinner	25
Communications of 19 March	25
Assessing McCormick's evidence	30
Findings of fact	31
Corrupt conduct	32
Section 74A(2) statement	32
Recommendation for suspension of McCormick	33
CHAPTER 5 — THE TAILOR SITE - POLITICAL INFLUENCE?	34
Assessing the evidence	37
Corrupt conduct and section 74A(2) statement	37
CHAPTER 6 — "THE EAGLE HAS TOUCHED BASE" - SITE ONE AND TWO	38
Site 1	38
Was any other councillor involved?	41
The site 2 development	45
Assessing the evidence	46
Findings of fact	46
Corrupt conduct?	46
Section 74A(2) statement	47
Recommendation for suspension of McCormick	47

CHAPTER 7 — LUSTY STREET, ARNCLIFFE	48
The Meeting of 31 January	48
Subsequent Communications.....	50
Submissions	51
Assessing the evidence.....	53
Findings of fact.....	54
Corrupt conduct?	54
Section 74A(2) statement.....	54
CHAPTER 8 — 2 TOOHEY CRESCENT, BEXLEY	55
What the Mayor did	55
McCormick becomes involved.....	56
Preparing a further report	57
Assessing the evidence.....	57
Corrupt conduct and section 74A(2) statement	58
CHAPTER 9 — ST GEORGE SOCCER ASSOCIATION GROUND.....	59
Assessing the conduct.....	59
CHAPTER 10 — DEVELOPING CORRUPTION RESISTANCE - LESSONS FROM ROCKDALE	60
Could Rockdale Council have done more?	61
What is Rockdale Council doing now?	62
Political donations	62
Binding caucus votes on development applications	62
Conflicts of interest	63
Councillors influencing staff.....	63
Need for reform	63
Will anything really change?	64
APPENDIX 1 — THE ICAC’s ROLE	65
APPENDIX 2 — CORRUPT CONDUCT DEFINED AND THE RELEVANT STANDARD OF PROOF	66

EXECUTIVE SUMMARY

This report arises from an investigation by the Independent Commission Against Corruption into the conduct of two Rockdale City Councillors, and their dealings with developers and intermediaries in respect of development proposals to be considered and determined by Rockdale City Council (RCC).

In particular, it examines:

- (1) the conduct of Councillor Adam McCormick, the Deputy Mayor, and Councillor Andrew Smyrnis and their dealings with certain property developers;
- (2) the conduct of Manuel Limberis and Tony Retsos who acted as intermediaries between Councillor Smyrnis and these developers in soliciting bribes; and
- (3) whether donations to a political organisation were sought or made for the purpose of currying favour with councillors aligned with the ALP in relation to a particular development.

Findings are made in this report that Andrew Smyrnis, Adam McCormick, Manuel Limberis, Tony Retsos, and two developers, Con (aka Costa) Chartofilis and Terry Andriotakis, engaged in corrupt conduct.

Recommendations are made in the report that the Director of Public Prosecutions give consideration to the prosecution of the following persons for the offences listed below:

Andrew Smyrnis

soliciting or receiving (or agreeing to receive) a corrupt reward or benefit contrary to s.249B(1) of the *Crimes Act 1900* or conspiracy to commit bribery (Chapters 4, 6 and 7), and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapters 3, 4 and 6).

Adam McCormick

soliciting (or agreeing to receive) a corrupt reward or benefit contrary to s.249B(1) of the *Crimes Act 1900* or conspiracy to commit bribery and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapters 4 and 6).

Manuel Limberis

aiding, abetting and procuring an offence under Part 4A of the *Crimes Act 1900* contrary to s.249F of the *Crimes Act 1900*, or conspiracy to commit bribery (Chapter 4), and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapters 3 and 4).

Con Chartofilis

giving a corrupt reward or benefit contrary to s.249B(2) of the *Crimes Act 1900* or conspiracy to commit bribery and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapter 4).

Tony Retsos

aiding, abetting and procuring an offence under Part 4A of the *Crimes Act 1900* contrary to s.249F of the *Crimes Act 1900*, or conspiracy to commit bribery and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapter 6).

Terry Andriotakis

offering a corrupt reward or benefit contrary to s.249B(2) of the *Crimes Act 1900* or conspiracy to commit bribery (Chapter 7).

Recommendations are made in Chapters 4 and 6 of this report that consideration be given to the suspension of Councillor Adam McCormick from civic office under s.440C of the *Local Government Act 1993* with a view to his dismissal for serious corrupt conduct. No such recommendation is made in respect of Smyrnis as he resigned from RCC during the course of the ICAC hearings.

The evidence before the ICAC did not indicate the level of systemic corruption within Rockdale City Council to warrant a recommendation that consideration be given to the dismissal of all councillors.

There was no evidence that any staff member of council acted other than professionally and properly in the discharge of their duties and no suggestion that any had acted corruptly.

Given that the evidence obtained in this investigation established that the corrupt conduct within Rockdale City Council was limited to Councillor McCormick and Councillor Smyrnis, and given the recommendations in this report concerning the former, and the resignation of the latter, no recommendation is made that an environmental planning administrator be appointed to Rockdale City Council pursuant to s.118 of the *Environmental Planning and Assessment Act 1979*.

Furthermore, there are no recommendations regarding suspension of development consents or modifications, permitted by s.124A of the *Environmental Planning and Assessment Act 1979*, in relation to the development proposals the subject of this investigation.

This report also canvasses the need for further reform of development control systems, and controls on political donations and influence at the local government level. These are aimed at preventing the type of corrupt conduct identified in the course of this investigation. This discussion is contained in Chapter 10.

CHAPTER 1 — INTRODUCTION

WHAT IS THIS REPORT ABOUT?

This is the report on the Independent Commission Against Corruption (ICAC) investigation into the conduct of certain councillors, developers and others in the Rockdale City local government area. In particular, the report examines the conduct of two Rockdale City Council (RCC) councillors, Adam McCormick, the Deputy Mayor, and Andrew Smyrnis and their dealings with certain property developers. The conduct of persons who acted as intermediaries between Councillor Smyrnis and these developers in soliciting bribes is also examined.

The report also examines whether donations to a political organisation were sought or made for the purpose of currying favour with councillors aligned with the ALP in relation to a particular development.

The primary purpose of this report is to make findings and recommendations regarding the possible corrupt conduct that was the subject of this investigation and report it to the Parliament. In this respect the report records:

- factual findings of what occurred,
- findings of corrupt conduct against individuals,
- recommendations that the Director of Public Prosecutions give consideration to the prosecution of named individuals for specified criminal offences, and
- recommendations that the Minister for Local Government give consideration to the suspension from office of a councillor with a view to his dismissal from office.

This report is divided into a number of chapters that deal with particular proposed developments that were the subject of the investigation. These are:

- 2-4 Parker Street, Rockdale (Chapter 3),
- 2-4 Frederick Street, Rockdale (Chapters 4 and 5),
- Two sites, that were codenamed Site 1 and Site 2 for the purpose of the investigation (Chapter 6),

- Lusty Street, Arncliffe (Chapter 7),
- 2 Toohey Crescent, Bexley (Chapter 8),
- St George Soccer Association ground (Chapter 9).

WHY DID THE ICAC INVESTIGATE?

This investigation arose as a result of information received by the ICAC that a developer had been approached by a person soliciting a substantial payment of money on behalf of an RCC councillor.

Over one third of the matters currently received by the ICAC concern local government. This is no surprise, given their number and the range of activities they undertake. However, the one issue that is the subject of most complaints to the ICAC from the public concerns planning decisions made by councils. Over 16% of all the complaints received by the ICAC in 2000-2001 from the public concerned development approvals.

Development applications represent a significant economic investment. Councillors make decisions daily on a vast range of project that impact on our economy, our community and our quality of life. It is vital that the public are assured that planning decisions are made on their merits, and not out of self interest or financial gain for the decision makers.

In the present case there was evidence to suggest that two councillors were involved in soliciting substantial bribes from developers in return for supporting those developments. Such actions go to the core of the integrity of the planning process. There was a clear public interest for such allegations to be thoroughly investigated to determine if they were accurate and if so to identify those involved.

HOW DID THE ICAC INVESTIGATE?

The solicitation of bribes is, by its nature, a secretive process. In particular, where each party consents to the corrupt transaction, it is unlikely that evidence of

the corrupt nature of the transaction will be readily available. It was desirable that the identity of all those engaging in such corrupt activities be established as well as the full extent of their activities. To do this effectively it was necessary for the ICAC to make full and extensive use of a number of its powers. In particular, it was necessary to make extensive use of covert electronic surveillance.

The ICAC gathered evidence in the following ways:

Telephone Interception

When serious criminal offences are suspected, such as bribery, the ICAC has the power to apply to the Administrative Appeals Tribunal for a warrant to listen to and record telephone conversations. Warrants are issued under the provisions of the *Telecommunications (Interception) Act 1979*. Warrants can remain in force for a period of up to 90 days. A further warrant is required to continue intercepting after this time. During the course of the investigation the ICAC obtained 34 warrants authorising the interception of telecommunication services. Some of these were renewals of warrants which expired. This enabled the ICAC not only to intercept telephone calls but also text messages sent by Short Message Services (SMSs), which were extensively used by some individuals.

Listening Devices

The *Listening Devices Act 1984* gives the ICAC the power to apply to a judge of the Supreme Court for a warrant authorising the ICAC to listen to and record private conversations between persons identified in the warrant. Such warrants remain in force for a period of up to 21 days after which it is necessary to obtain a further warrant. Given the long running nature of this investigation it was necessary to renew such warrants on a number of occasions. The relatively short duration of each warrant explains the fact that during the course of the investigation 53 listening device warrants were obtained.

Physical Surveillance

Physical surveillance is a useful but resource-intensive investigative technique. It was particularly useful in identifying those attending meetings and establishing relationships between particular individuals.

Search Warrants

The *ICAC Act* also gives the ICAC powers to apply to a magistrate for a warrant to search premises. During the course of the investigation the ICAC obtained and executed 12 such warrants which resulted in the ICAC obtaining a number of relevant documents and physical assets, including computers, which materially assisted the investigation. The ICAC conducted extensive computer forensics, using Encase methodology, on the computers seized pursuant to these warrants.

Notices to Produce

The *ICAC Act* permits the ICAC to serve a notice on persons or organisations for the production of documentation. During the course of the investigation 74 such notices were issued to obtain, amongst other things, financial information about a number of people.

THE HEARINGS

The *ICAC Act* provides that for the purposes of an investigation the ICAC may hold hearings. These may be conducted either in public or in private. In reaching the decision as to whether a hearing should be in public or private the ICAC is obliged to have regard to any matters which it considers to be related to the public interest.

Persons who are summonsed to appear at the ICAC to give evidence must answer all questions honestly and truthfully. Serious penalties are provided if false or misleading evidence is given.

Initially a number of private hearings were conducted to protect the integrity of the investigation and to enable the ICAC to determine if there was sufficient probative evidence to warrant further investigation and to conduct public hearings. Private hearings were conducted over 12 days.

Given the importance of the issues involved, the substantial evidence gathered by the ICAC indicative of corrupt conduct and the maintenance by the parties there was no corrupt conduct, the ICAC believed it was in the public interest to hold public hearings. The purpose in doing so was to gather further evidence to assist the ICAC in its investigation and to publicly

expose serious corrupt conduct on the part of councillors and others

Public hearings were held over 10 days commencing on 1 May 2002. During this period evidence was taken from 10 witnesses. Some witnesses gave evidence on more than one occasion and over a number of days.

The ICAC Commissioner, Irene Moss AO, conducted the hearings.

Mr Gregory Farmer acted as ICAC counsel in the hearings.

OUTCOMES

Findings are made in the report that the following persons engaged in corrupt conduct:

Andrew Smyrnis (Chapters 3, 4, 6 and 7).

Adam McCormick (Chapters 4 and 6).

Manuel Limberis (Chapters 3 and 4).

Con (aka Costa) Chartofilis (Chapter 4).

Tony Retsos (Chapter 6).

Terry Andriotakis (Chapter 7).

Recommendations are also made that the Director of Public Prosecutions give consideration to the prosecution of the persons listed below for the specified offences listed below:

Andrew Smyrnis

soliciting or receiving (or agreeing to receive) a corrupt reward or benefit contrary to s.249B(1) of the *Crimes Act 1900* or conspiracy to commit bribery (Chapters 4, 6 and 7), and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapters 3, 4 and 6).

Adam McCormick

soliciting (or agreeing to receive) a corrupt reward or benefit contrary to s.249B(1) of the *Crimes Act 1900* or conspiracy to commit bribery and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapters 4 and 6).

Manuel Limberis

aiding, abetting and procuring an offence under Part 4A of the *Crimes Act 1900* contrary to s.249F of the *Crimes Act 1900*, or conspiracy to commit bribery (Chapter 4), and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapters 3 and 4).

Con Chartofilis

giving a corrupt reward or benefit contrary to s.249B(2) of the *Crimes Act 1900* or conspiracy to commit bribery and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapter 4).

Tony Retsos

aiding, abetting and procuring an offence under Part 4A of the *Crimes Act 1900* contrary to s.249F of the *Crimes Act 1900*, or conspiracy to commit bribery and giving false and misleading evidence contrary to s.87 of the *ICAC Act 1988* (Chapter 6).

Terry Andriotakis

offering a corrupt reward or benefit contrary to s.249B(2) of the *Crimes Act 1900* or conspiracy to commit bribery (Chapter 7).

Legislative changes

The ICAC's investigation raised the issue of what action can be taken to remove a councillor against whom there is substantial evidence of corrupt conduct.

At the commencement of the ICAC's investigation, the *Local Government Act 1993* provided that the Governor could dismiss the mayor and councillors of a council only if there had been a public inquiry and after considering the results of the inquiry the Minister for Local Government recommended dismissal to the Governor.

Given the evidence presented during the ICAC hearings the Government determined to act promptly to introduce legislation enabling the removal from office councillors against whom the ICAC had made findings of corrupt conduct. As a result the Parliament passed a number of amendments to the *Local Government Act 1993* and the *ICAC Act 1988*.

In short, the amendments allow the Governor to dismiss a councillor from office if the ICAC makes a recommendation in its report that consideration be given to the suspension of the person from office with a view to his or her dismissal for serious corrupt conduct and the Minister for Local Government suspends the person as recommended and advises the Governor that dismissal is necessary in order to protect the public standing of the council concerned and the proper exercise of its functions.

Other amendments provide for the removal of all councillors where there is systemic corruption and for the suspension of a member of council staff against whom a finding of serious corrupt conduct has been made.

These amendments are important as it will no longer be possible for councillors or council officers who have engaged in serious corrupt conduct to continue in their role or to be paid fees or salary or to be involved in the day to day decision making of their council where the ICAC has made a finding of serious corrupt conduct.

Recommendations are made in Chapters 4 and 6 of this report that consideration be given to the suspension of Councillor Adam McCormick from civic office under s. 440C of the *Local Government Act 1993* with a view to his dismissal for serious corrupt conduct.

The evidence before the ICAC did not indicate the level of systemic corruption within Rockdale City Council to warrant a recommendation that consideration be given to the dismissal of all councillors. There was no evidence that any staff member of council acted other than professionally and properly in the discharge of their duties and no suggestion that any had acted corruptly.

Given that the evidence obtained in this investigation established that the corrupt conduct within Rockdale City Council was limited to Councillor McCormick and Councillor Smyrnis, and given the recommendations in this report concerning the former, and the resignation of the latter, no recommendation is made that an environmental planning administrator be appointed to Rockdale City Council pursuant to s.118 of the *Environmental Planning and Assessment Act 1979*.

Furthermore, there are no recommendations regarding suspension of development consents or modifications, permitted by s.124A of the *Environmental Planning and Assessment Act 1979*, in relation to the development proposals the subject of this investigation.

NOTE ON TRANSCRIPTION OF EVIDENCE

This investigation made extensive use of evidence gathered by means of electronic surveillance, particularly SMSs. Anyone familiar with SMS technology and transmissions will appreciate that contractions are often used, and “typing” errors occur frequently. The SMSs used as evidence in this report have been transcribed literally, with contractions and errors left in place. To assist the reading of this evidence, these have not been marked with “(sic)”, unless for the purpose of examining the evidence, it is necessary to ensure that it is clearly understood that the text in question is transcribed accurately.

SECTION 78(2) RECOMMENDATION

Pursuant to s.78(2) of the *ICAC Act* the ICAC 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.

CHAPTER 2 — ROCKDALE CITY COUNCIL AND DEVELOPMENT APPLICATIONS

THE COUNCIL

Rockdale City Council services the city of Rockdale and surrounding areas. Rockdale is located near Botany Bay, about 12km from the Sydney central business district. It has a population of 92,000, about 45% of which come from non-English speaking backgrounds. Growth in the area has been relatively stable, however a number of new medium and high density housing developments have recently come before RCC which is also implementing a major urban regeneration project in the former industrial precinct at North Arncliffe. RCC has an annual budget of approximately \$50 million.

In the financial year 2000-01 RCC considered development applications valued at over \$283 million.

There are 5 wards within the RCC area with 3 councillors representing each ward. At the time of the investigation six councillors belonged to the Australian Labor Party, 4 to the Liberal Party and 5 were Independents. The following is a list of RCC councillors and their political affiliations at the time of the commencement of the ICAC's public hearings:

First Ward

Yvonne Bellamy (Independent)
Phillip Kaloudis (Liberal Party)
Adam McCormick, Deputy Mayor (ALP)

Second Ward

Jeannette Brennan (Liberal Party)
Christopher Miles (ALP)
Shaoquett Moselmane, Mayor (ALP)

Third Ward

Geoffrey Hedge (Liberal Party)
Angela Koutoulis (ALP)
Bill Saravinovski (ALP)

Fourth Ward

Liz Barlow (Independent)
Steven Holroyd (ALP)
Andrew Smyrnis (Liberal Party)

Fifth Ward

Peter Bryant (Independent)
Kent Johns (Independent)*
Brian Peacock (Independent).

* Resigned from ALP 30 January 2002 and now sits as an Independent Councillor.

Smyrnis resigned from RCC during the ICAC public hearings as a direct result of the evidence before the ICAC.

Moselmane became Mayor in September 2000 and was re-elected to this position in September 2001. McCormick became Deputy Mayor in September 2001.

Councillors are elected by enrolled property owners and residents in the RCC area every four years. The last such election was in September 1999. A mayor is elected from among the councillors each year by the councillors.

As a corporate body RCC can only make a decision by making a resolution at a properly called and constituted meeting. There must be a quorum for a meeting. The quorum for any meeting is a majority of the councillors who hold office for the time being and are not suspended from office. The Mayor, or at the request of or in the absence of the Mayor, the Deputy Mayor, presides at RCC meetings. The person presiding at the meeting has a casting vote in the event of an equality of votes.

RCC meets on the second and fourth Wednesday of each month. Development Applications are initially considered by the City Development Committee (CDC), which meets on the first and third Wednesday of each month. The CDC comprises seven councillors with membership being determined by the councillors each year. The CDC had delegated powers to approve DAs in accordance with the recommendations contained in the report on the DA prepared by RCC officers. If the CDC wished to depart from any recommendation the DA would have to be referred to a full council meeting.

DEVELOPMENT APPLICATIONS

The *Environmental Planning and Assessment Act 1979* (“the *EP&A Act*”) and the *Local Government Act 1993* (“the *LG Act*”) set out the system for local government planning and assessment in NSW.

This system is supplemented by various planning instruments. These are State Environmental Planning Policies (SEPPs), Regional Environmental Plan (REPs), Local Environmental Plans (LEP) and Development Control Plans (DCPs). SEPPs and REPs are the domain of the State Government, whereas LEPs are primarily the domain of local government and generally cover the whole or part of a local council area. DCPs deal in more detail with matters covered in the relevant LEPs and REPs.

The first step in gaining consent for a proposed development is to lodge a Development Application (DA).

Most DAs are required to be publicly exhibited to enable interested persons to submit comments. Before determining a DA a council may request the applicant to provide it with additional information. Such requests are required by the *LG Act* to be made within 21 days from receipt of the DA.

A council determines DAs taking into account the relevant environmental planning instruments. The council is also required to have regard to the likely impact of the proposed development on the surrounding area, the general suitability of the site for development, any submissions received from the public and the public interest.

Initially, council officers consider the DA and prepare a report to council. The report sets out details concerning the DA and examines whether it complies with relevant requirements and policies. These reports can recommend whether council should approve or reject a proposed development. Such recommendations are not binding on the councillors.

A council can determine a DA by granting consent, either conditionally or unconditionally or by refusing the DA. A DA may be approved subject to a condition that the consent not operate until the applicant satisfies the council as to any matter specified in the condition. This is known as a “deferred commencement” consent.

Generally, a council is deemed to have refused a DA if it has not made a determination on the DA within 40 days of the lodgement of the DA. Any period in which the council is waiting for additional information it has requested from the developer is not required to be taken into consideration in calculating this period.

Once the DA has been determined a “Notice of Determination of Development Application” is issued advising the applicant. If the DA is approved, the Notice will set out details of any conditions of consent and the reasons for those conditions. If the application is refused the Notice will set out reasons for the refusal.

An applicant may appeal to the Land and Environment Court against a refusal by a council to grant consent for a DA.

CONDUCT OF COUNCILLORS

The *LG Act* establishes provisions for the exercise of functions by and conduct of local councils and councillors. Its stated purpose is to provide a legal framework for the effective, efficient, environmentally responsible and open system of local government in NSW. Needless to say, the soliciting or accepting of corrupt benefits by councillors in relation to the obtaining of council approval for DAs strikes at the very heart of effective, efficient and open government.

Under the *LG Act* the role of a councillor as a member of the council’s governing body is to direct and control the affairs of the council in accordance with the *LG Act*. Importantly, s.232(2) of the *LG Act* stipulates their role as an elected person is:

- to represent the interests of the residents and ratepayers;
- to provide leadership and guidance to the community
- to facilitate communication between the community and the council.

Every councillor is required to act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions. Councillors are required to observe the code of conduct adopted by their council.

The RCC Code of Conduct contains a Statement of Ethics. This provides that decisions are to be made

“... solely in terms of the public interest. We will not do so in order to gain financial or other benefits for ourselves or our family”. The Code also provides that “councillors and staff should not take advantage of their position to influence other members of staff in the performance of their work in order to gain, either for themselves or for any other person or body”. As illustrated in this report the conduct of Councillors Smyrnis and McCormick fell well short of these standards.

The *LG Act* places an obligation on a councillor to avoid being placed in the position where a private interest conflicts with his or her public duty. In particular, the *LG Act* imposes two obligations. Section 449 of the *LG Act* requires disclosure through the lodgement of returns listing financial interests. A return must be lodged within three months of a person becoming a councillor and thereafter by 30 September each year. The General Manager of the council is required to keep a register of such returns. Section 451 of the *LG Act* prohibits a councillor with a pecuniary interest from voting in certain circumstances. A councillor, who is present at a meeting and who has a pecuniary interest in a matter before the meeting, is required to disclose the interest to the meeting and is prohibited from taking part in consideration of the matter or voting. Essentially, there is a pecuniary interest if there is a reasonable likelihood or expectation of appreciable financial gain or loss. Breaches of pecuniary interest provisions are dealt with by the Local Government Pecuniary Interest Tribunal.

CHAPTER 3 — 2-4 PARKER STREET, ROCKDALE

This chapter details the events relating to the evidence of the first attempt by Smyrnis to obtain money from a developer and the use of a formula to calculate the amount of the payment. Manuel Limberis acted as intermediary.

A DA for the site at 2-4 Parker Street, Rockdale, was submitted to RCC on 11 June 1999. It was for an eight storey mixed residential and commercial development. RCC issued a Notice of Determination refusing consent in December 1999. The developer, Mr Robert Britt, unsuccessfully appealed to the Land and Environment Court.

Subsequently, there were a number of meetings organised by RCC between Mr Britt, the councillors (including Smyrnis) in whose Ward the proposed development was located, RCC officers and the objector to the DA. As a result of these meetings a modified DA was submitted to RCC on 6 November 2000. RCC approved a DA for a four storey mixed residential and commercial development in January 2001.

In his evidence to the ICAC, Britt said he met with Limberis on 10 October 2000. At this time Limberis offered to lobby Smyrnis to support the DA. Britt says Limberis told him that it would cost \$150,000 to obtain approval for a five level development and \$90,000 for approval for a four level development. Britt said he told Limberis there was no point lobbying Smyrnis because Britt already understood that Smyrnis supported the proposed development.

Britt says he understood Limberis was offering to act as a consultant and lobby for the approval of the project.

But did he expand upon anything as to who or how it might be that for \$150,000 you could get your five levels approved?—No, I – he didn't expand and I didn't want to ask.

Limberis describes his occupation as builder/development manager. He is a professional engineer by trade. He and Smyrnis are childhood friends and Smyrnis is godfather to his son.

In his initial evidence to the ICAC Limberis confirmed he approached Britt, but said he did so for the purpose of offering his services as a lobbyist.

Do you recall saying to him, that is Mr Britt, that if you get five levels approved it'll cost you \$150,000 and \$90,000 for a four level approval?—No, I can't remember, but I – I may have said that, depending on what the value of the building was. I – I don't think that sounds exorbitant.

For doing what, lobbying?—Getting it through Council.

Who were you going to lobby on that in relation to that site?—Lobby the normal process through Council and like I say, it may not have been me personally, but I would have dressed him up so he went and said the right things and – and gave some sort of merit to his application.

Limberis denied approaching Britt on behalf of Smyrnis for the purpose of soliciting a bribe.

Subsequently, Limberis reconsidered this evidence in light of the electronic surveillance evidence available to the ICAC, and the decision by Smyrnis to admit his involvement in corrupt activities. Limberis conceded that he had spoken to Britt at the behest of Smyrnis on 10 October 2000 and was aware that in effect he was soliciting a bribe whereby Britt would pay money to him to be passed on to Smyrnis. He said he knew at the time what he was doing was corrupt.

So far as you were aware, the purpose of the bribe was for Mr Smyrnis to give favourable consideration to the Development Application?—The way it was put to me was that this particular development had merit, it had been redesigned, it was a good – a good redesign. Mr Britt was seeking some help. I should go there and talk to him and offer him something that he hasn't got, which is contacts in Council. There was a sum of money, like you mentioned. I can't remember what that sum of money was. I tabled it to him. He said for that amount of money he'd prefer to take his chances at the Land and Environment Court.

As you say, the request for you to do those things came from Andrew Smyrnis, is that right?—That's correct.

Limberis confirmed that Britt had rejected the offer of assistance.

Limberis said that although he agreed with Smyrnis to facilitate the payment of the bribe he did not propose receiving any of the monies for his own use. He was asked why he was prepared to facilitate the payment of the bribe without any financial reward and gave the following evidence:

We've been friends for probably thirty years. He's godfather to my son. He's always given me the right advice. He helped me out with a sticky situation with my former employer. He helped me out with a lot of situations. I figured I could pay him something back by helping him out.

In his initial private evidence to the ICAC Smyrnis denied arranging for Limberis to approach Britt for the purpose of soliciting a bribe. Subsequently, following commencement of the public hearings, Smyrnis conceded that he had instructed Limberis to contact Britt to solicit a bribe from him. He said this was the first occasion on which a developer had been approached for monies. He gave the following evidence:

The knowledge that you have is that Manuel Limberis, at your behest, spoke to Mr Britt, is that right?—Yes.

You had requested Limberis to ask Britt to solicit a bribe from him, is that right?—Yes.

...

Again, in relation to Britt you were hoping to secure to yourself the payment of money with a view to you giving some favourable consideration to his Development Application, is that right?—Yes.

He said no other councillor was involved in relation to the approach to Britt.

As to the calculation of the amount requested from Britt, Limberis gave the following evidence:

And if the approval was for five levels, he would be required to pay the sum of \$150,000, is that right?—It sounds like typical for the formula on performance base.

The formula being what?—A fixed portion, plus a performance based on the difficult phases of development applications which may have been more levels or something which was particularly strange about that application.

DOSAN PTY LTD

Limberis also said that he had made an approach to a company called Dosan Pty Ltd at the request of Smyrnis. At the time he understood Dosan Pty Ltd had a DA before RCC.

Limberis said he spoke with "Peter" at Dosan Pty Ltd by way of initial approach. It appears that this was to sound out the company's situation and whether it would be amenable to an approach. He could not recall whether any money was mentioned.

The ICAC obtained a statement from Peter Douroudis, a director and shareholder of Dosan Pty Ltd. He confirmed that he was approached by Limberis however he says the only discussions that took place were in relation to the company's general business operations.

There was insufficient evidence to determine whether any intention had been formed between Limberis and Smyrnis to approach Dosan Pty Ltd with a view to soliciting a bribe, and certainly on the evidence there was no such solicitation. In these circumstances there is insufficient evidence on which to make any adverse findings or recommendations in relation to Limberis or Smyrnis.

FINDINGS OF FACT

Based on the evidence before me, which is summarised above, I make the following findings of fact:

1. On 10 October 2000 Manuel Limberis, at the request of Andrew Smyrnis, met with Robert Britt. During the meeting he told Britt that in return for him lobbying Andrew Smyrnis to obtain support for Britt's DA for 2-4 Parker Street, Rockdale, it

would cost Britt \$150,000 to obtain approval for a five level development and \$90,000 for a four level development.

2. Limberis sought money from Britt on behalf of Smyrnis knowing that in return Smyrnis would give favourable consideration as an RCC Councillor to Britt's DA for 2-4 Parker Street, Rockdale.
3. On his own admission, Smyrnis instructed Limberis to contact Britt with the intention of seeking money from Britt in return for Smyrnis giving favourable consideration as an RCC Councillor to Britt's DA for 2-4 Parker Street, Rockdale.
4. No monies were paid or agreed to be paid by Britt to Limberis or Smyrnis.

CORRUPT CONDUCT?

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

The soliciting of money for the purpose of influencing the performance of official functions, whether or not the money is actually paid, is conduct which clearly comes within s.8(1)(a)-(c) and s.8(2)(a), (b), (d) and (y) of the *ICAC Act*. Conduct comprising a conspiracy to engage in conduct that is corrupt under s.8(1) or (2) is itself to be regarded as corrupt pursuant to s.7(2) of the *ICAC Act*.

The conduct of Smyrnis could constitute criminal offences of bribery, soliciting a corrupt benefit contrary to s.249B(1) of the *Crimes Act 1900*, and conspiracy to commit bribery for the purposes of s.9 of the *ICAC Act*.

The conduct of Limberis, even though he may not have intended to retain any part of the monies to be obtained from Britt for his own use, could constitute criminal offences of aiding, abetting or procuring the solicitation of a corrupt benefit contrary to s.249F of the *Crimes Act 1900* or conspiracy to bribe for the purposes of s.9 of the *ICAC Act*.

In these circumstances I find that both Limberis and Smyrnis engaged in corrupt conduct in relation to seeking monies in return for Smyrnis giving favourable consideration to Britt's DA.

SECTION 74A(2) STATEMENT

Section 74A(2) of the *ICAC Act* provides that, in respect of each "affected person" a report must include a statement as to whether or not in all the circumstances the ICAC is of the opinion that consideration should be given to the following:

- (a) 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.

The term "affected person" is defined as including a person against whom, in the ICAC's opinion substantial allegations have been made in the course of or in connection with the investigation. For present purposes, in relation to the matters set out in this chapter, Smyrnis and Limberis can be regarded as "affected persons".

Each of Smyrnis and Limberis gave evidence with the benefit of a declaration made pursuant to s.38 of the *ICAC Act*. The result of this is that their evidence is not admissible against them in criminal or disciplinary proceedings other than in proceedings for an offence against the *ICAC Act*.

The evidence given by Britt concerning the approach made to him by Limberis would be available. However his evidence is that he did not understand the approach being made to him by Limberis to involve the solicitation of a bribe. He understood Limberis to be offering lobbying services. Limberis did not expand upon his offer and Britt did not wish to pursue the matter further. There is no relevant electronic surveillance in relation to this matter.

In these circumstances, given that there appears to be insufficient admissible evidence in relation to this matter, I do not make any recommendation that consideration be given to the prosecution of Smyrnis or Limberis in relation to the soliciting of money from Britt.

In considering whether any recommendation should be made that consideration be given to the prosecution of Smyrnis or Limberis for offences of giving false and misleading evidence, it is relevant to take into account that both ultimately changed their evidence and admitted their involvement what has been found to have been corrupt conduct.

In relation to Smyrnis there is also evidence to indicate he played a positive role in ultimately persuading Limberis and Tony Retsos, another intermediary used by him (see Chapter 6) to change their evidence and cooperate with the ICAC. I also note the personal toll the investigation has taken on Smyrnis and Limberis, and in particular the impact on Smyrnis' professional and family life.

However the admissions made by Smyrnis and Limberis, and Smyrnis' cooperation, only came after the overwhelming nature of the evidence obtained by the ICAC became apparent to them. The giving of false or misleading evidence to the ICAC is a serious matter and must be treated accordingly.

In all the circumstances, I have formed the opinion that the DPP should give consideration to the prosecution of Smyrnis and Limberis for offences of giving false or misleading evidence contrary to s.87 of the *ICAC Act* in relation to their initial denials that Limberis approached Britt on behalf of Smyrnis for the purpose of soliciting a bribe.

The cooperation of Smyrnis and Limberis will be brought to the attention of the DPP at the time the relevant evidence is referred for consideration.

CHAPTER 4 — THE TAILOR SITE - BRIBERY

This chapter examines evidence that Councillors Smyrnis and McCormick solicited monies from a developer, Con (aka Costa) Chartofillis in return for arranging to have his DA approved by RCC. Once again Limberis acted as intermediary between Smyrnis and the developer.

A DA was submitted to RCC on 16 November 2001 for redevelopment of property at 2-4 Frederick Street, Rockdale. This site is owned by Chartofillis who operates a tailor's business known as Meraklis Tailors from the site. The DA was for an eight storey mixed commercial and residential development. The proposed size of the development presented difficulties in that any development above four levels would exceed the permissible floor space ratio. There were also some other concerns regarding drainage and traffic.

Nick Katris was the architect for the project. It was common ground that he was not aware of or involved in any corrupt solicitation of monies from Chartofillis.

In the course of executing search warrants on Chartofillis and Smyrnis' office copies of a letter dated 25 July 2001 on the letterhead of Strategies & Management Pty Ltd were located at each of the premises. A copy of this letter is reproduced on the following page. On its face it is an agreement between Chartofillis and Manuel Limberis, as director of Strategies & Management Pty Ltd, whereby Chartofillis has accepted, with some amendments, a quotation for the provision of lobbying services in relation to the proposed DA. The amended agreement provides for a payment of \$40,000 for "lobbying all parties to consolidate approval for 4 levels" and thereafter \$70,000 per floor for each additional floor. The agreement provides that GST is additional.

Also obtained by search warrant was an unsigned letter from Chartofillis to Limberis dated 16 August 2001 accepting this amended quotation and asking that work commence as soon as possible.

Three invoices from Strategies & Management Pty Ltd to Meraklis Pty Ltd were also obtained when executing a search warrant. These are generally expressed as being for the provision of consulting services. Dated

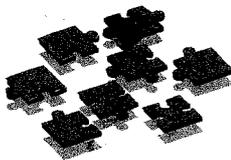
25 July 2001, 31 July 2001, and 12 December 2001 they are for \$15,000, \$25,000 and \$10,000 respectively, plus GST. Chartofillis did not always pay these invoices on time and accordingly a number of reminder invoices were also sent to him from time to time.

Limberis is registered as the director of Strategies & Management Pty Ltd. However, when executing the search warrant on Smyrnis' office, a declaration of trust document was obtained which is signed by Limberis and Smyrnis. Under this document Smyrnis is the beneficial owner of one of the two shares in the company.

The ICAC's investigation also ascertained that between 28 August 2001 and 14 January 2002 five deposits totalling \$54,500 were made from banking accounts controlled by Chartofillis to the Strategies & Management Pty Ltd bank account. On 9 October 2001 the amount of \$40,489 was withdrawn from this account and paid into the account of Kamarga Constructions Pty Ltd, another company of which Limberis is director. A further sum of \$10,000 was withdrawn on 21 January 2002 and also paid into the account of Kamarga Constructions Pty Ltd.

Between 3 July 2000 and 25 January 2002 there were 17 transfers of funds from the Kamarga Constructions Pty Ltd account to the account of A&S Smyrnis Pty Ltd, a company controlled by Smyrnis. These transfers total \$320,439. The most recent were transfers on 24 September 2001, 26 September 2001, 8 October 2001, and 25 January 2002 for \$15,000, \$10,000, \$19,939 and \$5,000 respectively.

In initial evidence in private hearings Smyrnis and Limberis denied any knowledge or involvement in soliciting payments from Chartofillis for or on behalf of Smyrnis or other RCC councillors. They sought to maintain the fiction that Limberis was legitimately engaged by Chartofillis. Limberis said that he was being paid to make sure the DA had merit by using his experience to give Chartofillis guidance about what reports he needed and refining the drawings. He also said he had spoken to a couple of councillors to find out the "history of the application".



STRATEGIES & MANAGEMENT

(ACN 097 568 593)

34 Rawson Avenue,
Bexley NSW 2207
Tel: 0412 236 333 Fax: 95887869

25 July, 2001

Meraklis Pty Ltd
2 Frederick St
ROCKDALE NSW 2216

Ref: Priv. MERAKLIS.quote.1

Dear Con,

Re: Property at Cnr Railway and Frederick St Rockdale

We submit our quotation costs and incidentals to acting on your behalf in relation to the rezoning (if applicable) and obtaining approval for at least 4 a four storey building as discussed and agreed to and incorporating:

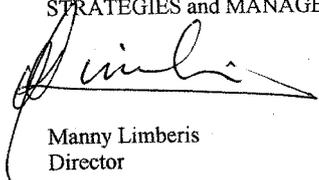
1. Lobbying all parties to consolidate approval for 4 levels (including all previous work done to get to this current position) \$40,000
40,000
2. Lobby all parties to get approval for floors additional to 4 at the agreed rate of ~~\$67,000~~ 70,000 per floor (if successful)

Note: (a) These prices are nett so GST needs to be added to them.
(b) These figures include all disbursements
(c) Payment must be made prior to any further work commencing
(d) Signing this document represents approval and acceptance of same
(e) Tax invoices will be issued for each portion of 1. And 2. above.

We thank you for the opportunity to price this work and await your further instruction. If in the meantime you want other aspects of your project priced we would be happy to help. Should you have any queries or require clarification of the above quote please do not hesitate to call me on 0412 236 333.

Yours faithfully
STRATEGIES and MANAGEMENT Pty Ltd

COSTAS CHARTO FILI


Manny Limberis
Director



Limberis denied that any of the monies paid by Chartofillis to Strategies & Management Pty Ltd went to Smyrnis. He explained that monies paid from the Kamarga account to Smyrnis were part of a \$25,000 monthly retainer for “advertising, stationery, printing and advice”.

Subsequently, after becoming aware of the substantial electronic surveillance evidence obtained by the ICAC, and after the commencement of the public hearings, both Smyrnis and Limberis admitted that Limberis acted as an intermediary for Smyrnis in arranging the payment of monies from Chartofillis to Smyrnis in return for Smyrnis working to obtain RCC approval for the DA. Smyrnis gave the following evidence:

Again a formula was put to him (Chartofillis) in the sense of monies upfront plus a success fee depending on how many levels were approved, is that right?—Yes.

In this case monies were actually paid?—Yes.

They were paid by, or on behalf of Chartofillis to Strategies & Management?—Yes.

Contrary to his initial evidence, Smyrnis admitted that Strategies & Management Pty Ltd had been set up purely to provide a façade to disguise the corrupt arrangement. The agreement between Limberis and Chartofillis set out in the letter of 25 July is a sham, designed as a cover for the true purpose of the payments being made to Limberis.

Of the \$54,500 paid by Chartofillis some \$49,500 had been transferred to Smyrnis with \$5,000 being retained by Limberis.

Smyrnis said that Chartofillis had initially approached him for assistance. Smyrnis then asked Limberis to deal with Chartofillis. Smyrnis said that he had never discussed directly with Chartofillis the payment of money in return for giving his DA favourable consideration.

Limberis confirmed that Smyrnis asked him to talk to Chartofillis. Smyrnis told him what figures to put to Chartofillis. He gave evidence about the negotiations leading up to the agreement:

I think Mr Chartofillis tried to negotiate with me the figures. At that point I said openly to

him, “look, you’re negotiating with the wrong guy, I’m not – I don’t get one cent of this money,” you know, “whatever agreement you had with Andrew or whoever you spoke to” – I said – “that’s the figures they came back to me with.” I think he – he managed to reduce the upfront cost and add some money onto the – onto performance based part, and I went back to Andrew and he accepted that.

As to what Chartofillis was told, he gave the following evidence:

So far as you were aware, did Chartofillis know that you were merely the go-between, between he, Chartofillis, and Andrew Smyrnis?—I made it perfectly clear in the – in the meeting that we had when he started negotiating the – negotiating the – the contract fee, that I don’t make one drachma out of what – what monies requested it, were.

...

Did you tell him that Councillor Andrew Smyrnis was at the other end of the deal?—I can’t remember, I can’t remember. It would have been understood I – I guess that it was Andrew on the other end of the deal. I don’t know whether I specifically said that but I didn’t have a reason to think that he would think it would be someone else.

Did you, as far as you’re aware, make it clear to him that it was a bribe that he was paying?—I make it clear to him? I said, “this is money. You’ve gone to seek some help to get your application through. This is what they’ve come back with. Are you happy with that?”

You dressed the arrangement up, so to speak, as a contract for the provision of, in effect, lobbying services?—Yes.

That was just a façade for what the payments were really meant for, wasn’t it?—On this occasion, yes.

Limberis confirmed that he had kept \$5,000 of the monies paid by Chartofillis. He said he had done so as he had been having some cash flow problems but

ultimately intended to forward the money onto Smyrnis.

Smyrnis gave evidence that he expected Limberis would keep the \$5,000 and could expect to receive an additional amount depending on the success of the DA.

Limberis said that it was his understanding in his discussions with Smyrnis that other councillors were involved but he had never been told their identity.

In his initial evidence to the ICAC Smyrnis denied having any agreement with McCormick in relation to this DA. After admitting his own involvement he said he had an arrangement with McCormick whereby McCormick would be paid for his assistance in getting RCC to approve more than four levels. He gave the following evidence:

You were dealing with McCormick on the basis that he too would share in any monies that were paid?—Yes.

Did he share in any of the \$54,000 odd that was paid?—No.

Was he aware that \$54,000 odd had been paid?—I don't think so.

He was promised monies in relation to his vote, as it were?—Yes.

Smyrnis said that McCormick initially wanted to be paid \$70,000 in cash once the DA had been approved. Subsequently McCormick sought a larger amount. Smyrnis said that he was not aware of any other councillors who were to be paid by McCormick.

Smyrnis said that McCormick became involved in order to get ALP support for the DA so it would get RCC approval.

Despite this evidence and substantial evidence obtained by way of electronic surveillance, both Chartofillis and McCormick denied having any knowledge or involvement in corrupt dealings concerning this DA. Accordingly, it is necessary to examine the evidence relating to their conduct in some detail.

CHARTOFILLIS

Chartofillis said that in about late 2000 he approached Smyrnis as his Ward Councillor for advice on the proposed development. He said Smyrnis outlined to him the applicable council planning guidelines. Chartofillis said he wanted to erect a larger building than appeared to be permitted by these guidelines. He said Smyrnis told him RCC was interested in developing the area and it was possible it would allow a larger building.

Chartofillis said about a few weeks later Smyrnis rang him and suggested he contact Limberis as "... a person who does searches, so that he can help me to find the right things ...".

Chartofillis met with Limberis. At the hearing, he was asked what Limberis said he would do:

... he told me that he had to do searching all around the area, all around the other side – the other side – the other side of Rockdale to see the height of buildings and the station and the autos around the station and all that and they would find out if there was any problem with the RTA and that – that's – that's it, no nothing more.

He agreed he had entered into an agreement with Limberis to pay \$40,000 upfront and \$70,000 for every floor approved above four floors. Although he had a solicitor he did not seek the advice of his solicitor before signing the agreement.

He was very vague on what Limberis was to do in return for the money. He gave the following evidence:

I understood that he was going to look at buildings. No, he would go – he would give the council papers, so they would be ready for the council, not to pass the application, but to – to check it.

The written agreement refers only to lobbying and makes no mention of such work.

Chartofillis agreed that his architect, Katris, was in fact responsible for preparing and obtaining all necessary reports for submission to the RCC in relation to the DA. Chartofillis said he never told Katris that he had engaged Limberis because Limberis told him

not to say anything. Katris confirmed he was unaware Chartofillis had engaged the services of Limberis.

Although Chartofillis had agreed to the payments in August 2001, and had commenced making payments, by the time he first gave evidence to the ICAC in March 2002 he said he had still not received any reports from Limberis on what he had done.

And you didn't receive any reports or correspondence or anything from them telling you what they'd done, is that right?—No.

He gave the following evidence:

And you know you've paid the last amount of \$10,000 in January of this year, didn't you?—Yes.

Two months ago?—Before I get upset. Because he ask me for the last payment.

You would have been upset, well and truly before then, they hadn't done anything had they?—Yes I know, I'm silly - - -

He denied knowing that any payments he made to Limberis would be passed on to Smyrnis or that Smyrnis had any interest in Strategies & Management Pty Ltd. Even after having been made aware of the admissions made by Smyrnis and Limberis, Chartofillis maintained that he was not aware that the money he was paying to Limberis would go to Smyrnis.

A handwritten attendance note dated 18 September 2001 obtained when executing the search warrant on Smyrnis' office indicated Chartofillis had rang Smyrnis' office and left a message to advise Smyrnis that he would be attending to a payment that week. The note, written by an employee of Smyrnis, indicated, "I advised that we would like same paid by Friday". It was not disputed that this attendance note related to an overdue payment for Strategies and Management Pty Ltd. Chartofillis was asked why he contacted Smyrnis' office rather than Limberis directly. He said he did so because Smyrnis had helped him find Limberis. He said he could not remember why he had not contacted Limberis about the late payment.

Assessing Chartofillis' evidence

Although Chartofillis had initially approached him, Smyrnis said he directed him to Limberis and never discussed the payment of money with him directly. Limberis said he made it clear to Chartofillis that the money he was asking for was by way of a bribe and that he was taking instructions from someone else. Although he could not specifically recall mentioning Smyrnis by name he had no doubt Chartofillis understood Smyrnis was the person who was ultimately to receive the money.

Smyrnis and Limberis however admitted lying to the ICAC and it would not be appropriate to make adverse findings against Chartofillis based solely on their evidence in circumstances where Chartofillis denied being aware he was making payments through Limberis to Smyrnis. However, there is other evidence which supports that of Smyrnis and Limberis and indicates clearly that Chartofillis was aware of the purpose of the payments.

The spurious nature of the written agreement between Limberis and Chartofillis is confirmed by the vagueness with which the terms of the work to be performed by Limberis are set out. The agreement is expressed in terms of lobbying. No mention is made of doing any other work such as preparing reports for submission to RCC or undertaking traffic or RTA studies. The liability of \$320,000 if all eight floors were approved appears excessive. Chartofillis was only obliged to pay \$40,000 if only four floors were approved. The evidence suggested that four floors were within RCC planning requirements for the property. If the agreement was to be believed on its face additional payments were only due if more than four floors were approved. Yet by mid-January 2002 Chartofillis had paid not only the \$40,000 required by the agreement, but an additional \$14,500 even though no DA had yet been approved. He was not a rich man and it does not appear it was easy for him to raise this money. It is difficult to believe that if the agreement was legitimate he would have paid above the required \$40,000 until such time as the RCC had approved the DA and the number of levels approved were known.

What is even more surprising is that Chartofillis continued to make payments even though he had received no reports from Limberis. It is difficult to

accept he would have thought it was sound business practice to make such substantial payments if he was not getting anything in return, and could not even be sure that he would get anything in return. What is more, he ultimately conceded that the reports he claimed were to be obtained by Limberis as part of the services he was supposedly providing, were in fact being attended to by Katris.

It is particularly relevant that he did not tell Katris about his agreement with Limberis. Katris was his architect who was also, as will be seen in the next chapter, actively engaged in lobbying on his behalf, as well as obtaining necessary reports. If Chartofillis truly believed the agreement with Limberis to be legitimate then it would be expected that not only would he disclose the agreement to Katris but most likely seek his advice as to whether it was appropriate or even necessary to enter into such an agreement.

Finally, there is the fact that when Chartofillis was late with making one of the invoiced payments in September, rather than contact Limberis he contacted Smyrnis' office. His explanation for having done so is not believable. The ICAC is satisfied to the requisite standard that he contacted Smyrnis' office because he was aware that Smyrnis was the real recipient of the money he was paying Limberis and therefore had an interest in knowing when the next payment would be made.

On the whole, Chartofillis did not present as a witness of credit. Even allowing for the fact that English was not his first language and it was often necessary to give his evidence through an interpreter, his answers to questions were often vague or evasive.

MCCORMICK

Throughout his evidence McCormick denied that he had any involvement in corrupt dealings involving developers or Smyrnis. He said he had not received and did not anticipate receiving any money in relation to any development.

McCormick said in evidence he was aware of the proposed development and that the developer was a tailor although he said he did not know his name. Katris, however, told the ICAC that he had contacted McCormick on a number of occasions about the DA

and that by January 2002 McCormick would have been well aware that the name of the developer was Chartofillis. There is no reason to doubt Katris on this point. His evidence is corroborated to some extent by voice messages he left on McCormick's answering machine on 11 January referring to the tailor as "Costa" and 4 February referring to "Con the tailor".

When McCormick initially gave evidence on 26 March 2002 he said he was considering the DA favourably but had not yet made up his mind to support the DA. He said he had spoken about the DA with Katris, Smyrnis, Moselmane and Terry Diamantis. He said he had not lobbied other councillors although he had raised the matter in an ALP caucus discussion.

The ICAC had recorded a substantial body of communication between McCormick and Smyrnis. When this was played to him he either sought to explain away conversations indicative of him being involved with Smyrnis in corrupt dealings with Chartofillis, or, where he was unable to come up with any plausible explanation, claimed his messages to Smyrnis were "fanciful" inventions on his part.

Two weeks after the submission of the DA to RCC, at 3:04pm on 30 November, Smyrnis and McCormick had a telephone discussion. The following excerpt is relevant:

MCCORMICK: Mate, you've gotta look after your little bro!

SMYRNIS: Why is that?

MCCORMICK: (laughs) That, that bloody premium for the tailor was 70, mate.

SMYRNIS: For which?

MCCORMICK: The, the tailor (laughs).

SMYRNIS: Oh, what are you talking about?

MCCORMICK: Nah, mate. I've heard more, mate. So it's got to be 70, mate.

SMYRNIS: For what?

MCCORMICK: The tailor.

SMYRNIS: What have you heard?

MCCORMICK: (laughs) Otherwise your, you're only be half what he wants to be.

McCormick goes on to tell Smyrnis that the Mayor and others are opposed to the development.

In his earlier evidence to the ICAC McCormick had made no mention of any donation to be made by Chartofillis to the ALP, despite being questioned about donations in general. He said he had not asked Chartofillis for a donation for the ALP, was not aware whether anyone else had, and was not aware if Chartofillis had in fact made a donation. After hearing a recording of this conversation McCormick said the reference to 70 was a reference to a donation of \$70,000 that Chartofillis was to make to the ALP. He said he had requested Smyrnis to get the developer to make a donation of \$70,000 to the ALP. He claimed that he had been tired when he gave his previous evidence and had only subsequently recalled the matter.

It is peculiar, to say the least, that McCormick, an ALP Councillor, would request a donation for the ALP through a Liberal Councillor. Particularly relevant to the issue of McCormick's credit is the fact that no-one else seems to have been aware of this potential donation. Chartofillis makes no mention of it in his evidence. Although McCormick said both Diamantis and Katris were aware, both denied any such knowledge. Diamantis vehemently denied McCormick ever told him that Chartofillis was prepared to donate \$70,000 to the ALP. It is difficult to believe that if McCormick was involved in getting Chartofillis to agree to donate \$70,000 to the ALP (either directly or through the Greek Labor Consultative Committee) he would not have made this fact, which would have been something of a coup for him, known to people within the ALP. Mayor Moselmane told the ICAC that McCormick had not told him about the donation and agreed he was surprised McCormick had not shared such information with him.

McCormick sent the following SMS to Smyrnis at 4:15am on 24 December:

So Big Bro when will the tailor be finished with the first piece of my suit? He's taken his time!

McCormick agreed the reference to "tailor" was a reference to Chartofillis. He denied he was asking Smyrnis for money from Chartofillis. He said he was querying why Chartofillis had not yet attended any ALP functions.

Smyrnis told the ICAC that "suit" was a code word for money used between him and McCormick and that one suit was \$10,000.

In a telephone conversation on 24 January 2002 Smyrnis asked McCormick to arrange a meeting between Chartofillis and Terry Diamantis, the President of the Greek Labor Consultative Committee. The purpose of the meeting was to get Diamantis to "work on" Moselmane who in turn could work on RCC officers to get a favourable report on the DA. During the course of the conversation Smyrnis said to McCormick, "Well it's got to happen mate, because the guy's doing his part and he's gathering up that which he's been required to gather up" to which McCormick responds, "Yep, yep, yep".

Smyrnis told the ICAC that he was asking McCormick to arrange a meeting to start mobilising support for the DA by getting Diamantis to speak favourably about it to Moselmane.

McCormick's evidence was that he did not know whether the reference to "the guy" in the telephone conversation was a reference to Chartofillis or Katris, who he said he understood needed to "gather up some things, like an RTA report with some various things, which he hadn't got on to" in relation to the DA. He disagreed that a possible explanation was that Chartofillis was gathering up cash.

Two days later, at 6:20pm, McCormick rang Smyrnis to tell him he had told Moselmane he would be supporting the DA. He told Smyrnis that Moselmane did not support it and he doubted that Diamantis would be able to convince Moselmane. The conversation proceeds:

SMYRNIS: We've got to – we've got to work around this, because, you know, -

McCORMICK: Well, mate I think you've gotta, I think –

SMYRNIS: - started to, you know, he's doing what we've asked him to mate.

McCORMICK: Yeah, well fuck, you know, that's what I mean. Well, if we can't, if we can't do it, we can't do it, we can't do it, but fuck you gotta start –

SMYRNIS: Doesn't look good for us bud, you know –

McCORMICK: Well, you've got to start fucking putting it on Shaoquett mate.

Smyrnis said he would try and speak with Moselmane later in the week and suggested that McCormick arrange for the ALP to caucus to gain support for the DA.

McCormick agreed in his evidence that he had spoken with Moselmane and Diamantis about the DA. He said it came up in a general conversation when they were having coffee. While he denied it was his role to get Diamantis to speak to Moselmane about the DA he conceded he may have asked Diamantis to talk to Moselmane about the DA.

McCormick sent the following SMS to Smyrnis at 9:45am on 9 February:

Terry ready to play hard-ball with Shock! If he don't do that or I call him off, you no suit! Me need bigger suit!

Smyrnis said he understood by this message that McCormick would get Diamantis to put pressure on Moselmane (referred to as "Shock") to support the DA. He understood McCormick to be saying he wanted more money when he referred to a "bigger suit".

McCormick agreed in evidence that he was telling Smyrnis that Diamantis was ready to put pressure on Moselmane. He said the message was "fanciful" and he sent it out of a sense of humour. He said he did not know what the word "suit" meant in the context of this message. He said the word "suit" was a generic term used by him to mean many things, however he conceded when pressed that it could mean money or a deal. He denied he was requesting more money.

Within seconds of the above SMS the following response was sent by Smyrnis:

Suit size has been conveyed. No change allowed now.

Smyrnis said that he was conveying to McCormick that Chartofillis had been told how much money he had to pay and there could be no change.

McCormick said this SMS could have been a reference to the donation Chartofillis was to make to the ALP.

McCormick sent an SMS to Smyrnis on 13 February at 4.37am:

Just to let you know Big Bro, I have been working hard & pulling more strings with head office, Godfather etc. To pull the suit off! So although I don't expect you to do a deal of GM for it, I will be so pissed off if you are not being more maluable costs us clearly! It is a WANT for you that things work out, it's a NECESSITY for me that things work out! So don't be stubborn, arrogant, pigheaded or a closed shop as things MUST come to fruition!

McCormick claimed in his evidence the passage dealing with "want" and "necessity" related to the appointment of a new RCC general manager. However, he was not able to explain satisfactorily why such an appointment was a necessity for him or a want for Smyrnis. He denied the references had anything to do with his personal financial situation. He said he had no financial problems despite his income being limited to what he received from RCC and another allowance. He owed \$500 to Smyrnis for a business they were in the process of establishing. He said his sister had taken out loans to support him.

On 1 March 2002 at 8.34pm Smyrnis sent the following SMS to McCormick:

Lbnk [Nick Katris] tells me he has left a message 4 u 2 call him on at least 5 occasions. Why have u not called him back 2 meet & discuss. What r u doing.

At 8.58pm on that date McCormick responded by SMS to Smyrnis:

I have called him and he said he was going to call me back so not my fault besides he think 8 is asking way too much.

Some 12 minutes later Smyrnis responded by SMS to McCormick:

He told me u were 2 meet with him in your office but u not there 2 take & returned call. Number is up 2 us. As number goes down so does size. Call & meet with nk asa.

In his evidence McCormick said he believed the reference to “us” was a reference to Smyrnis and Chartofillis. He denied it was a reference to the number of floors to be approved being up to him and Smyrnis. He denied the second last sentence in the last SMS meant that as the number of floors approved went down so did the size of any payment. He could offer no explanation for what it meant.

Communications of 3 March

Two days later, on 3 March, at 8.25pm Smyrnis sent the following SMS to McCormick:

Have u contacted nk 2 meet with him, u terry & shocks? Please do this urgently.

McCormick agreed that Diamantis was to meet with Moselmane to talk about the development.

About one minute later Smyrnis sent the following SMS to McCormick.

Well if i need 2 call him it means u have done fuck all. What about all your promises & influence. This is your job. U get it thru with 8 as promised by u!!!

McCormick said that contrary to what is in this SMS he had not made any promises to Smyrnis to get the DA approved for eight storeys.

At approximately 8:29pm McCormick responded by SMS to Smyrnis:

So I still get my complete suit with 6?

Smyrnis responded by SMS at 8:32pm:

I think a tee shirt & shorts is more appropriate if u break your promise.

Prior to being shown these SMSs, McCormick twice denied he had any concerns that the size of the donation to the ALP he claimed was to be made by Chartofillis might decrease. He said the size of the donation was not connected to how many floors were approved by RCC. After he was shown the 8:29pm SMS McCormick said in contradiction of his previous evidence that he was asking Smyrnis whether the donation would still be \$70,000 if only six storeys were approved.

He agreed the promise referred to in the SMS of 8:32pm was his promise to deliver ALP support for the DA. This of course is contrary to evidence he gave shortly before that he had not made any promise to Smyrnis to get the DA approved.

Smyrnis said he understood McCormick was inquiring whether he still got his \$70,000 if only six floors were approved.

At 9.16pm McCormick sent the following SMS to Smyrnis:

No-one pays me anything! Just I do too much work already for a reward of your vote on issues that we don't need it on! As Shock say, forget deals and we see what happens!

McCormick said the first sentence was confirmation of his evidence that he was not to receive any money. It is however also open to the interpretation that he had not as yet received any payment. He could not say what the second sentence meant.

At 9.21pm McCormick received the following SMS from Smyrnis:

Please answer my question. What about your promises and loyalty 2 repay same.

When giving evidence concerning this SMS McCormick again denied he had made any promises. This denial is to be contrasted with his previous admission.

Three minutes later McCormick sent the following SMS to Smyrnis:

You are getting an astronomical payment out of this for doing nothing! No fighting with your mates or colleagues, no having your party pull strings NOTHING!

This SMS directly contradicts his evidence that he was not aware Smyrnis was to receive any money in relation to the DA. The following evidence is typical of the stance taken by McCormick when confronted with such compelling evidence in the hearings:

Here in black and white you say to him, “You are getting an astronomical payment out of this for doing nothing?—M’mm, m’mm.

Is that right?—That’s right.

So you did know that he was going to get money out of it?—No. I – to me that doesn't mean in

—

You just made it up, did you?—Well, it doesn't – no, it doesn't talk about monetary figures so

—

What does it —?—Because we were helping out his friend, that's what I'm talking about, Mr Farmer.

What do the words “astronomical payment” mean to you, Mr McCormick?—Well, “astronomical” is a word that uses – rarely use, I —

Astronomical means big?—That's right, so.

What does “payment” mean, Mr McCormick?—Payment could mean anything.

Just a generic word for cash, is it?—No, no, Mr Farmer.

What does it mean, Mr McCormick?—Payment in the sense of looking after his friend.

Mr McCormick, you've been caught out lying; five minutes ago you denied saying anything to Smyrnis about him receiving money and now there it is, proof that you did know exactly that, isn't it?—No, Mr Farmer. I've told you that I had suspicions of – of, but no.

You had suspicions of him doing something corruptly, did you?—That's – that's right. I've told you – I've told you that previously, Mr Farmer.

You had more than suspicions, didn't you, Mr McCormick?—No, Mr Farmer.

You were in on it with him, weren't you, Mr McCormick?—No, Mr Farmer.

This shows that you knew that Smyrnis was getting money as well?—It doesn't show that to me.

...

You were telling Smyrnis about all the hard work you were having to do to get your hands on

this corrupt money, weren't you?—No, Mr Farmer.

A clear and logical reading of this communication indicates knowledge on behalf of McCormick that Smyrnis was receiving money, not mere suspicion.

Communications on 4 March

There is a series of SMS communications between Smyrnis and McCormick on 4 March. The first is at 8.35am from Smyrnis to McCormick:

Suit size has been conveyed. No change allowed now.

McCormick agreed this was in relation to the Chartofillis DA but insisted “suit size” was a reference to the donation to be made by Chartofillis. He said he was not sure how to interpret the message.

At 8.58am McCormick sent an SMS to Smyrnis:

Deal based on truth & facts not blatant lies to deceive others, as u have clearly done! NK said 8 floors is never going to happen! I was told he said it could.

McCormick said he did not know what deal he was referring to in this SMS.

At 9.06am Smyrnis sent an SMS to McCormick:

How would u know about nks view at a time when u havnt given him the curtesy (sic) 2 meet with him? Again u lie 2 suite (sic) yourself. Meet with nk & me today. U tee up.

At 9.09am McCormick sent an SMS to Smyrnis:

You lie I spoke to him last week, and he told me that! I told I was told 8 possible, he said no! So forget NK he is going for 6 and he told of that!

At 9.16am Smyrnis sent an SMS to McCormick:

You're reluctance 2 meet says it all. Stop your lying and big noting. U can't deliver on anything.

Smyrnis told the ICAC that these SMSs were part of an ongoing dispute between him and McCormick as

to whether or not McCormick should receive more money in relation to obtaining RCC approval for the DA.

After these SMSs were put to him in the hearing McCormick agreed that he had told Smyrnis he could deliver ALP votes in relation to the DA. McCormick said that from time to time he told Smyrnis how the ALP councillors were likely to vote on the DA. However, he said he changed his advice to Smyrnis "... a few times just to get him off my back". He claimed in fact that he never made inquiries to ascertain what would be the likely voting intentions of the ALP councillors. He agreed that he was being deceitful to Smyrnis and said he did so in order to "... keep him off my back". He did not send him an explicit message saying "get off my back" "because I – at the same time I thought Mr Smyrnis was a decent sort of guy, so". The evidence of the extensive communications between McCormick and Smyrnis is not consistent with McCormick trying to get Smyrnis off his back. He was unable to offer any plausible explanation for why he did not simply tell Smyrnis to cease bothering him. On the other hand, the nature of the communications is consistent with McCormick having a very clear interest not only in how councillor support for the DA would stack up but also what that would mean for him in financial terms.

In his evidence, McCormick said he spoke to Moselmane and ascertained, at one stage, that Moselmane was going to declare a conflict of interest in relation to the DA and would therefore not participate in the voting. He said he believed the conflict arose because Moselmane played soccer for a nearby club. He said he had passed this information on to Smyrnis. He agreed that if Moselmane declared an interest then he, as Deputy Mayor, would have been responsible for chairing the meeting and if the voting was tied would have had the casting vote. McCormick claimed he would not have exercised a casting vote in relation to a large development. However, he could point to no precedent where he had previously so acted.

He said, in his evidence, that as he had not lobbied other councillors he could not be confident about the DA obtaining sufficient support to be approved. He gave the following evidence:

And, I suppose, because you had not done any lobbying the question of whether or not you got the casting vote probably didn't even come up?—Well, it didn't.

This evidence concerning lobbying other councillors and the issue of him exercising a casting vote not arising was contradicted by a number of communications between him and Smyrnis on 11 March.

Communications of 11 March

McCormick was shown a number of SMS communications between himself and Smyrnis on 11 March. At 10.59am McCormick sent an SMS to Smyrnis:

Andrew, Angela, Adam, Jan, Geoff, Phillip, Kent and 8 likely to be Miles! And if Shock declare interest won't be using casting vote.

McCormick gave the following evidence concerning this SMS:

The message which is the first part of [the SMS] reads, "Andrew, Angela, Adam, Jan, Geoff, Phillip, Kent, and eight likely to be Miles! They're the names of Councillors who are going to vote in favour of this Development Application, aren't they?—The – that's – its hearsay, they're just names that – yep. No.

They're the names of Councillors that you were telling Smyrnis would vote in favour of the Development Application, right?—Yes, I give him those names, yep.

Yours is one of them, isn't it?—That's right.

How many times have you told us that you hadn't yet made up your mind, Mr McCormick?—Well, I still hadn't so – and I keep telling you.

That was another lie to Smyrnis, was it?—It was – it was – and I keep saying this to you, Mr Farmer, I keep telling you this.

That you keep lying?—I keep – I keep – yeah, I keep telling Mr Smyrnis that, yeah, you know, this is the way it's going to be and – and it's not.

At 11.02am Smyrnis responded by SMS to McCormick:

What interest could Shock declare & why. I may need not b there.

McCormick agreed Smyrnis was advising he would not be present at the RCC meeting which would decide the fate of the DA. In these circumstances the numbers McCormick had referred to in his SMS sent at 10:59am would be reduced to seven.

At 11.06am McCormick replied by SMS to Smyrnis:

Shock declare interest as he is involved and plays with the CALLIMINIANS (sorry about spelling) Soccer Club who are objectors to proposal!

At 11.09am McCormick sent an SMS to Smyrnis:

You fuck me off as you expect way too much! And it insults me you expect me to do all the work and you nothing! A deal is a deal my friend!

Although agreeing this message related to the DA he denied, again, that the deal referred to was a deal to share monies being paid by Chartofillis.

At 11.19am McCormick sent an SMS to Smyrnis:

You want more than borderline decision without you need 30 more suits!

Smyrnis said he understood that McCormick was saying he wanted more money. He believed the reference to “30 more suits” was probably a mistake and that McCormick wanted an extra \$30,000, not an extra \$300,000.

McCormick could offer no explanation for this message other than to claim it was “something fanciful”.

At 11.29am Smyrnis sent an SMS to McCormick:

I have always told u this i need 2 b absent. This was said from beginning. What about bill? Nk told me Kalimnians not objectors so Shock can vote.

Smyrnis said the reference to “bill” was a reference to Councillor Saravinovski.

At 11.34am McCormick sent an SMS to Smyrnis:

I am thinking about jumping out on the night as well.

At 11.45am Smyrnis sent an SMS to McCormick:

Why. Your job is 2 stay & deliver. Our mate will be talking 2 bill Direct. Don't discount bill.

Smyrnis said “our mate” referred to Chartofillis.

McCormick gave the following evidence concerning this SMS:

Your job is to stay and deliver. Is that right? You don't take Smyrnis to issue or to task about that direction do you?—No. No.

You understood exactly what he meant, is that right?—Yeah.

Your part of the deal is to deliver votes on the Chartofillis Development Application. Right?—What he's saying there? Yeah.

The 21st Anniversary Dinner

The Greek Labor Consultative Committee held its 21st anniversary dinner on 18 March 2002. McCormick and Chartofillis were among those who attended.

Despite his evidence that he understood Chartofillis was to make a donation to the ALP of \$70,000 he said he did not speak to Chartofillis at the dinner.

It appears from SMS traffic between Smyrnis and McCormick the following day that something occurred at the dinner which led McCormick to seek to renegotiate his agreement with Smyrnis. McCormick once again claimed these SMS communications were “fanciful”. He claimed by this time he had some suspicions about Smyrnis and “I was getting – pushing myself away from it, yes”. However, the communications themselves do not support his contention that he was attempting to distance himself from Smyrnis.

Communications of 19 March

The first relevant SMS was sent by McCormick to Smyrnis at 5.37am:

My boy is going to ask for 30 more suits.

Smyrnis said he understood McCormick was asking for an additional \$30,000. He did not know the identity of “my boy”.

McCormick said in evidence that he did not have a “boy” and maintained the message was fanciful. He denied he wanted an additional \$30,000. He denied he used the term “suit” as a substitute for money. He said it was used as a “humorous word” and referred to an incident in China where Smyrnis arranged for McCormick and others to be fitted for suits. However, such an interpretation makes no sense of the SMS.

He denied that after the anniversary dinner he was convinced the DA would get through on ALP support. This was contrary to what he conveyed to Smyrnis in a further SMS at 7:25am:

You know what Big Bro, I think my suit definitely needs to go up to 8! I am serious, as last night it was further guaranteed to get up. It is all coming from my side of politics, so time you recognised it and stopped shafting me you bastard. I am serious, you are using me and my party something severe! Seriously, if you have any sense of conscious (sic) you will stop being a prick and listen to what I am saying.

In his evidence Smyrnis said he understood McCormick to now be asking for an additional \$80,000. He agreed McCormick was indicating to him that from what McCormick had gathered from the dinner the previous night there was almost a guarantee that the DA would succeed.

McCormick denied he was asking for an extra \$80,000 and maintained that his message was “fanciful”.

McCormick sent a further SMS to Smyrnis at 7.26am:

If we pull the plug on this now, it will never see the light of day! Seriously, and discussions last night prove that the number 8 was a bonus for you! They only wanted 6 or 7. You are screwing me silly, and last night the Tailor was at the function, and he discussed issue with some of my closest political allies. And it now evident you are playing bigger games than I realised! So after last night, I AM PUTTING MY MAN ON THE JOB TO MAKE UP THE DIFFERENCE! You are suppose (sic) to be my

friend you are not, you think only for yourself! Anyway I put my guy onto it last night, he will see Tailor today or tomorrow! You too greedy my friend! Now have to send my boy in to make things even! And there is an old saying, to (sic) many Chefs spoil the broth! Lets hope it not happen! My boy is going to ask for 30 more suits, to assure a full outfit!

Once again, McCormick maintained the message was “fanciful”. He said the purpose of the message was “... to put Smyrnis off, to show him that – no interest”. He denied that he had realised Smyrnis was getting more money than him. He was asked what he was trying to convey to Smyrnis:

Well, what were you trying to convey to Smyrnis?—That I’d had enough. So.

That’s supposed to make Smyrnis think that you’ve had enough and you want out of the deal. Is that what you’re saying?—Yeah. Yeah.

Although McCormick told the ICAC he had “had enough” the communication between him and Smyrnis continued. At 7:26am McCormick sent the following SMS to Smyrnis:

You are so stupid sometimes my friend! I was so pissed off last night! Now we have to have more players in this! You should not take people for fools my friend. I AM SO FUCKING ANGRY WITH YOU! You are so SLY & DUPLICITOUS! YOU CAN’T BE TRUSTED!

McCormick would have the ICAC believe this was another message he sent to Smyrnis that he was bailing out of providing ALP support. He said the balance of the SMS did not make sense to him and it was all part of a “fantasy”.

At 8:41am Smyrnis sent an SMS to McCormick:

P U keep your promise & g’tee 2 deliver 8, maybe we can review. Must go 4ward cdc & council next week. Call dcuth and arobinson 2 get it on 2morrow recommending aprovl.

Smyrnis said he sent this message to McCormick to ask him to keep his promise to guarantee a vote to approve the DA for eight floors. He said the reference to “cdc” was a reference to RCC’s City Development

Committee. The names referred to in the SMS are RCC officers he said he was asking McCormick to contact so as to get the DA before the City Development Committee as soon as possible.

McCormick said he was not sure what the SMS meant.

At 8:42am McCormick responded with the following SMS to Smyrnis:

No way! I have my boy speak with Tailor first!

McCormick said he was telling Smyrnis there was no way he was going to speak to the RCC officers to have the matter brought before the City Development Committee. He said the reference to “my boy” was “fanciful”.

At 8:46am Smyrnis responded to McCormick:

Who is your boy & what is he going 2 talk about.

At 8:48am McCormick responded by SMS to Smyrnis:

I mean it has a lot of ALP political support! Big support! So can afford to speak to Taylor (sic) to arrange more suits.

In his evidence McCormick denied the DA had ALP political support and claimed that much of what he communicated to Smyrnis was “concocted, it was – it was – it was dreamt up, yeah”.

Smyrnis said when he received this SMS he understood McCormick to be claiming the DA would be approved by RCC on ALP support alone and therefore McCormick believed he was entitled to more money.

At 8:55am Smyrnis sent the following SMS to McCormick:

Your size based on u delivering 8. Have u forgotten discussions & deal. Stop trying 2 shift goalposts all the time. I look after u better than anyone else.

McCormick responded by SMS at 8:56am:

You just make sure you deliver. Further negotiations are nothing to do with you!

This was followed at 8:59am by a further SMS from McCormick to Smyrnis:

Not shift Goal Posts just starting play on another field. And you just make sure you deliver on the field we are both already on!

This was followed at 9:01am by a further SMS from McCormick to Smyrnis:

And don't interfere with the other field!

Smyrnis responded almost instantaneously by SMS:

Fine. Have you guy look after u in full. I will not. U get what u deserve.

McCormick responded at 9:02am by SMS to Smyrnis:

My any (sic) only want 15% so makes your boy look like a loan shark!

McCormick accepted, in evidence, that “any” was meant to be “boy”. The misspelling is the result of incorrectly pressing the buttons on a mobile phone to provide a text message. Once again he denied having a “boy”. He denied this SMS indicated he was aware Smyrnis had an agent representing him in dealings with Chartofillis or that any such intermediary was to receive money for his efforts.

At 9:07am McCormick sent the following SMS to Smyrnis:

See, I know that with 6 or 8 everything remains the same with me, but you it does not, and I found this out last night! So either today or tomorrow, the big 200 Suits is going to be requested of the Suit maker!

Once again McCormick claimed this SMS was “fanciful”. He gave the following evidence:

Let's just deal with this question of you fantasising that if there was six, seven or eight floors approved by Council, Smyrnis would get more money? It just came to you, did it?— No, it – it doesn't look good, Mr Farmer, no, it doesn't. I admit it doesn't look.

It doesn't look good?—Well, it doesn't look good if you're telling me that that's the way it was, this six, seven or eight, meant that you know, Smyrnis got more. However, that's – that's what I've written.

Yes?—And – and it doesn't, but if you can – I found out this last night at an ALP function, I found out that – what Smyrnis does as far as his floors go.

You say it was impossible to find out at an ALP function, something like?—Yes.

Unless of course one of the parties to the agreement was there, is that right?—No.

Such as Mr Chartofilis?—Who I never spoke to.

You just made this up, that if it was six, seven or eight, Smyrnis would do better, is that what you're saying?—Well I'm saying I admit it – no, from what you're saying now, it doesn't look good.

He persisted that at the time he sent the SMS message he had no knowledge that any money Smyrnis was to receive from the developer would increase in line with the number of floors ultimately approved by RCC. He was unable to provide an explanation for what he meant by reference to “200 suits” in the SMS.

The following SMS was sent by McCormick to Smyrnis at 9:18am:

Now you have faulted on the deal. I am left with no option but to stall things until, Mr Suit comes to the party!

McCormick said he sent this SMS because “I wanted to stall things”. He agreed the SMS referred to the Chartofilis DA and that “Mr Suit” was a reference to Chartofilis. He denied he was threatening Smyrnis with delaying matters until he received more money.

At 9:22am Smyrnis responded by SMS asking to what deal McCormick was referring. McCormick responded almost immediately:

The Tailor thought if it was 8! So now its evident the Tailor will bend as you have made him for you, NOW FOR ME!

McCormick sent a further SMS to Smyrnis at 9:44am:

My boy, good value at 15% he also carry a firearm, as he involved in debt collecting. Your boy is like u, want too much for a lobbyist! My boy EXTREMELY LOYAL!

McCormick said once again this SMS was “fanciful”. He said he mentioned a firearm in the SMS “because I wanted out. I – I didn't want to have anything to do with it, so it was overdramatising things”. He gave the following evidence:

Well look, Mr McCormick, so far in this series of SMS messages on the morning of 19 March, you've guessed that Mr Smyrnis has someone operating between him and the developer, and that came true. Then you also guessed that Mr Smyrnis was on a deal which was so structured that if more floors were approved, he'd get more money – that came true. Now in that last message, you've guessed that Mr Smyrnis' boy is wanting too much money for a lobbyist. Did you know that Limberis was pretending by the use of contracts and the company Strategies & Management, that he was a lobbyist?—No, Mr Farmer.

McCormick telephoned Smyrnis at 5:24pm. They had a long conversation from which it is apparent that McCormick believed he had been “shafted” by Smyrnis and wanted more money. He appeared to believe the DA would get ALP support in which case it was guaranteed to get through and therefore “... mate this is – this is worth a lot more ...” The conversation continued:

SMYRNIS: But don't you understand that a deal has already been done. Can't you understand that?

McCORMICK: Yeah, but –

SMYRNIS: That was done – that was done mind you, after you were invited to express a particular position!

McCORMICK: Yeah well –

SMYRNIS: And requirement.

McCORMICK: You've should have, you should have said then, “look I don't think you should have been good”, and, and like a friend, and said, “I think this is not good. This should be bigger”. So –

SMYRNIS: But you look – you haven't delivered anything yet!

- McCORMICK: No, no –
- SMYRNIS: You know that's fine to be ... in theory.
- McCORMICK: - last night –
- SMYRNIS: Yeah, why didn't you just find out last night?
- McCORMICK: He was happy with 6, he was happy with 6, he was fine with 6 and that was it. He was happy and then 8 was gonna be a big bonus anything – 8 was gonna be like unbelievable to him, and then I realised fucking 8 for fucking more than what you're fuck'n talking about mate.
- SMYRNIS: Adam, Adam, you're letting your, your mind and your immaturity here take over –
- McCORMICK: No.
- SMYRNIS: - because, because, because don't forget that all the discussions that have ever taken place, and all the assurances and the deal that was done, was done on the basis of you delivering on 8. Now if you had said to me, if you had said to me that you're only gonna deliver on 5 or 6, then there's no way whatever you're requesting would have been at that level. And I've invited you a number of times. You go down there direct, talk to him direct and you deal with him direct, I don't give a stuff! If you think that you're getting short changed go and deal with him! But the fact of the matter is, the fact of the matter is, the poor bloke has been given a proposal, there's a deal that he has accepted that's been given to him after consultation, and you're trying to shift the goal posts every time you go to a function and someone sort of gets into your ear, you sort of come back and you start saying you've been shafted. Well, like I said to ya mate, you prove to me what you've received from someone else in a similar way okay? At a far greater, ah, return and then I'll say yes you've been shafted! But you can't deliver anything. You can't show anything because nothing has happened! So you're looking the proverbial gift horse in the mouth and saying I want more! Well, go get it! Go get all of it!
- McCORMICK: Well, that's all we're doing.
- Later the discussion continues:
- SMYRNIS: Now, now, you know, we can do a hari kari here mate and, you know, just sort of go ballistic, or we can truly work towards the common good. But the common good can't have the goal posts shifted every time, you know, you wake up and you're in a cranky mood. You can't do that!
- McCORMICK: Well, mate, mate I stopped and realised that you've fucking shafted me –
- SMYRNIS: Oh –
- McCORMICK: - and when I've got and when I've got someone say look – saying a Minister of Parliament [sic] saying "it's gotta get up, I want it up at 8 floors".
- ...
- SMYRNIS: Okay? If you had eight (votes), a different situation you could sort of be as aggressive as you wanted with me, but at the moment you've got four maybe five (votes).
- McCORMICK: Yeah.
- SMYRNIS: Now we've got – we've got the same number, but, but, you know, look trust me on this one, don't, don't be, are, don't sort of be problematic and interventionalist. It's, it's there almost at the starting blocks –

McCORMICK: It is, yeah.

SMYRNIS: Let it, let it go through, let it go through and that's why I always ask you, I always ask you like I did on this one, you go away and you think about what it is that you think is fair and reasonable. I've never forced someone onto you.

...

McCORMICK: Well, well, well, at least the party will be happy with political donations.

...

McCORMICK: So there, there, there good political donations mate from the ah, tailor.

McCormick agreed he was talking to Smyrnis about the Chartofillis DA. However he denied the conversation was evidence of a deal between him and Smyrnis whereby Chartofillis was to pay money in return for getting his DA approved. He said he was "not too sure what (the conversation) was about". He denied he was seeking to obtain a bigger slice of corrupt payments being exacted from Chartofillis. He said his advice to Smyrnis that he had spoken to a Member of Parliament was "fanciful". He did it to get Smyrnis off his back.

McCormick claimed that the references to political donations in the latter part of the conversation were confirmation of his earlier evidence that the only money he was aware the developer might pay was a donation to the ALP. This was a typical example of McCormick seizing on a word or phrase in a communication to support his version of events while ignoring the context in which the word or phrase occurred. As will be seen in the next chapter Chartofillis had contributed monies to the Greek Labor Consultative Committee, a fundraising organisation for the ALP, on the night of 18 March. McCormick's references to "political donations" in this conversation are consistent with a knowledge of those contributions. It is clear from the conversation as a whole that McCormick is not seeking donations for the ALP but is discussing with Smyrnis the amount of money he can expect to receive from Chartofillis in return for obtaining RCC approval for his DA.

Smyrnis said McCormick never identified the "Minister of Parliament" to him. McCormick said he had not discussed the matter with any Minister. In his evidence Smyrnis confirmed that in this conversation he was telling McCormick that the deal with Chartofillis had only been made after consultation with McCormick and after McCormick had expressed what he required in terms of money, being \$70,000. This evidence is consistent with a logical interpretation of the terms of the conversation. The tone of voice used by McCormick in the conversation is not consistent with someone attempting to get Smyrnis off his back but rather someone initially upset at being "shafted" and gradually calming down and acknowledging the reasonableness of what Smyrnis put to him.

From the tone and content of the communications between McCormick and Smyrnis over the course of the 19th of March, it is apparent that something was said on the previous day to McCormick regarding Chartofillis's DA and the associated arrangements, most likely at the Greek Labor Consultative Committee Anniversary dinner. Knowing what was said, and who might have said it, was naturally of interest to the ICAC, and extensive inquiries were made on this aspect, both prior to and at the hearings. Ultimately, only McCormick (and perhaps the person who spoke to him) know what caused him to confront Smyrnis in the manner he did on the following day, and McCormick was not telling the ICAC what this might have been.

Assessing McCormick's evidence

Although at the time he gave his evidence he was undergoing medical treatment, it was apparent that his medical condition neither prevented him from understanding the evidence nor answering the questions put to him. Even making allowances for his condition McCormick was not an impressive witness, nor one who presented as a witness of credit. This is said taking into account not just his evidence but his demeanour in the witness box. He gave contradictory evidence on a number of occasions. He often chose not to answer questions directly. On other occasions he refused to accept what were clearly natural and logical interpretations of the communications that passed between him and Smyrnis. In many instances he was unable to come up with any explanation for particular

communications he claimed such communications were, on his part, “fanciful”. This frequently occurred in situations where it was plain he was communicating with Smyrnis concerning corrupt payments to be obtained from Chartofillis.

Evidence given by McCormick to the effect that certain communications between him and Smyrnis concerned a political donation of \$70,000 to be made by the developer to the ALP is but one example of the unreliability of his evidence. Initially he said he had not asked Chartofillis for a donation and was not aware anyone else had. It was when confronted with a tape of the telephone conversation between himself and Smyrnis of 30 November in which he referred to a “premium for the tailor” of 70 did he claim that he had spoken to Smyrnis about having the developer make a donation of \$70,000 to the ALP. However, there is nothing in the conversation between Smyrnis and McCormick indicating the \$70,000 was to be a political donation. These words simply do not appear in the conversations concerning the \$70,000. Moreover, no one else was aware of the possibility of the donation.

McCormick’s communications with Smyrnis of 19 March showed surprising prescience for someone claiming not to be involved with Smyrnis’ dealings with Chartofillis. McCormick suggested that whilst engaged in fanciful communication he innocently stumbled on the fact that Smyrnis had someone acting between him and the developer, that Smyrnis’ deal was so structured that the more floors that were approved the more money he would receive and that his intermediary was posing as a lobbyist.

Smyrnis has given clear evidence that McCormick was to share in the monies he obtained from Chartofillis and in return was to deliver ALP support for the DA. While, given that Smyrnis has admitted lying to the ICAC, it would be unsafe to draw any conclusions adverse to McCormick based solely on his evidence, he is corroborated in a number of ways. These predominantly include SMSs and telephone conversations between the two. Of particular relevance is the telephone conversation of 19 March 2002 which on a clear and logical reading encapsulates the nature of the agreement between Smyrnis and McCormick.

FINDINGS OF FACT

Based on the evidence before the ICAC, which is summarised above and its assessment of that evidence, I make the following findings of fact:

1. In or about July/August 2001 Manuel Limberis and Con Chartofillis entered into an agreement whereby Chartofillis agreed to pay to Limberis \$40,000 if he obtained approval for a four level development at 2-4 Frederick Street, Rockdale, and an additional \$70,000 per floor for each additional floor.
2. This agreement was a sham to disguise the payment of money by Chartofillis to Andrew Smyrnis, a RCC councillor, in return for Smyrnis giving favourable consideration to the DA and organising support from other councillors for the DA.
3. Limberis sought and obtained money from Chartofillis on behalf of Smyrnis knowing that the purpose of the money was to influence Smyrnis in relation to Chartofillis’ DA and for Smyrnis to organise support from other councillors for the DA.
4. Smyrnis instructed Limberis to deal with Chartofillis with the intention of seeking money from Chartofillis in return for giving favourable consideration to Chartofillis’ DA and organising support from other councillors for the DA.
5. Chartofillis agreed to pay and paid money to Limberis knowing that the money would ultimately be paid to Smyrnis in return for Smyrnis giving favourable consideration to his DA and assisting his DA to get RCC approval.
6. Between 28 August 2001 and 14 January 2002 Chartofillis made payments to Limberis, through Limberis’ company, Strategies and Management Pty Ltd, totalling \$54,500. Of this sum some \$49,500 was transferred to Smyrnis through his company A & S Smyrnis Pty Ltd. The balance was retained by Limberis.
7. Smyrnis agreed with Councillor Adam McCormick to pay McCormick \$70,000 in return for McCormick supporting the Chartofillis DA and obtaining the support of other ALP RCC councillors. Later, McCormick sought to renegotiate this

agreement for the purpose of obtaining a larger sum of money.

8. No monies were paid by Smyrnis to McCormick in relation to the Chartofillis DA.

CORRUPT CONDUCT

In determining findings of corrupt conduct I have applied the approach set out in Appendix 2 to this report.

The offering, giving, soliciting and receiving of money for the purpose of influencing the performance of official functions is conduct which clearly comes within s.8(1)(a)-(c) and s.8(2)(a), (b), (d) and (y) of the *ICAC Act*. Conduct comprising a conspiracy to engage in conduct that is corrupt under s.8(1) or (2) is itself to be regarded as corrupt pursuant to s.7(2) of the *ICAC Act*.

The conduct of Smyrnis and McCormick could constitute criminal offences of bribery, soliciting and receiving (or agreeing to receive) a corrupt benefit contrary to s.249B(1) of the *Crimes Act 1900*, and conspiracy to commit bribery for the purposes of s.9 of the *ICAC Act*.

The conduct of Chartofillis could constitute criminal offences of bribery, offering and paying a corrupt benefit contrary to s.249B(2) of the *Crimes Act 1900*, and conspiracy to commit bribery for the purposes of s.9 of the *ICAC Act*.

The conduct of Limberis, even if he did not intend to retain any part of the monies to be obtained from Chartofillis for his own use, could constitute criminal offences of aiding, abetting or procuring the offering and solicitation of a corrupt benefit contrary to s.249F of the *Crimes Act 1900* or conspiracy to bribe for the purposes of s.9 of the *ICAC Act*.

In these circumstances I find that each of Smyrnis, McCormick, Chartofillis and Limberis engaged in corrupt conduct in relation to the giving and receiving (or agreeing to give or receive) monies as an inducement or reward in return for Smyrnis and McCormick showing favour to Chartofillis' DA and obtaining RCC councillor support for the DA.

SECTION 74A(2) STATEMENT

Each of Smyrnis and Limberis gave evidence with the benefit of a declaration made pursuant to s.38 of the *ICAC Act*. The result of this is that their evidence is not admissible against them in criminal or disciplinary proceedings other than in proceedings for an offence against the *ICAC Act*.

However, potentially at least, the evidence of Smyrnis and Limberis is available against each other. In addition, there is documentary evidence, referred to in the report, evidence of financial transactions and the electronic surveillance evidence referred to in this report.

In relation to Chartofillis, potentially at least, the evidence of Smyrnis and Limberis is available together with the documentary evidence referred to in this report, and evidence of relevant financial transactions.

In relation to McCormick available evidence would potentially include that of Smyrnis together with the substantial body of electronic surveillance evidence referred to in this report.

In these circumstances I recommend that the DPP give consideration to prosecuting:

- (a) Andrew Smyrnis in relation to the soliciting and receiving of a corrupt reward or benefit contrary to s.249B(1) of the *Crimes Act 1900* or conspiracy to commit bribery,
- (b) Adam McCormick in relation to the agreeing to receive a corrupt reward or benefit contrary to s.249B(1) of the *Crimes Act 1900* or conspiracy to commit bribery,
- (c) Con Chartofillis in relation to the offering or giving of a corrupt reward or benefit contrary to s.249B(2) of the *Crimes Act 1900* or conspiracy to commit bribery,
- (d) Manuel Limberis in relation to aiding, abetting and procuring the commission of an offence under Part 4A of the *Crimes Act 1900* contrary to s.249F of the *Crimes Act 1900* or conspiracy to commit bribery.

I am also of the opinion that the DPP should give consideration to the prosecution of Smyrnis, Limberis,

Chartofillis and McCormick for offences of giving false or misleading evidence contrary to s.87 of the *ICAC Act*. In relation to Smyrnis, Limberis and Chartofillis the offences would relate to their denials that Limberis was obtaining money from Chartofillis on behalf of Smyrnis for the purposes of soliciting a bribe. In relation to McCormick, the relevant evidence is his denials that he was to receive any monies from Chartofillis or that he was aware of the nature of the corrupt agreement with Chartofillis.

In stating this opinion in relation to Smyrnis and Limberis I have taken into account the considerations referred to in Chapter 3.

RECOMMENDATION FOR SUSPENSION OF MCCORMICK

McCormick remains a councillor of RCC. The conduct in which he has been found to have engaged in this chapter constitutes serious corrupt conduct for the purposes of the *LG Act*. In these circumstances I recommend that the Minister for Local Government give consideration to the suspension of Councillor Adam McCormick from civic office, pursuant to s.440C of the *LG Act*, with a view to his dismissal from that office by the Governor. In making this recommendation I am of the opinion that prompt action is required in the public interest.

CHAPTER 5 — THE TAILOR SITE - POLITICAL INFLUENCE?

During the course of the investigation the question arose whether Chartofillis had been encouraged to make donations to the ALP through the Greek Labor Consultative Committee on the basis that by so doing he could influence ALP councillors to support his DA. While political donations are a fact of life, they should not be something which influence a councillor in the exercise of his or her official duties. Such a consideration would not accord with councillors acting in the public interest and strikes at the heart of the concept of open government espoused by the *LG Act*.

Terry Diamantis is the President of the Greek Labor Consultative Committee which he founded in 1981. He said the committee is affiliated with the ALP. The purpose of the Committee is to provide advice and assistance to members of the NSW Greek community, particularly in relation to their dealings with government. Diamantis knew nothing about the payments being made by Chartofillis to Limberis, or the purpose of those payments.

Apart from being the architect for the building proposed by Chartofillis, Katris is also a member of the ALP and a Kogarah Councillor. Katris initially contacted Smyrnis about the DA because Chartofillis had told him Smyrnis was interested in assisting him in the development. Smyrnis was the Councillor for the ward in which Chartofillis's proposed development was located. Katris regarded it as part of his role as architect to make representations to councillors. Like Diamantis, he was not aware of the payments from Chartofillis to Limberis, or their purpose.

Katris said it was his idea that Chartofillis meet Diamantis. He thought it was a good idea to introduce Chartofillis to the Committee not in order to shore up ALP support for the DA but to give him access to put his case to ALP councillors.

Katris rang Smyrnis on 11 January 2002 at 11:15am. He told Smyrnis he had spoken with Diamantis the previous night. The following is an excerpt from their conversation:

KATRIS: Well, I think the only problem is that if he, if Terry doesn't get to know him, he's not gonna, he's not gonna, he's not

going to, he's not going to push Shaoquett in ...

SMYRNIS: Okay.

KATRIS: You know what I mean?

SMYRNIS: Well I'll leave it up to you then to sort of further that aspect of it.

Smyrnis suggested to Katris that McCormick should also be part of any meeting.

In his evidence to the ICAC Katris said he presumed Diamantis wanted to meet Chartofillis before the DA went before RCC because he presumed Diamantis wanted to offer support to Chartofillis. He was not sure that Diamantis would have any influence on the ALP councillors but he could at least canvass their views. Katris said what he meant by "... he's not going to push Shaoquett ..." was that Diamantis would not be able to put Chartofillis' case for the DA to the Mayor.

Ten minutes after the above conversation with Smyrnis Katris rang McCormick and left a voicemail message telling him he had spoken with Diamantis last night and "it would be good for him to meet, ah, the fellow, Costa, the tailor, and probably good for you to be along".

At 2:12pm Katris telephoned Smyrnis and told him he had left a message for McCormick regarding organising a meeting with Chartofillis. In his evidence to the ICAC Katris said he was not able to arrange this meeting between himself, McCormick and Diamantis.

In a telephone conversation commencing at 6:39pm on 24 January, Katris advised Smyrnis he had received a fax from an RCC officer advising the DA was an overdevelopment. They discussed the need to have McCormick arrange a meeting with Diamantis so that he could talk to Moselmane who in turn could talk to RCC officers to get the Design Review Panel to favour a seven or eight storey development.

At 7:42pm the same day Smyrnis and McCormick spoke on the telephone and Smyrnis relayed the information provided to him by Katris. He asked

McCormick to arrange a meeting between Chartofillis and Diamantis so that Diamantis could “work on” Moselmane who in turn could work on RCC officers to support the DA.

Katris said he spoke to McCormick about the DA and told him what he thought were its merits. He was asked McCormick’s attitude:

Did McCormick indicate to you one way or the other what his view of the development application was?—He – he didn’t have a problem with stimulating development in the Rockdale Town Centre.

...

... do you have any understanding of what McCormick’s position is so far as your development application on behalf of Mr Chartofillis is concerned?—I felt by his discussion that he would be quite willing to look at a high density and a high height on that site.

Did he say why?—Because he wants to see development in the Rockdale Town Centre occur.

On 31 January at 2:01pm Katris telephoned Chartofillis about arranging a meeting between Chartofillis and Diamantis. Katris told Chartofillis, “Well normally he must meet you, now we wanted to arrange a meeting, as far as he is okay, he is okay, but he must meet you so he can push it did you understand? That is the problem”. Later he told Chartofillis that “... but if he will not meet you he will not push it, that is the problem”. Katris told Chartofillis he would speak with Diamantis that afternoon.

In his evidence to the ICAC Katris said that by “push it” he meant having Diamantis put Chartofillis’ case for the DA to the councillors.

At 12:05pm on Monday 4 February Katris telephoned McCormick and left a voicemail message advising he had spoken with Diamantis who had told him to bring Chartofillis to a Committee meeting at Marrickville at 7:30pm that Thursday. He suggested McCormick attend so they could discuss matters. At 1:30pm Katris rang Chartofillis and suggested he attend Thursday’s Committee meeting.

Katris arranged for Chartofillis to attend the Committee meeting. He explained what happens at committee meetings:

We basically sit round a table, organised fundraisers, organised various fundraisers, functions, discuss matters that affect the community, pensions, transferable pensions overseas to Greece. Matters that affect them with regards to items that appear on council – with you know – increasing rates.

Katris said Moselmane was present at the committee meeting.

I just basically indicated to Shaoquett that Chartofillis is the one that’s involved with the Frederick Street project. And he may want to discuss this project with you at some stage.

Chartofillis recalled meeting Diamantis. He said Diamantis told him it was impossible to have seven or eight floors. Diamantis said he heard about Chartofillis’ DA but thought that trying to build an 8 storey building at that location was “impossible”. Diamantis said that he personally was opposed to high rise development.

Chartofillis said Diamantis invited him to attend the Committee’s 21st anniversary dinner on 18 March. Chartofillis agreed to pay for a table for 10 people, costing \$1,100. He was asked about why he agreed to pay for the table:

Did you or were you given to understand from Mr Diamantis that if you went to this dinner and paid \$1,100, that you would gain some favourable viewing of your development application?—He didn’t tell me exactly, but I understood so.

Diamantis denied ever telling Chartofillis that by donating money he might enhance the prospects for his DA.

At 11:27am on 27 February Chartofillis rang Diamantis to ascertain whether he had banked the cheque to pay for his table at the dinner. The conversation then proceeded:

DIAMANTIS: I spoke with Katris again yesterday.

CHARTOFILLIS: Yes.

DIAMANTIS: We talked, I explained to him, what exactly you can pass.

CHARTOFILLIS: Yes.

DIAMANTIS: Did you understand, so we will not have any troubles.

CHARTOFILLIS: All right.

DIAMANTIS: And the man says all right we have no ...

CHARTOFILLIS: Whatever we can do it would be good because and afterwards ...

DIAMANTIS: Exactly, exactly, don't listen to anyone.

CHARTOFILLIS: Yes.

DIAMANTIS: What we can do we will do it.

CHARTOFILLIS: Okay.

DIAMANTIS: Did you understand, Costa?

CHARTOFILLIS: Yeah.

DIAMANTIS: We're looking after you don't worry.

Chartofillis said in evidence he understood from this conversation that Diamantis was telling him they would look after his DA. He was asked about this:

You were hoping that by getting money to members of the Labor Party, through the Greek Consultative Committee, that if things became tight when it came down to the vote on your development application, your monies paid to them would somehow get you some benefit in terms of the vote at the critical stage, right?—Yes, I was, of course, but subject to the councils regulation.

That's what you understood would be the case when Mr Diamantis said to you, "don't worry, we'll look after you."?—Yes, I understood that.

When asked about this conversation, Diamantis said he talked to Katris and Chartofillis about the DA but

there was nothing more he could do. He said he told Katris that it would be impossible to erect an eight floor building on the site. He denied the purpose of being introduced to Chartofillis was so that he could introduce him to ALP councillors.

The 21st anniversary dinner was held on the evening of 18 March. Apart from paying for the table Chartofillis was also the successful bidder at an auction at the dinner for \$1,500 for a suit and \$800 for advertising. The suit had previously been donated by him for the purpose of the auction. It appears that when the highest bid for the suit was well below what Chartofillis estimated its value to be he decided to bid himself. At the time Chartofillis gave evidence to the ICAC he had not paid the Committee for the suit or advertising but Diamantis told the ICAC he expected Chartofillis to pay for these items.

Submissions made on behalf of Diamantis are that in return for accepting payment for a table and the monies bid at auction, Diamantis and the Committee provided Chartofillis with the opportunity to meet with the RCC mayor and ALP councillors in an open forum, an opportunity additional to those otherwise open to Chartofillis to approach the RCC mayor and councillors directly about his DA.

Diamantis' evidence is clear and uncontested that he did not speak in favour of the DA to the RCC mayor or ALP councillors at the dinner.

Chartofillis certainly believed that attending the dinner and making a donation would not harm his chances of getting his DA approved. He gave the following evidence:

Are you saying that all you had to do was make a donation in one form or another to do your development application some good?—I go to many functions. They do help you and they look after you because you help them, they help you, that's the way it's done.

Chartofillis recalled in his evidence that Moselmane was present. He said Moselmane greeted him and told him he knew where his shop was. He said McCormick was present but they did not speak.

Katris also attended the anniversary dinner. Katris said he was not sure that Chartofillis attending the dinner

would advance his position however it would give him an opportunity to network with councillors. He said he did not assist Chartofillis in networking at the dinner as he was too busy himself networking. He saw McCormick there but did not see him in the company of Chartofillis.

Katris telephoned Chartofillis at 1:27pm on 22 March to update him on some engineering and traffic reports required to support the DA. He told Chartofillis Smyrnis suggested bringing the DA before RCC on Wednesday. Katris told Chartofillis it might be necessary to speak with Diamantis. Chartofillis responded:

You know, the day before yesterday the only thing that he told to the Mayor – he said to him, “look after Con because” – no, he said to him, “try to look after Con”.

Katris agreed Chartofillis was telling him Diamantis had spoken to Moselmane. He said he understood that Diamantis was asking Moselmane to look at the DA to see whether he thought it appropriate.

ASSESSING THE EVIDENCE

It is clear from the evidence that Katris wanted Chartofillis to meet Diamantis in the hope that Diamantis would lobby ALP councillors to support the DA. It seems from the evidence however that Diamantis himself had reservations about the DA and was not prepared to give it his support. This is corroborated by Moselmane who told the ICAC that he did not regard Diamantis as putting him under pressure in relation to the DA. The evidence indicates Moselmane himself was opposed to the DA.

Diamantis was prepared to have Chartofillis attend a Committee meeting and to pay to attend the anniversary dinner. His attendance at both gave him an opportunity to meet some RCC ALP councillors and to possibly put his case to them. There is nothing improper or corrupt about Chartofillis attending a function for this purpose. Impropriety or corruption would arise if Chartofillis was promised or given the support of councillors in relation to the vote on his DA in return for him making political contributions. The evidence does not disclose this to have been the case.

CORRUPT CONDUCT AND SECTION 74A(2) STATEMENT

There is no evidence any person engaged in corrupt conduct in relation to this matter. As no issue of conduct of a criminal or disciplinary nature arises from the facts of this matter the issue of expressing an opinion under s.74A(2) of the ICAC Act as to whether consideration should be given to prosecution or disciplinary action does not arise.

CHAPTER 6 — “THE EAGLE HAS TOUCHED BASE” - SITE ONE AND TWO

This chapter relates to proposed developments involving a developer, codenamed R1 for the purposes of the ICAC’s investigation, on two properties in the Rockdale City Council area, codenamed Site 1 and Site 2 respectively. The first development involves the solicitation of a bribe from the developer by Smyrnis using his friend, Anthony Retsos, as an intermediary. Evidence suggested the possibility that McCormick was also to receive part of the monies being solicited from R1 in return for supporting the DA. It appears from the evidence that although no approach was made to R1 in relation to Site 2 the possibility of doing so was discussed between Retsos and Smyrnis and between Smyrnis and McCormick.

SITE 1

R1 did not own this site but had options to purchase the properties comprising the site.

A DA to build 18 units was lodged with RCC on 2 November 2000. To be approved, the DA would require RCC to rezone the site. Ultimately, RCC refused to rezone due to potentially unacceptable aircraft noise impacts from Sydney Airport. On 27 June 2001, RCC resolved that the site remain as a “deferred matter” under the Rockdale LEP until such time as a current Aircraft Noise Exposure Forecast (ANEF) map is available to allow RCC to determine an appropriate zoning for the land.

Retsos is a director of Satella Concrete and Formwork Pty Ltd. His company had previously done some work for R1 on a project at Chippendale. In their initial private and public evidence to the ICAC, both he and Smyrnis adamantly denied attempting to obtain payments of money from R1.

A recording of a conversation of 17 October 2001 between Retsos and R1 in which it was clear Retsos was seeking \$240,000 from R1 to pass on to RCC councillors in return for getting his DA approved was played to Retsos. Retsos then admitted he had sought money from R1 for approval of the DA, the monies to be paid to an RCC councillor. Retsos said however this was a ruse he used with R1 in order to obtain

money for himself. He continued to deny that he had acted on the instructions of Smyrnis or that any of the money he was seeking from R1 was for Smyrnis.

Retsos maintained this position over two days of public hearings during which time a number of communications between himself and others, which are set out below, were put to him.

After considering this evidence, obtaining further legal advice and speaking with Smyrnis, Retsos apologised to the ICAC for lying and confirmed that he was acting on instructions from Smyrnis in relation to his approaches to R1.

Smyrnis also accepted that he gave instructions to Retsos to solicit a bribe from R1 on his behalf in return for which he would assist to obtain RCC approval for R1’s DA. He admitted he was prepared to take money to vote in favour of the application. He accepted that such conduct was corrupt.

There was ultimately no dispute on the evidence that during the course of the conversation of 17 October Retsos sought from R1 a payment of \$90,000 up front with a further \$150,000 to be paid to Retsos and held by him, in trust, until such time as the DA was approved by RCC. During the course of the conversation the impression is clearly given by Retsos that more than one councillor is involved. R1 made a counter offer to Retsos to secure the councillors’ interests by making Retsos a shareholder for a percentage of the project.

After the meeting on 17 October Retsos sent the following SMS to R1:

I have relayed your counter offer – will let you know.

At 3:10pm on 1 November, Smyrnis rang Retsos. He told Retsos that he had become aware R1 had attended a fundraiser the previous Sunday in which he had apparently been generous with his money. As a result, Smyrnis told Retsos that “... *the situation is now not negotiable and it has gone up – it’s what we had said plus fifty, payable tomorrow afternoon, if not, don’t bother ringing*”.

Retsos rang R1 at 5:13pm that day. He told him there was concern about “flashing around a bit of money” at the fundraiser and “they’re gonna want all the money up front, mate”.

Retsos and Smyrnis had a further telephone conversation at 12:10pm on 7 November. Retsos told Smyrnis that he had left a message for R1 to contact him. Smyrnis told Retsos that “the others that are interested don’t want to be shareholders”.

Five days later Retsos telephoned R1 to find out what was happening. R1 told Retsos he was having difficulties in exercising the option to purchase one of the properties. At 1:32am on 15 November Retsos sent the following SMS to Smyrnis:

Friend having problem with option on 3rd property.

This was followed by a telephone conversation between Smyrnis and Retsos at 4:03pm that day in which Retsos relayed the difficulties R1 had encountered to Smyrnis.

In a telephone conversation at 5:19pm on 27 November, R1 told Retsos he was getting close to finalising matters and asked, “Well, is the deal still okay or what, mate?”, to which Retsos responded, “Well, as far as I know, I don’t know, I haven’t spoken to him, I told him – what the scenario was ...” and agreed to come back to him.

At 5:24pm Retsos sent the following SMS to Smyrnis:

The eagle has touched base! Need 2 discuss terms.

At 1:14pm on 30 November the following SMS was sent by Retsos to Smyrnis:

I need a figure to go to him with?

Smyrnis responded by SMS to Retsos some five minutes later:

450 now & non-refundable. 200 prior 2 appro. If no success. refund. U can add your component. GST is additional.

On 3 December Retsos spoke with R1 on the telephone. Retsos told R1 he would need to make a payment of \$250,000 up front. The conversation proceeded as follows:

RETSOS: First they’ll get, they’ll get you to do the BAs (sic) – they’ll get you to do the BA (sic) -

R1: Yeah.

RETSOS: You drop the 90Gs –

R1: So now you’re saying they want 250Gs up front?

RETSOS: They don’t want – they don’t want any shares. They don’t want anything.

R1: They want 250Gs up front?

RETSOS: Yep. Put into – put into a trust account with me controlling it.

R1: Okay.

RETSOS: The first 90 goes down, they’ll get you the BA (sic) and then as soon as the rest of it goes through they’ll give you the nod and the money is then disbursed, accordingly.

Later in this conversation R1 asks who else is involved, to which Retsos gives the following response:

Mate, I don’t know who they are and I deliberately haven’t asked Anthony. I know there’s about five of them, and at the end of the day what they’re saying is, look you know they’ve got – you know I’m only this is coming from, you know, the source is from there. I only – I only speak to one person and he represents the other four as well himself.

Later in the conversation Retsos tells R1 the Mayor is not involved.

On 3 December, in response to an SMS from Smyrnis asking “Any news from our friend?”, Retsos sent the following SMS to Smyrnis:

In yes! I told him the offer today & I told him about (name)! I said no shares – 250K (90K & 160k thereafter) u may have to consider our cut from 250K – GST?

This resulted in a quick SMS response from Smyrnis approximately one minute later:

Gst is additional.

At 10:25am on 4 December Retzos sent the following SMS to Smyrnis:

He wants to meet to get assurances that if he forks out he will get what he is asking 4?

To which Smyrnis responded by SMS to Retzos at 10:30am that day:

U r the medium. No contact with anyone else. 50K not refundable. U keep balance. If not ok, bal refunded. Has 2 go now!!

At 3:40pm on 14 December Retzos sent an SMS to Smyrnis advising that he was arranging a meeting and he needed final instructions. In response Smyrnis telephoned Retzos at 3:44pm. He confirmed he had received the SMS. It appears from this conversation that Smyrnis is to receive an initial non-refundable payment of \$50,000:

SMYRNIS: What is needed that is non-refundable, irrespective.

RETSOS: Yeah.

SMYRNIS: Okay.

RETSOS: Seventy-five we have said.

SMYRNIS: Eh?

RETSOS: Haven't we said seventy-five?

SMYRNIS: Well I had told you fifty.

RETSOS: Fifty?

SMYRNIS: I think you have put more.

RETSOS: Yeah.

SMYRNIS: I don't mind you know take as much as you can how can I say it.

RETSOS: OK.

SMYRNIS: But the amount that is ...

RETSOS: Non-refundable?

SMYRNIS: Non-refundable is fifty.

RETSOS: OK.

SMYRNIS: All right. And the rest into my account.

RETSOS: Okay. And tell me is he going to give the rest up front?

SMYRNIS: Yes.

RETSOS: All together?

SMYRNIS: They do not trust him.

RETSOS: Two hundred thousand?

SMYRNIS: Yep.

At 7:02pm that day Smyrnis sent an SMS to Retzos:

This is it. Deal must be now or never. Keep me posted.

At 6:05am on 15 December Retzos sent an SMS to R1 arranging a meeting at his office at 4:30pm that day. At 10:01am on that day Retzos had a telephone conversation with Smyrnis. The following are relevant extracts from this conversation:

SMYRNIS: 250 we have said.

RETSOS: 250.

SMYRNIS: Yes but they were inclusive from the 50 we got up front so there is the 50 up front which is non-refundable plus 200.

...

RETSOS: And it is 250 plus GST?

SMYRNIS: Yes.

RETSOS: Done.

SMYRNIS: And the first payment must be before ...

RETSOS: Friday.

SMYRNIS: Yes because like I said it's a bit "pie in the sky".

...

SMYRNIS: But whatever is to be done must be done before it comes for decision before such

RETSOS: Before the Council.

SMYRNIS: So if he wants to delay it so he can give bit by bit to build up the amount and then get is on that's it that's no problem.

RETSOS: All right.

SMYRNIS: Do you understand but it won't be decision and afterwards completion.

RETSOS: All right. Look I will tell him 75.

SMYRNIS: Yes.

RETSOS: Up front.

SMYRNIS: Yes.

RETSOS: Non-refundable.

...

RETSOS: From the 250 the ten percent will be my amount.

SMYRNIS: Okay.

RETSOS: Because from what I understand I don't think I'm going to get a look-in for this job.

...

SMYRNIS: Yeah. They must understand that this amount is about twelve or thirteen thousand in every unit.

...

SMYRNIS: You'll have sort of to render the invoice for a consulting service or I don't know what.

RETSOS: Yeah.

SMYRNIS: And from that perspective all the GST a lot of taxes are paid by you.

Retsos told the ICAC he did not originally intend to receive any money from this transaction for himself. Retsos said that he originally agreed to undertake the role of intermediary on behalf of Smyrnis with a view to securing concreting work from R1 should the DA be approved. However, by 15 December he had come to the view that he should receive some remuneration for his efforts. He gave the following evidence:

I became frustrated by virtue of the fact that I was doing all these things for Mr Smyrnis and nothing was happening at the very last stages, and at the very last stages I discussed with him about getting a cut of the proceeds, foolishly thinking that I'm being made to carry out all these meetings, calls and SMSs and it didn't appear from [R1's] demeanour that I would be getting any work (from him).

He was asked about the SMS message of 4 December that suggests Smyrnis is to receive \$50,000 of the \$90,000 up front payment with Retsos to retain the balance. Retsos said it was his understanding that he was only ever going to receive about \$20,000 to \$25,000.

I don't know how that 40 came about but you can see from the conversation, sir, that there was a confusion about money all the time and that's why I keep coming back saying, "What are your instructions?" You know, the amount changed week by week.

Ultimately the meeting arranged for 4:30pm on 15 December was cancelled by R1. Despite further messages sent by Retsos no further meeting was arranged. No monies were paid. Finally R1 advised Retsos that the project was on hold pending a court hearing to determine the problem concerning the option to purchase one of the properties. Retsos relayed this advice to Smyrnis by SMS on 23 January 2002:

Project off! Everything on hold pending Crt hearing to determine option.

WAS ANY OTHER COUNCILLOR INVOLVED?

In a number of the above communications the clear impression is given that more than one councillor is ultimately to receive a share in the monies being solicited from R1. In particular, in his discussion with R1 on 3 December 2001 Retsos refers to "about five of them" being involved, and says that he speaks to only one person who represents the other four. It was important for the ICAC to establish whether any other councillors or council officers might be involved in this matter.

Retsos was asked what knowledge he had of the involvement of others.

Did you ever have any conversation with Smyrnis as to who the others were?—No, sir.

Did you ever get any indication from him whatsoever as to who he was working with, apart from yourself?—No, sir, and I never sought to ask.

Smyrnis said McCormick was involved in this matter: He gave the following evidence:

Did you have any arrangement with Councillor McCormick in relation to the Development Application of [R1]?—He was going to try and get support from the ALP councillors on the Council.

...

Was he to receive any of the money that you hoped to receive from [R1]?—Yes.

In his evidence of 3 May 2002, Smyrnis said McCormick was to receive money but was not sure their discussions had progressed to the extent of determining the precise figure. When he later gave evidence on 7 May he was able to recollect that the agreement was for McCormick to receive \$70,000 in exchange for him getting the ALP councillors to support the DA. Smyrnis had no recollection of McCormick indicating he would pass on any of this money to other councillors.

Throughout his evidence McCormick denied having any such arrangement with Smyrnis. Although McCormick was not an impressive witness, it would not be appropriate to make adverse findings against him based solely on the evidence of Smyrnis who, on his own admissions, had given false evidence to the ICAC. However, there are a number of legally intercepted communications that corroborate Smyrnis' evidence that McCormick was involved in this matter.

As indicated above, Smyrnis received an SMS from Retsos at 5:24pm on 27 November advising that the eagle had touched base and there was a need to discuss terms. At 6:50pm on that date Smyrnis spoke with McCormick on the telephone. The following is a relevant excerpt from the transcript of the conversation:

SMYRNIS: Well we need to talk. I got a – a message from um that acquaintance of mine.

McCORMICK: Oh okay.

SMYRNIS: Who said that he had heard something and – and he – he expects me to sort of chat with him tomorrow and I need to chat with you.

They met later that night at a pizza restaurant in Bexley.

In his evidence to the ICAC McCormick said he did not remember this SMS and did not know to whom Smyrnis was referring. He could not recall what they discussed at the meeting.

Having failed to hear any news from R1 by early January 2002, Smyrnis forwarded the following SMS to Retsos at 9:02pm on 4 January:

Can U drop past 2 c him cold and find out once and 4 all what's happening asap.

Smyrnis and McCormick spoke on the telephone at 1:17pm on 7 January. The following is a relevant extract from this conversation:

SMYRNIS: Ah, but find out about that other one as well, I'm keen to know, you know the, the long hair one, because I'm keen to know what the lay of the land there is.

McCORMICK: Yep, yep, yep.

SMYRNIS: Because the one I think, once again, there's no ah, yeah I've got no compulsion ah to be sympathetic with that crew.

McCORMICK: Yep.

SMYRNIS: And you know for them I think it should be a, a very hard proposition.

McCORMICK: Yep, yep.

SMYRNIS: Um so, yeah.

McCORMICK: Otherwise we just fuckin' get someone else in there.

SMYRNIS: Ah yeah, but um then of course they could go sort of ah rabid and start saying all sorts of things.

McCORMICK: Yep, yep. Oh well, yeah.

SMYRNIS: Let's just sort of see how far we can go, you do your homework from your end, I've got my guy hopefully calling cold turkey in to see them and to find out what's happening.

In their evidence both Smyrnis and McCormick agreed that the reference to "long hair one" was a reference to R1. Smyrnis said the conversation was concerned with their agreement to obtain money from R1 in return for supporting his DA.

McCormick said he was just acknowledging Smyrnis' conversation and that he did not understand that Smyrnis was referring to bribery negotiations with R1. Although it appears from the conversation that McCormick was suggesting they try and get someone else in to take on the development, who will presumably be more amenable to coming up with the bribe money, he told the ICAC that he didn't know to what he was referring in that part of the conversation. It is of interest that McCormick later told the ICAC he had heard a rumour that another developer was interested in the site.

McCormick and Smyrnis had a further telephone conversation on 11 January at 7:48pm. The following is a relevant extract from this conversation:

SMYRNIS: But, look, have you found out anything about our other mate?

McCORMICK: Which one? Um, no, no. I'm still trying to find – so what I was gonna go and have a word to him, so, yeah.

SMYRNIS: Well, don't do that, because my intermediary is gonna do that.

McCORMICK: Oh okay.

SMYRNIS: Because he's been dodging him, and I just said, "Look, just go round cold turkey and say, mate, what's the story?"

McCORMICK: Yeah.

SMYRNIS: You know, do you want somethin' to happen or don't ya? It's as simple as that.

McCORMICK: (Unintelligible). But he realises that, um, ah, you know, if he doesn't get onto it he's gonna lose them and someone is gonna jump in, so, yeah.

SMYRNIS: Well, look, I mean, let my sort of guy exhaust his approach.

McCORMICK: Aha.

SMYRNIS: When he comes back to me and says, you know, X, Y or Z, I'll let you know and then, you know, you can, ah, involve yourself, find out what's happening and don't say anything just relay it back to me and, you know, we'll approach it the same way.

McCORMICK: Yep, rightyo. No problem. Yep, okay. Well, give me a call in the morning, mate.

Smyrnis told the ICAC this conversation related to R1's DA for Site 1. McCormick said he didn't know who they were talking about. In the conversation he told Smyrnis he was going to approach the person Smyrnis referred to as "our other mate". He was asked what he meant:

As I said previously, quite a lot of things with Mr Smyrnis was just to get him off the phone, so he'd like – he used to go on and on with harassing and so forth and – and trying to get me to do things and so forth, so it would be just like, yeah, okay, so.

From the tone of the conversation recorded on the tape however McCormick gives no indication of feeling harassed or anxious to end the conversation. The fact that he continued to communicate with Smyrnis on this matter is not indicative of someone concerned that he is being harassed or is anxious to cease contact.

At 8:26am on 6 March, Smyrnis received the following SMS from McCormick.

Big Bro I think we need to screw long haired prick 'cause he is very cocky. He has [Site 2] up already! He says he has all Libs and half ALP!

Smyrnis said McCormick referred to him as Big Bro and often referred to McCormick as Little Bro. The “long haired” person was a reference to R1. McCormick confirmed he referred to Smyrnis as Big Bro and that Smyrnis sometimes referred to him as Little Bro.

McCormick said he was simply saying that it was necessary to make sure the DA complied in every way with RCC planning requirements.

At 8:49am that day Smyrnis sent the following SMS to McCormick:

Let's meet 2 discuss your long haired mate.

McCormick said he didn't think he and Smyrnis met to discuss the “long haired mate”.

In a telephone conversation between Smyrnis and McCormick commencing at 10:32am on 18 March, Smyrnis refers to “your mate ... with the long hair”. The conversation proceeds:

SMYRNIS: And once again, I don't wanna go away and put something at a time when you're gonna turn around and fuckin' start to – and you know have a dummy spit over it.

McCORMICK: Over, over what?

SMYRNIS: Well, over the issue of, ah –

McCORMICK: Mate, as long as you – as long as you be mate sensitive to – and, and, and think of people.

SMYRNIS: Yeah, look I will, but you've gotta sort of find out what would be approved irrespective of whether we did, or didn't do anything – I mean surely there must be a level where the Council would recommend approval –

McCORMICK: Yeah, yeah.

SMYRNIS: So you've gotta say to yourself well, if that's gonna be at four or five or whatever, but they want ten, then you can sort of work out a differential, but if the approval is seven and they're going for eight, well you can't

– they might say well fuck it, you know we'll just take the seven.

McCORMICK: Yep, yep.

SMYRNIS: You know what I mean? You can't go in there and sort of -

McCORMICK: Well, that's why –

SMYRNIS: - ... something when you don't know what, what Council's ordinarily gonna approve.

McCORMICK: Yep, yep, yeah, okay.

SMYRNIS: So that's what you've gotta find out, if, if nothing happened and the officers assessed it in the ordinary way –

McCORMICK: Yep.

SMYRNIS: - what would they sort of approve – recommend for approval?

McCORMICK: Rightio.

SMYRNIS: How does that compare with what these blokes want? And then when you've got the difference –

McCORMICK: Yep.

SMYRNIS: - you can sort of work out a formula.

McCORMICK: Okay. Well I'll – yeah, okay actually I might, I gotta speak to (RCC officers).

SMYRNIS: Find out, because – find out from the one that's gonna sign off on it, probably (RCC officer) I suppose, and yeah, we've gotta know what the differential is.

McCORMICK: Okay.

SMYRNIS: You know that's, that's where you go and sort of – that's when you go and sort of lobby.

McCORMICK: Okay, rightio I'll find out.

Smyrnis agreed he was advising McCormick how to calculate an appropriate figure for a bribe. He said they had also previously discussed this issue. Smyrnis said he was telling McCormick he did not want to put something by way of soliciting a bribe and then have McCormick do a “dummy spit” over the size of the bribe.

McCormick said he knew nothing about any formula. He maintained that he was unaware of any attempt to obtain money from R1.

As indicated in chapter 4 there was a falling out of sorts between Smyrnis and McCormick in relation to the Chartofillis matter on 19 March.

Part of a telephone conversation between McCormick and Smyrnis at 5:24pm that day is set out in chapter 4. During the course of this conversation, Smyrnis referred to McCormick’s indication he wanted a larger payment and told McCormick “... you’re sort of pushing the envelope all the time, and there’s only a limited sort of ability, for this person. He’s not a professional”. Smyrnis went on to refer to “the bloke with the long hair” and said, “He is a professional sort of player and you could probably shift the goal posts there”. McCormick agreed with what Smyrnis said. In the context of the conversation it is clear the reference to shifting the goal posts is a reference to increasing the amount of payments to be made for providing support at RCC for the DA.

THE SITE 2 DEVELOPMENT

R1 was also seeking to undertake a redevelopment of a former garage site at Site 2. There is no evidence that R1 was actually approached to make a payment in relation to this development. However, the possibility of doing so was discussed between Smyrnis and Retsos.

In a telephone conversation between Smyrnis and Retsos at 12:38pm on 5 March 2002, Smyrnis told Retsos that Site 2 is at “a delicate stage”. The conversation proceeds:

SMYRNIS: No he’s been sort of working behind the scenes, upsetting a few people on the way that he has been working to try to get that sort of ahead. Now can I suggest with the other one I’ve

heard nothing, all right? So that’s, that’s sort of in the sleeper category.

RETSOS: Mm.

SMYRNIS: With this one um, once again, it’s sort of at a delicate stage if you want tell him you know I hear that, you know, there are some potential obstacles there, um, you know is there any role that, ah, you feel I can play?

...

SMYRNIS: Mm. Well, tell him, you know, I mean it can be sat on as well this one anyway.

RETSOS: That’s right.

Smyrnis later tells Retsos to get back to “him” and tell him it’s up to him that “... it can either languish, or he can go forward”.

Retsos told the ICAC he never approached R1 on behalf of Smyrnis in relation to this development.

In a telephone conversation between Smyrnis and McCormick on 14 February 2002 at 6:18pm Smyrnis tells McCormick he saw the “long hair” person having a very long discussion with another RCC councillor. He indicates his surprise at this and says “I’m sure they’re gonna try to by-pass things”. McCormick refers to a DA being submitted in relation to a garage site and that the Mayor considers the application “ludicrous”. Smyrnis then responds, “Well, there might be an opportunity there. We’ll need to discuss”.

Smyrnis told the ICAC the discussion concerned the potential for soliciting a bribe from R1 in relation to the Site 2 DA. He said that to his recollection he and McCormick did not ultimately decide on a figure to put to R1.

McCormick confirmed the conversation concerned R1 and that he was aware of the Site 2 DA. He confirmed he had spoken to Moselmane about the DA. It was put to him that Smyrnis was suggesting there might be an opportunity to apply the formula to seek corrupt payments from him. He said that was not how he understood the conversation but he did not know what the opportunity was to which Smyrnis referred.

ASSESSING THE EVIDENCE

In relation to the Site 1 proposal, Smyrnis and Retsos each acknowledged that Retsos acted on Smyrnis' instructions in approaching R1 to seek money in return for which Smyrnis would assist to get RCC approval for the DA. Initially, \$240,000 was sought, later rising to \$250,000 plus GST. There is some evidence that larger sums were considered by Smyrnis and Retsos but these were not communicated to R1. It is admitted by Retsos that he was to receive some of the money to be obtained from R1 for his own use. The evidence is clear that no money was actually paid.

Smyrnis also gave evidence that McCormick was to receive a payment of \$70,000 as his share in exchange for arranging support for the DA from ALP councillors. McCormick has denied any such agreement.

The reliability of McCormick as a witness of truth is dealt with in chapter 5.

In considering the evidence as a whole, the communications between McCormick and Smyrnis are important as they corroborate Smyrnis' evidence concerning McCormick's involvement. They indicate McCormick's willingness to get another developer to develop the site if R1 is not co-operative. The SMS of 11 January makes it clear that Smyrnis is using an intermediary, while the conversation of 18 March makes it clear that McCormick is to speak to RCC officers to ascertain what might be approved so that a "formula" can be put to the developer. Their conversation of 18 March also makes it clear that money is to be obtained from R1.

In relation to Site 2, there appears to have been some discussion between Retsos, Smyrnis and McCormick about approaching R1. However, it does not appear that an approach was definitely decided upon or how much would be sought if an approach was made. Ultimately no approach was made.

FINDINGS OF FACT

Based on the evidence before me, which is summarised above and following assessment of that evidence, I make the following findings of fact:

1. On 17 October 2001 Anthony Retsos, at the request of Andrew Smyrnis, met with R1. During the meeting he sought from R1 a payment of \$90,000 and an additional payment of \$150,000 to be paid to Retsos and held by him, in trust, until such time as R1's DA for Site 1 was approved by RCC.
2. Retsos sought this money from R1 on behalf of Smyrnis knowing that in return Smyrnis would give favourable consideration as an RCC councillor to R1's DA for Site 1.
3. On his own admission, Smyrnis instructed Retsos to contact R1 with the intention of seeking money from R1 in return for Smyrnis giving favourable consideration as an RCC councillor to R1's DA for Site 1.
4. On 3 December 2001 Retsos spoke with R1, on behalf of Smyrnis, and told R1 the amount of money required was now \$250,000.
5. At all times Retsos understood that in return for dealing with R1 on behalf of Smyrnis he could expect to receive a payment of money of between at least \$20,000-\$25,000.
6. Smyrnis agreed with Councillor Adam McCormick to pay McCormick \$70,000 in return for McCormick supporting R1's DA for Site 1, and obtaining the support of other ALP RCC councillors.
7. No monies were paid by R1 to Retsos, Smyrnis or McCormick, either directly or indirectly.

CORRUPT CONDUCT?

In determining findings of corrupt conduct I have applied the approach set out in Appendix 2 to this report.

The soliciting of money for the purpose of influencing the performance of official functions, whether or not the money is actually paid, is conduct which clearly comes within s.8(1)(a)-(c) and s.8(2)(a), (b), (d) and (y) of the *ICAC Act*. Conduct comprising a conspiracy to engage in conduct that is corrupt under s.8(1) or (2) is itself to be regarded as corrupt pursuant to s.7(2) of the *ICAC Act*.

The conduct of Smyrnis and McCormick could constitute criminal offences of bribery, soliciting a corrupt benefit contrary to s.249B(1) of the *Crimes Act 1900*, and conspiracy to commit bribery for the purposes of s.9 of the *ICAC Act*.

The conduct of Retsos could constitute criminal offences of aiding, abetting or procuring the solicitation of an offence under Part 4A of the *Crimes Act 1900* contrary to s.249F of the *Crimes Act 1900* or conspiracy to solicit a bribe for the purposes of s.9 of the *ICAC Act*.

In these circumstances I find that Smyrnis, McCormick and Retsos engaged in corrupt conduct in relation to seeking monies from R1 in return for Smyrnis and McCormick giving favourable consideration to his DA for Site 1.

SECTION 74A(2) STATEMENT

Each of Smyrnis and Retsos gave evidence with the benefit of a declaration made pursuant to s.38 of the *ICAC Act*. The result of this is that their evidence is not admissible against them in criminal or disciplinary proceedings other than in proceedings for an offence against the *ICAC Act*.

However, potentially at least, the evidence of Smyrnis and Retsos is available against each other. In addition, it is likely the evidence of R1 would be available against both. Also available is the electronic surveillance evidence referred to in this chapter.

In relation to McCormick the evidence of Smyrnis is potentially available. Also available is the electronic surveillance referred to in this chapter.

In these circumstances, I recommend that the DPP give consideration to prosecuting:

- (a) Andrew Smyrnis in relation to the soliciting of a corrupt reward or benefit contrary to s.249B(1) of the *Crimes Act 1900* or conspiracy to commit bribery,
- (b) Anthony Retsos in relation to aiding, abetting and procuring the commission of an offence under Part 4A of the *Crimes Act 1900* (the soliciting of a corrupt reward or benefit) contrary to s.249F of the *Crimes Act 1900*, or conspiracy to commit bribery.

- (c) Adam McCormick in relation to agreeing to receive a corrupt reward or benefit contrary to s.249B(1) of the *Crimes Act 1900* or conspiracy to commit bribery.

I am also of the opinion that the DPP should give consideration to the prosecution of Smyrnis, Retsos and McCormick for offences of giving false or misleading evidence contrary to s.87 of the *ICAC Act*. In relation to Smyrnis and Retsos the relevant evidence is their initial denials that Retsos approached R1 on behalf of Smyrnis for the purpose of soliciting a bribe. In relation to McCormick the relevant evidence is his denial of having an arrangement with Smyrnis whereby he could expect to receive money in return for supporting R1's DA and arranging for other ALP councillors to support the DA.

In stating this opinion in relation to Smyrnis and Retsos I have taken into account the considerations referred to in Chapter 3.

RECOMMENDATION FOR SUSPENSION OF MCCORMICK

The conduct in which McCormick has been found to have engaged in this chapter constitutes serious corrupt conduct for the purposes of s.440C of the *LG Act*. In these circumstances, as in chapter 4, I recommend that the Minister for Local Government give consideration to the suspension of Councillor Adam McCormick from civic office with a view to his dismissal from that office by the Governor. In making this recommendation I am of the opinion that prompt action is required in the public interest.

CHAPTER 7 — LUSTY STREET, ARNCLIFFE

Terry Andriotakis is a director of a company that is part of a group that has a Development Control Plan (DCP) proposal before RCC in relation to a property at Lusty Street, Arncliffe. He said he was first introduced to Smyrnis approximately 20 years ago.

Andriotakis said he and his brother met with Smyrnis in the latter's office on the afternoon of 31 January 2002. He told the ICAC he believed their proposal complied with RCC requirements but was concerned that the evaluation and approval of the proposal not become bogged down. He said he approached Smyrnis to ask for his assistance because "... we wanted to know about the politics, and how the politics worked in the area". He was emphatic, however, that he was not seeking to offer any bribe to Smyrnis.

At that meeting on 31 January, did you suggest anything to him in the nature of a bribe?—I didn't suggest anything to him in the nature of a bribe, I said if he could help us, we could try and help him wherever we could.

He said Smyrnis asked for some help in networking in relation to a mortgage company and public relations company in which he was involved.

What was he to do for you in return for that sort of help that you were prepared to offer him?—Nothing. Well, just have a look at the proposals and then just like put it through, like – just through the motions. I – look obviously he doesn't make all the decisions in the Council and there are other people there, but we just wanted to talk to somebody and take our proposal through with somebody and just see how it went. Like, it was just – wasn't any – that was it.

...

You say do you that you were simply speaking to him with an expectation that he would do what any councillor might do when an Development Application comes to Council, is that right?—Yes, they – they talk – they obviously discuss it amongst themselves, and that's why people go and lobby councillors.

He agreed that councillors should not expect to receive anything for carrying out such normal duties. He said that although he was prepared to offer some networking assistance he did not offer any monetary or financial assistance.

THE MEETING OF 31 JANUARY

The meeting of 31 January was lawfully recorded by the ICAC. In the conversation, Andriotakis indicated he wanted to keep the RCC consideration of his matter moving along. He also wanted to keep his work crew in work.

The reason why it's a bit of a pressure for us at the moment is I've gotta business where we employ crews, and you buy stuff ..."

Andriotakis was also concerned that a nearby development at a Meriton site might be completed before the approval for his site gets the go-ahead. In such a case he was concerned that the people residing in the Meriton development might become potential objectors to his development.

He told Smyrnis he had a meeting with an RCC officer to discuss the proposal on 5 February. Smyrnis suggested he wait to see what happened at the meeting "and then I'll sort of start canvassing some of the other councillors there, and see what their sort of general feeling might be towards it".

The discussion with Smyrnis goes beyond merely seeking his advice and assistance in lobbying other councillors. It changes in tone because Andriotakis offers to benefit Smyrnis in return for him providing assistance. The following excerpts from the conversation are relevant:

TERRY: So have you guys got the numbers at the moment?

SMYRNIS: We form coalitions.

TERRY: Yeah, so can pull numbers if you need to.

SMYRNIS: And normally we try to work on the ALP as a first preference rather than Independents.

...

TERRY: We will, we'll do the right thing by you and you will need a hand on some stuff, if you're doing other stuff in the future.

SMYRNIS: Mm.

TERRY: I can tell you now Andrew, I know my shit when it comes to property.

SMYRNIS: Mm.

TERRY: You can ring me whenever you want, I'll help ya out.

...

TERRY: Yeah, yeah you might be needing something in the future around here and you say, you don't actually wanna buy or you going into Sydney. You can whiz around the office and say "Terry ten minutes" (inaudible) should I fuckin' buy it or not and I'll tell ya if you should be buying it or not. That's worth a lot of money.

SMYRNIS: Yeah.

TERRY: - and I only do that to people that help me out and I think you'll get it back more than - if you took a bit of time to help us.

SMYRNIS: Look

TERRY: We can't pay ya, can I tell we can't pay 'cause there's an unethical issue there right?

SMYRNIS: Yeah, yeah, yeah.

Smyrnis then indicated that he and some partners were considering entering the property development business. The conversation proceeded:

SMYRNIS: ... so if we put a site together in Botany, for example, but ah, and it stacks up I might say to you guys, do you wanna to come in and look at it -

...

TERRY: Yeah, yeah, you might even say to us, "Terry, listen, um, we'll get into this, you guys take half, we'll take half, give us half the money and we'll do the thing and you guys run the development, because we're very good at that ... Andrew we're very good at that.

...

TERRY: So you know I mean like if you help us out here it'll come back to you.

...

TERRY: You can help us here look there'll be a time when you come in and say "Terry I need a fuckin' hand with this. Help me out" and I'll help you out. All right?

SMYRNIS: Yeah, okay.

TERRY: We work like that.

Smyrnis then told Andriotakis that he was involved with a finance company called Mortgage Wise. The conversation proceeded:

SMYRNIS: ... if you say to me, if you guys say to me you've got 250 units under construction, okay? Now your purchasers usually are steered for finance by your agency -

TERRY: They are.

SMYRNIS: Or by whoever.

TERRY: Yeah, yeah, yeah well listen Andrew.

In evidence, Andriotakis agreed he was "looking for a smoother path" so he could start work on the development before people moved into the Meriton development and potentially started objecting. He said he did not refer people to the mortgage business, merely placed pamphlets in a display centre. Smyrnis gave evidence that he believed a couple of referrals had been made to the company but that although he was working towards acquiring an interest in the business he did not have one at the moment.

Andriotakis claimed he was essentially offering potential networking opportunities and did not consider there was anything wrong with doing so. He was asked

about the part of the conversation where he offered to provide Smyrnis with advice which he indicated was worth a lot of money. He confirmed that he believed his advice was worth a lot of money.

*Yes, and you say that's worth a lot of money?—
To a – yes, in the context of the – of my
statement, it – for my advice which I don't give
out to people, I believe is worth a lot of money.*

He gave the following evidence:

*You say that you know it's unethical to pay him
for services?—Yes, of course it is.*

*But you do it in other ways by offering him
these favours?—It's not a favour, it's just some
help.*

He was asked why, if he was only asking Smyrnis to carry out his normal duties as a Councillor, he should be entitled to any assistance and why he had offered any assistance.

*I just offered it but whether – I offered because
I didn't think there was anything wrong with
offering what I offered, which was some potential
networking opportunities. Now, if he – he could
have said to me at that time, "Terry, I don't
need that, I will still help you anyway, because
that is my job", if he said that to me I would
have dropped it from the start, but he did not
say that to me.*

It is clear from the taped conversation that Andriotakis was offering Smyrnis more than just networking opportunities.

Subsequent Communications

Andriotakis and Smyrnis subsequently spoke on the telephone on 6 February. Andriotakis told Smyrnis he had been happy with the meeting with the RCC officers who had some concerns regarding acoustics. Andriotakis told Smyrnis the RCC officers had asked for a presentation on the project to be given to the Ward Councillors, who included the Mayor. Smyrnis told him that he had spoken to the Mayor about the project and he appeared to be supportive.

Smyrnis rang Andriotakis and had a further telephone conversation with him at 10:44am on 18 March. Part

of the discussion concerned the development of a site recently purchased by the Mayor's brother. They discussed the possibility of Andriotakis doing a joint venture with the Mayor's brother in developing the site. The conversations proceeded:

TERRY: Tell me something, if we help them obviously they would help us as well, wouldn't they?

SMYRNIS: Exactly. And that's why I wanted to speak to –

TERRY: Even if, even if nothing happened, like you can put pressure on his brother and say listen these guys are helping your brother out, fucking make sure the DA comes up.

SMYRNIS: Yep.

TERRY: True? Right. Okay the guy -

SMYRNIS: That's why I'm saying we gotta keep them friendly and keep them in the loop ..."

Andriotakis told the ICAC he saw nothing untoward in this sort of conduct. He was asked to explain what he meant about applying pressure.

*But what you were proposing is to put pressure
on the Mayor. You see that as normal,
commercial practice ...?—Everyone lobbies.
Everyone lobbies people.*

...

*To make sure —?—But you know if we – if we
help them with their development of their site
– the (nominated site) they might be able to
help us. That's all it was. I even said we didn't
do that work – that line of work, in my
conversation with him.*

*So it just works on a system of favours or
something. Is that what you're saying?—Not
favours. But if – if you do something for
somebody and they can help you without
compromising their position they would help
you back. I don't think there's anything wrong
with that. As long as it is above board and it's
the right – it's done the right way.*

Andriotakis said that he never actually helped the Mayor's brother. He ultimately agreed that in asking Smyrnis to tell the Mayor that Andriotakis was helping his brother he was asking him to ask the Mayor to assist Andriotakis.

During the course of the telephone conversation of 18 March Andriotakis asked Smyrnis whether he has had an opportunity to talk to the Mayor. Smyrnis said he would ring him as soon as their conversation finished. Andriotakis wanted him to do so in order to organise a meeting. His conversation with Smyrnis then proceeded:

TERRY: And obviously – look the other thing is that, I suppose Nick and I will look after ya for helping us, you know that, you know that!

SMYRNIS: Yes, yes, yes, yes.

TERRY: And there's also the fucking mortgages –

SMYRNIS: Yes, yes, yes.

TERRY: And I'll even put you on the fucking site if you want you understand that.

SMYRNIS: Yes, yes, yes look about them as I said it is not necessary to repeat them.

Smyrnis gave the following evidence regarding his contact with Andriotakis:

On at least two occasions, when you've spoken to Mr Andriotakis, he has indicated to you in effect that he will look after you for your efforts, is that right?—Yes.

What was it that you were to do so that Mr Andriotakis would look after you?—Look favourably on his project.

Does that include getting the Development Application approved if possible?—Yes. Although as I indicated previously, that development was in an area that was going forward with the Council's blessing to a large degree in relation to development. This was a development within that area and most councillors, if not all, including the Council proper, were keen to see the area develop in an appropriate way.

However, Smyrnis said he did not regard the offers being made to him by Andriotakis as a bribe. The basis for this belief appears to be that he did not solicit a benefit but rather had benefits offered to him and that he believed in any event the project would receive RCC approval without him doing anything.

You differentiate Lusty Street from the others?—I do, because in this matter because in this matter Andriotakis offered to look after me, if that's the right way of putting it. It wasn't something that was initiated by me.

I see?—And in any event, as I have mentioned to you previously, because of my relationship with him that went back many years, and because his offer may have amounted to something, I would have not participated in those discussions or Council deliberations and declared an interest.

You would have declared an interest in this one?—Yes.

Why is that?—Because for the reasons that I had said, and also because I would have formed the opinion that it would have got the approval, or the general sort of consensus without me really doing anything.

So, you couldn't really justify asking any money or favours?—I've known Terry for many years, I didn't do that.

SUBMISSIONS

Before considering findings in this matter it is necessary to consider submissions made by counsel for Andriotakis that the ICAC should not make any adverse findings or recommendations concerning his client. The basis of these submissions was that:

1. such findings would offend the rules of procedural fairness, and
2. the evidence as a whole does not warrant such a finding.

In relation to issues of procedural fairness it was submitted:

- (a) there was a failure to advise Andriotakis of the general scope and purpose of the hearing and that he was likely to be a person at risk of an adverse finding,
- (b) there was a failure to advise Andriotakis of the matters being investigated,
- (c) as a consequence of (a) and (b) Andriotakis lost the opportunity to be present for the evidence of Smyrnis and lost the opportunity of cross-examining him, and
- (d) Andriotakis and his legal representatives were misled by Counsel Assisting as to the evidence Smyrnis had allegedly given against him.

Submissions 1 (a), (b) and (c) appear to be made on the basis that Andriotakis should have been informed of the nature of the evidence implicating him in possible corrupt conduct either before he gave evidence or at the commencement of his evidence. Such a proposition is clearly contrary to settled authority that such disclosure may be deferred until later in the investigative process (e.g. *NCSC v News Corporation Ltd (1984) 156 CLR 296*).

The general scope and purpose of the investigation was set out in the summons to attend served on Andriotakis. It was read out in the hearings at the commencement of the day on which Andriotakis gave evidence. It was submitted, however, that the scope and purpose referred to “development application” and that the DCP being proposed by Andriotakis was not an environmental planning instrument but rather a policy instrument and could not therefore be characterised as a “development application”. This is semantic argument. The term “development application” in the scope and purpose of the investigation is used in the broad sense. It is not limited to DAs as provided for in the environmental planning legislation. It is notable that in his telephone conversation with Smyrnis on 18 March, Andriotakis himself refers to the DCP as “the DA”. In any event, it would have been clear to Andriotakis during the course of his questioning that the ICAC was investigating whether he had engaged in corrupt conduct arising from his discussion with Smyrnis on 31 January 2002

and subsequently in relation to the DCP. Recordings of his conversations with Smyrnis were played to him in the hearings and he was questioned extensively in relation to those conversations.

It was submitted that because Andriotakis was not given advice prior to his appearance that he might be a person whose interests would be affected by the evidence he lost the opportunity to be present when Smyrnis gave his evidence and to cross-examine him. However, in making these submissions the ICAC was told by counsel for Andriotakis that he did not suggest he would have wanted to challenge Mr Smyrnis’ evidence.

Although provided with a copy of the transcript of Smyrnis’ evidence after he gave evidence Andriotakis did not advise the ICAC he wished to cross-examine Smyrnis. After considering his counsel’s submissions, he was invited to indicate whether he wished to have Smyrnis recalled for the purpose of cross-examination. He did not. This is not surprising as there was no conflict between Smyrnis and Andriotakis in the essentials of their evidence. The evidence on which any adverse findings may be made in relation to Andriotakis comes from his own conversations with Smyrnis electronically recorded by the ICAC and referred to in this chapter.

It was submitted that Andriotakis was not advised he was likely to be a person at risk of an adverse finding. This is incorrect. Written submissions of Counsel Assisting were provided to Andriotakis at the conclusion of the hearings. These specifically drew his attention to the possibility that he could be the subject of an adverse finding, and the evidence upon which such an adverse finding could be based. It is partly the function of such submissions to give those against whom adverse findings may be made notice of that fact and an opportunity to address in response. That opportunity, both in the form of written submissions and the final hearing day on 11 June, was given to and availed by Andriotakis.

It was further submitted that Andriotakis was misled by a statement made by Counsel Assisting. The relevant instance occurred prior to Andriotakis giving evidence during the hearing of an application on his behalf for a suppression order. Responding to submissions by Andriotakis’ counsel in support of such an order, Counsel Assisting said, in part:

He (Smyrnis) admitted in general terms that he accepted that he was to be looked after, as it were, by Mr Andriotakis and my recollection is that he conceded that that was conduct unbecoming a councillor.

It was submitted that Smyrnis had denied he was to be looked after in relation to Lusty Street and never conceded that his dealings with Andriotakis were unbecoming.

It is clear from the transcript of Smyrnis' evidence that he did accept that Andriotakis offered to look after him. Indeed, that is borne out by the electronic surveillance evidence referred to in this chapter. The fact that Smyrnis said he would have been sympathetic to the proposal irrespective of Andriotakis' offer does not detract from the fact that the offer was made and that Smyrnis accepted the offer was made.

Smyrnis had previously conceded, in general terms, on the first occasion he gave evidence that it would be improper to expect or receive a reward for performing his official duties. In relation to Andriotakis specifically, however, he did not concede his conduct was "unbecoming". It is unfortunate if Andriotakis felt misled by the statement of Counsel Assisting in this respect. However, during the course of his evidence he was taken through the issues of interest to the ICAC. An opportunity was given to his counsel to question him at the end of his evidence in chief to clear up any misunderstandings. Ultimately, he was provided with a copy of Smyrnis' evidence and the submissions of Counsel Assisting which clearly indicated the matters of interest to the ICAC and the evidentiary basis upon which any adverse findings might be made.

ASSESSING THE EVIDENCE

It was submitted on behalf of Andriotakis that the evidence as a whole did not warrant any adverse finding against him. It was submitted that Andriotakis was seeking to get RCC approval for a DCP and that a DCP, unlike a DA, is not amenable to corrupt conduct. It was submitted a DCP must conform to the relevant LEP and that to find there had been corrupt conduct in relation to a DCP "is a legal absurdity".

This submission is incorrect. Unlike an LEP a DCP provides detailed criteria against which a DA is to be measured. It will cover details not contained in the

LEP. It follows that there is room to exercise a degree of judgement in the precise contents of a DCP and therefore there is potential for such judgement to be adversely influenced.

The facts of this case indicate that Andriotakis was primarily seeking Smyrnis' assistance in getting RCC to approve the DCP sooner rather than later. For Andriotakis the issue was one of time. It would be of advantage to him to get RCC to approve the DCP as submitted rather than occasion delay by debating changes and having to submit an amended proposal. He was clearly interested in ascertaining that Smyrnis could gather the necessary political support on council to get the proposal through. The language used by Andriotakis in his conversations with Smyrnis on 31 January and 18 March, and the tone adopted by him in these conversations, indicate a person making offers of assistance to Smyrnis with the clear intention of influencing Smyrnis to support the DCP, and lobby the Mayor and other Councillors to have it approved quickly.

It was also submitted that no adverse finding should be made as Andriotakis made it clear he did not intend offering Smyrnis any money. However, it is well settled law that corruption, and corruption offences, are not limited to the offering or accepting of monetary benefits only. The term "benefit" in Part 4A of the *Crimes Act 1900* is not limited to money. At common law bribery is defined in terms of "reward" which covers anything which is regarded or intended to be regarded as of value to the person being bribed. It is clear from the evidence that Andriotakis was offering valuable consideration to Smyrnis in return for his assistance.

An additional submission made on behalf of Andriotakis was that because Smyrnis said he would have declared a pecuniary interest and not voted on the DA there could be no corrupt conduct. However, in the present case it was not so much an issue of whether Smyrnis would ultimately vote in favour of the DCP as Smyrnis using his position as a councillor with other councillors and RCC officers to ensure the DCP was brought before RCC in a timely manner. Even if Smyrnis' evidence is accepted that he would not ultimately have voted in relation to the DCP he would nevertheless be acting favourably in relation to Andriotakis' interests. Even if he had no intention of being influenced in the performance of his official duties the acceptance by him of the offers made by

Andriotakis could constitute bribery (*S v Van Der Westhuisen (1974) 4 S.A. 61*). It is clear from their conversations of 31 January and 18 March that Smyrnis acquiesced in the offers being made by Andriotakis. Indeed it is Smyrnis who raises the prospect of Andriotakis referring clients to the mortgage company in the conversation of 31 January and providing assistance in relation to a possible development site at Botany.

It is settled authority that the offence of bribery can be made out even though the inducement or reward being offered is to encourage the recipient to do his or her duty (*Williams v R (1979) 23 A.L.R. 369*). The offering of a reward or benefit with the intention the offer affect the conduct of the person promised the benefit, even though it is not intended to induce the person to come to the wrong decision, can constitute bribery (*R v Gurney (1867) 10 Cox C.C. 550*).

FINDINGS OF FACT

Based on the evidence before me, which is summarised above and following assessment of that evidence, I make the following findings of fact:

1. On 31 January 2002 and subsequently on 18 March 2002 Terry Andriotakis offered to provide benefits to Councillor Andrew Smyrnis by way of free advice in relation to property deals (which Andriotakis said was worth a lot of money), referring potential customers to a mortgage business in which Smyrnis said he was involved, and assisting Smyrnis in joint ventures, including the possibility of Smyrnis becoming a beneficiary in a development. These offers were made by Andriotakis and accepted by Smyrnis with the intention that Smyrnis would, in his capacity as a councillor of RCC, lobby other RCC councillors to ensure that Andriotakis' DCP for Lusty Street, Arncliffe, was approved by RCC as soon as possible.
2. Terry Andriotakis was anxious to get RCC approval for his DCP as soon as possible in order to avoid the risk of potential objections from a neighbouring development and to maintain his work crew in work.
3. Smyrnis agreed to the offers made by Andriotakis both in his conversation of 31 January 2002 and in a subsequent conversation on 18 March 2002.

CORRUPT CONDUCT?

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

The offering and agreeing to receive a benefit for the purpose of influencing the performance of official functions, is conduct which clearly comes within s.8(1)(a)-(c) and s.8(2)(a), (b), (d) and (y) of the *ICAC Act*.

The conduct of Terry Andriotakis could constitute criminal offences of bribery, or offering a corrupt benefit contrary to s.249B(2) of the *Crimes Act 1900*.

The conduct of Smyrnis could constitute criminal offences of bribery, or agreeing to receive a corrupt benefit contrary to s.249B(1) of the *Crimes Act 1900*.

In these circumstances I find that both Terry Andriotakis and Smyrnis engaged in corrupt conduct in relation to the offering and agreeing to accept benefits to be provided to Smyrnis by Andriotakis in return for Smyrnis using his position as an RCC councillor to assist Andriotakis get his DCP approved by RCC in a timely manner.

SECTION 74A(2) STATEMENT

Each of Smyrnis and Andriotakis gave evidence with the benefit of a declaration made pursuant to s.38 of the *ICAC Act*. The result of this is that their evidence is not admissible against them in criminal or disciplinary proceedings other than in proceedings for an offence against the *ICAC Act*. However, the electronic surveillance evidence referred to in this chapter is available.

In these circumstances I recommend that the DPP give consideration to prosecuting:

- (a) Terry Andriotakis in relation to offering a corrupt reward or benefit contrary to s.249B(2) of the *Crimes Act 1900*, or conspiracy to commit bribery, and
- (b) Andrew Smyrnis in relation to agreeing to receive a corrupt benefit contrary to s.249B(1) of the *Crimes Act 1900* or conspiracy to commit bribery.

CHAPTER 8 — 2 TOOHEY CRESCENT, BEXLEY

As part of its investigation the ICAC examined the conduct of the RCC Mayor, Shaoquett Moselmane and McCormick in relation to a development at 2 Toohey Crescent Bexley being proposed by the Mayor's cousin. There was no evidence that any bribery was involved. The issues for investigation were whether the developer was shown any improper favouritism because of his relationship to Moselmane and whether any improper pressure had been placed on RCC officers to fast track the application for approval. As will be seen below the facts established there was no corruption involved.

The DA for the construction of three villa units was lodged with RCC on 18 September 2001. The plans provided for a bedroom, walk-in robe and en-suite in the roof space. It was argued this accommodation came within the definition of "attic space" in the relevant DCP and therefore did not comprise a second storey. If this argument was accepted then it was more likely that the DA would be found to comply with relevant floor space ratio planning requirements and would be approved.

Moselmane told the ICAC he determined he should not vote on the DA because of a possible conflict of interest with the applicant being his cousin. This was not necessary given the provisions of the *LG Act* requiring a councillor to declare a pecuniary interest do not apply if the only interest is that the applicant is a cousin.

Mark Adams was the RCC officer responsible for initially assessing the DA. He did not believe the internal roof space came within the definition of "attic space" because vertical walls were visible from the exterior. On 29 October he wrote to the developer advising that after a preliminary assessment of the DA there were a number of matters which needed addressing. These included the enclosing of part of the attic by dutch gables which constituted external vertical walls contrary to the DCP. The developer was asked to submit amended plans. These were submitted on 7 November with the gables removed. However, Adams did not believe the amended plans addressed all the issues raised in his letter.

A number of local residents had objected to the development. Their objections continued despite the amendments.

What the Mayor did

On 27 November 2001 Moselmane issued a memo to RCC officers titled "MAYOR'S ACTION REQUEST" concerning finalisation of outstanding matters. The memo is in the following terms:

I want every application, be it for building, extensions, renovations, opening of shops/offices, leases footpaths, etc. that we can process prior to our last Council Meeting to be finalised.

I want all outstanding matters, matters nearing completion, to be finalised with an extra bit of effort to ensure we provide the service that our community deserves and ensure they enjoy the Christmas and New Year festivities.

Moselmane says he wanted to complete consideration of applications nearing completion as RCC was going into recess for a month and a half or so over the Christmas/New Year period. It is relevant to note the memo is not limited to DAs but relates to applications in general.

Adams says approximately two weeks after this memo was circulated he was in the office of Gregory Raft, the RCC Manager – Residential Development. Raft received a telephone call from Moselmane. Adams says Raft put the telephone on "speaker" mode and they then had a conversation with Moselmane concerning his cousin's development. Raft says Moselmane wanted the development finalised before the Christmas break. Raft said he told Moselmane he would prefer to meet with the applicant to sort out remaining non-compliance issues and submit a report to RCC in mid-January. Raft says Moselmane wanted the matter finalised before Christmas and he agreed to have the necessary report prepared.

Moselmane told the ICAC he could not specifically recall requesting a report but allowed he may have done so. He said that he did not seek to put pressure on any RCC officer to get the matter before RCC and did not do anything to direct what recommendation should be made. Neither Adams nor Raft say that Moselmane commented on what recommendation should be made in the report.

McCormick becomes involved

Raft and Adams subsequently met with McCormick at his request to discuss issues of non compliance with the DCP. They say they told McCormick that if a report was prepared for RCC at this stage they could not recommend approval of the DA because of outstanding issues of non-compliance. They said McCormick said he would still like the DA reported to RCC for its meeting on 12 December.

McCormick told the ICAC he spoke with RCC officers about the DA but did not put any pressure on them. Neither of the officers say they felt improperly pressured. Moselmane says he did not ask McCormick to speak with RCC officers about the DA.

Adams prepared a report recommending refusal of the DA which was duly included in the RCC business papers for the meeting of 12 December.

On Friday 7 December, following completion of the report, Adams and Raft met with the applicant, his architect, and McCormick. Adams and Raft explained their concerns regarding non compliance and suggested some design changes. The applicant agreed to make the necessary changes. Amended plans were received on Monday 10 December.

Adams completed a memo to councillors to be included in the business papers for the 12 December meeting. It included a table of compliance, outlining the amendments and how they satisfied the original concerns. He advised he considered the latest amendments largely addressed the concerns raised in his report and that the remaining non-compliances were relatively minor.

McCormick telephoned Moselmane on 11 December. He suggested the ALP caucus to support the DA and they discussed who in the ALP was likely to give support. Moselmane suggested two names and McCormick a third. Moselmane said that together with McCormick's votes that would be sufficient to gain caucus support.

MOSELMANE: That's four in caucus, and you can get it through. And they have to, they have to fuckin' vote for it.

Later in the conversation, McCormick indicated he was angry that the matter would not be decided before Christmas.

In his evidence to the ICAC, McCormick said he raised the DA in caucus but it was decided not to have a caucus vote. He said he was told it was not ALP policy to caucus on DAs. Moselmane told the ICAC he did not regard caucusing on DAs as appropriate. He said he was present at the ALP meeting when the issue was raised by McCormick and "... I made sure that we decided we did not caucus". RCC records indicate the ALP councillors did not vote as a bloc on this matter.

The report and memo prepared by Adams were considered by RCC at its meeting on the evening of 12 December. Moselmane declared a pecuniary conflict of interest on the basis that the applicant was related to him. He left the meeting and did not vote. The decision was to defer consideration of the DA for further consultation and authority was delegated to McCormick as Deputy Mayor, the First Ward Councillors and the General Manager to determine the application.

Shortly after RCC reached this decision, at 8:30pm, McCormick made a telephone call to Moselmane's brother. He asked him to make sure to tell the applicant that "... we fuckin' tried our hardest to get it through before Christmas". He was asked why he was keen to get this message to the developer.

Because the Mayor wanted – had put out originally that he was trying to get developments through Christmas before it, because he wanted to sort of give people like this an early Christmas present type thing, so – and knowing that the Mayor couldn't contact or speak to him directly about the development, I spoke to him instead.

So you were doing the Mayor's bidding, were you?—No, not at all. Not the Mayor's bidding, but I was playing the role of the Mayor through the fact that the Mayor couldn't be involved in that development.

McCormick denied he had left the RCC meeting specifically to make this call. RCC minutes of the meeting record that immediately following discussion

of the DA McCormick left the chamber at 8:24pm. He said his purpose in leaving was to go to the toilet. He denied there was an urgent need to get information to the developer.

Preparing a further report

The amendments to the plans failed to satisfy those objecting to the DA. A public meeting was held on-site for objectors to discuss the DA on 22 January 2002. Those given delegated authority to determine the DA were unable to reach consensus therefore requiring the matter to go back to an RCC meeting for determination.

Adams believed "... given the involvement of councillors, the Mayor, the General Manager, Council Directors and Managers, the large number of contesting residents and the fact that the plans had been amended and there was too short a timeframe to address the issues raised ..." the matter should not be reported to the next RCC meeting on 30 January. He felt this timeframe was too short for him to adequately address all of the issues raised at the onsite meeting. He raised these concerns with Diane Cuthbert, the Director – City Development. She decided to proceed and have a report prepared. She said she did so as she understood from her discussions with Raft and Adams that the DA now complied with RCC planning requirements. She allocated preparation of the report to another officer.

There was nothing improper in the actions of Cuthbert. She was exercising her professional judgement in deciding that it was appropriate for a report to be prepared at this stage. There is no evidence that she was the subject of any improper pressure either as to the speedy preparation of a report or the recommendations to be contained in the report.

The new report recommended the DA be approved subject to a number of conditions which are not relevant for present purposes.

This report was considered at the RCC meeting on 30 January. Once again, Moselmane declared a pecuniary conflict of interest and did not participate in the meeting or vote. RCC resolved to defer consideration of the application pending receipt of legal advice in relation to the definition of "attic space" in the DCP.

On 13 February RCC again considered the DA after receiving legal advice. Once again Moselmane declared a pecuniary conflict of interest, left the meeting and did not vote. A motion for deferral on the grounds that the DA was contrary to the intent of the DCP in relation to density was defeated on the casting vote of McCormick. The DA was passed. A subsequent rescission motion was debated and lost 6 votes to 8 votes on 20 February.

ASSESSING THE EVIDENCE

It is clear from the evidence that those RCC staff involved in this matter at all times acted professionally and appropriately. Whether it was wise for either Moselmane or McCormick to directly approach RCC planning officers and seek to have them speed up preparation of their report on the DA is another issue.

Councillors making direct contact with planning officers concerning applications being considered by those officers, particularly where the councillor may have some perceived interest in the outcome of any recommendation, may lead to perceptions that the councillor is attempting to improperly pressure or unduly influence the relevant officer. Such perceptions may arise no matter how innocent the motivation of the councillor involved, and bring into question the integrity of the planning process.

In order to fulfil their functions it will be necessary from time to time that councillors obtain information about the progress of DAs and planning issues raised by them. In such circumstances, it is preferable if this information is obtained either through the council general manager or senior staff, rather than by direct contact with junior staff so as to avoid the creation of adverse perceptions. The advantages of such a policy have been recognised by Moselmane.

In his evidence to the ICAC on 14 May 2002 Moselmane said he had instructed the General Manager a few months previously to issue a memo that councillors are not to talk to any of the junior planning staff. He gave the following evidence:

*You foresaw that Councillors approaching junior staff could lead to problems, is that right?—
That's correct.*

And that the public may lose confidence in the way in which the planning process worked, is that right?—Well, it implied it would have had an impact on the application, no doubt – on the reporting of the application.

At the RCC meeting of 8 May 2002 Moselmane moved a Mayoral Minute recommending a number of steps to promote better transparency and accountability in RCC's planning processes. He recommended the preparation of a Code of Practice to provide clear guidelines and responsibilities for councillors, staff, applicants and local residents in dealing with DAs. He noted that private conversations between planning staff and councillors about pending DAs or zoning changes were a matter of concern. In particular he noted "when such communication takes place councillors leave themselves open to suggestion of compromising the officer's recommendation". He suggested the Code of Practice deal with this issue.

CORRUPT CONDUCT AND SECTION 74A(2) STATEMENT

There is no evidence that any person engaged in corrupt conduct in relation to this matter. As no issue of conduct of a criminal or disciplinary nature arises from the facts of this matter the issue of recommendations under s.74A(2) of the ICAC Act does not arise.

CHAPTER 9 — ST GEORGE SOCCER ASSOCIATION GROUND

During the course of its investigation the ICAC became aware of an allegation that a former treasurer of the St George Soccer Association Inc had used \$44,400 of the Association's money to bribe RCC councillors to secure approval for a proposed development by the Association. The ICAC investigated the matter. As will be seen from the facts set out below the evidence does not indicate any RCC Councillor was bribed, or that any attempt was made to bribe a councillor.

In about September 2001 the current President of the Association became concerned that a number of cheques totalling \$44,400 had not been properly authorised by the Association. He made a number of further enquiries, including questioning the former treasurer responsible for drawing the cheques, Mr William (Bill) Bariamis.

The ICAC was provided with information that Bariamis claimed he used the money to bribe some RCC councillors. The bribe was to secure approval for a proposed DA for the redevelopment of the Association's ground into a new multi-purpose sporting and recreation facility. Subsequent investigation did not substantiate this information.

Between 9 March 2001 and 20 August 2001 some 13 cheques were drawn on the Association's account totalling \$44,400. These were each signed by Bariamis and countersigned by the Association's Secretary.

During the execution of a search warrant on Smyrnis' office the ICAC found a 2001 diary. An entry for 18 April 2001 for 10:00am indicated "Bill Bariamis – St George Soccer Stad. Dev." Also found was a copy memo from an RCC officer to Smyrnis providing background information on the Association's proposal. The memo indicates it is in response to a request from Smyrnis. The memo is dated 10 August 2001. Also located was some correspondence from August 2001 concerning the proposal.

Bariamis told the ICAC that the Association began consideration of a proposal to redevelop its ground in about December 1999. As one of the then directors of the Association it was his role to co-ordinate the proposal from the Association's end. As part of his

role he met with RCC officers. He said subsequently RCC established a task force comprising six councillors. One of these was Smyrnis. It appears from his evidence that there were a number of discussions both with RCC officers, RCC councillors and others concerning the project. Although there was some interest expressed in the project it did not, for various reasons, proceed.

Bariamis confirmed that his signature appeared on the 13 cheques. He denied however that he used any of the money from the cheques to pay RCC officers or councillors. He said he cashed each of the cheques at the bank. He said he used some of the money to pay certain players their fees. He said some of the money was used to recompense him for expenses incurred by him in undertaking work on the proposal for the Association. He denied that he was in effect stealing money from the Association.

He denied telling any Association official that he had used the money to bribe RCC councillors.

In his evidence to the ICAC Smyrnis confirmed he had a meeting with Bariamis concerning the proposed development. He did so because he was part of the task force. He said he knew nothing about monies going missing from the Association's account and had not sought nor received any payment of monies from Bariamis.

Assessing the conduct

It is clear from the evidence that Bariamis obtained the \$44,400 from the Association's account. It appears some of these funds were used to pay or reimburse players and part was retained by Bariamis to cover expenses which he claimed were associated with preparing the proposal for redevelopment of the Association's ground. Ultimately there was no evidence to indicate that any of the monies obtained by Bariamis were used to pay Smyrnis or any other RCC councillor or officer. In these circumstances there is no evidence that any person engaged in corrupt conduct.

It is a matter for the Association to determine what, if any, action should be taken against Bariamis in relation to the \$44,400.

CHAPTER 10 — DEVELOPING CORRUPTION RESISTANCE - LESSONS FROM ROCKDALE

The issues identified in this investigation warrant consideration of how the systems in place at RCC, and other councils, might be improved so as to prevent corruption in the development control systems and processes.

The statutory reforms already made in response to this investigation deal with the most pressing issues to have arisen. Further reform of development control systems is still necessary. A more comprehensive response to the issues that arose in relation to the integrity of the planning system may impact on the effectiveness and efficiency of the process, and warrant careful consideration of the benefits and disadvantages of possible options for reform. Accordingly, I am not making any specific corruption prevention recommendations at this time.

Instead, in this chapter, I wish to raise some additional issues that I believe must be considered if we are to comprehensively respond to corruption risks in the system. The purpose of raising these issues is to stimulate discussion on them before settling on further recommendations for reform.

In coming months, I will release a series of recommendations for further statutory reform in relation to planning and development. The ICAC will also issue guidelines and a range of model approaches for dealing with the remaining issue, relating to policy, procedure and practice, identified in our ongoing project for addressing corruption risks in development control systems.

During 2000-2001 we undertook extensive research into the corruption risks in local government. In June 2001 we released our research report *Corruption resistance strategies – researching risks in local government* which identified corruption in development applications as one of the four major corruption risks facing local councils. The first *Taking the devil out of development* discussion paper was released in November 2001.

At around the same time, the ICAC began investigating whether corrupt conduct had occurred in RCC. By 1 May 2002, public hearings were ready to commence. Because of this inquiry, and the submissions received in response to the first discussion paper, we decided to issue an interim report and call for further submissions. The *Taking the devil out of development - interim report* was released in late May 2002. The closing date for submissions in response to the interim report is 2 August 2002.

In this project, we have identified ten issues about the way development applications are managed by councils. We are committed to producing a range of guidelines and model approaches to better manage the corruption risks we have already identified.

This investigation confirms that we are on the right track with *Taking the devil out of development*. We say that all councils can do more to help prevent corruption occurring in managing development applications. We have made suggestions about:

- Informing applicants and objectors about council values and business ethics
- Improving the community's knowledge of the system
- Model approaches to notification of development applications
- Ensuring appropriate delegations and separation of responsibilities
- Statutory measures to help prevent corruption in development applications
- Modifications to development applications
- Helping councillors choose the right hat – including guidelines on lobbying, a revised code of conduct for councillors and more meaningful guidelines on what constitutes a non-pecuniary conflict of interest for councillors.
- Alternative decision making models and dispute resolution

- What to do when council is both developer and consent authority
- Contemporary planning instruments.

Could Rockdale Council have done more?

Could more have been done by Rockdale Council to help prevent the conduct that we have found to be corrupt in this report? I believe so. However, I do not want to single Rockdale Council out. What happened at Rockdale could easily have happened in other councils in New South Wales.

How would any of the measures identified in *Taking the devil* helped in the Rockdale matter? To illustrate, in this investigation evidence shows that councillors solicited bribes from developers in return for assisting their development application through the process. When asked why he had offered Councillor Smyrnis 'networking' opportunities, the developer Terry Andrioiaktis said:

... I didn't think there was anything wrong with offering what I offered, which was some potential networking opportunities. Now, if he – he could have said to me at that time, "Terry, I don't need that, I will still help you anyway, because that is my job", if he said that to me I would have dropped it from the start, but he did not say that to me

In *Taking the devil*, we suggest that all councils should produce a Statement of Business Ethics that spells out, amongst other things, that it is inappropriate to give gifts or benefits to staff or councillors and is not a precondition to having matters dealt with efficiently and ethically. The Statement would also address issues like conflicts of interest, secondary employment offers and what to do if approached to provide a gift or benefit.

Also in *Taking the devil out of development*, we made recommendations about:

- corrupt practice provisions -statutory provisions intended to deter applicants from acting corruptly to obtain development consent (Issue 5)
- lobbying guidelines - for applicants and councillors about acceptable lobbying practices (Issue 7), and
- alternative decision making models – as a means of diffusing the potential for corruption to occur in development approval decision by increasing transparency, objectivity and capacity for expert input.

If Rockdale Council had provided a Statement of Business Ethics to applicants or had in place lobbying guidelines, arguably developers might have been persuaded not to pay any councillor or offer them any other 'opportunities'. At the very least, it would have been clear to them that this might constitute corrupt conduct.

The first set of responses to *Taking the devil out of development* revealed widespread support for the use of a Statement of Business Ethics, statutory reforms and increased guidance for councillors and others about lobbying. We intend to develop a model Statement and guidelines for lobbying, in consultation with relevant bodies, for use by all Councils.

If Rockdale Council had an independent advisory hearing panel, developers may have been more reluctant to approach Smyrnis or McCormick or respond to their solicitations. This is because councillors would not be able to exercise the same influence over development applications.

Many councils are looking seriously at alternative decision making models. We are likely to recommend that Planning NSW undertake a cost and benefits analysis of independent hearing panels to assess how effective they are.

The NSW Government has responded quickly to this investigation and our *Taking the devil out of development* work by introducing some of the statutory measures we suggested earlier. In parliament all parties have supported and enabled the timely passage of amendments to the *Local Government Act 1993*, through the *Local Government Amendment (Anti-Corruption) Act 2002* and the *Environmental Planning and Assessment Act 1979* through the *Environmental Planning and Assessment Amendment (Anti-Corruption) Act 2002*. These measures will give ICAC additional powers to deal more effectively with corruption in the development assessment system.

For instance, if the corrupt practice provisions had been in place Chartofilis may have thought twice about offering a bribe to Smyrnis. This is because the stakes would have been so much higher for him. For example, he would have faced the prospect of the development approval being suspended and then rescinded or the proceeds of his corrupt act being confiscated by the State.

What is Rockdale Council doing now?

We are working directly with Rockdale Council on improving their processes and systems consistent with the measures we advocate in *Taking the Devil*. In fact, some progress has already been made. For example, Council is looking at adopting a Statement of Business Ethics. A review commissioned by Council is examining alternative decision making models that would mean councillors play more of an oversight role over development applications by having them first reviewed by an expert panel. Council is also examining a code of planning practice to improve transparency, accountability and probity in its planning systems and ensure staff and councillors play appropriate roles in the process.

But it is not only council systems that are under the microscope. The experience of Rockdale has also brought into question the following further issues:

- making political donations
- binding caucus votes
- pecuniary interest controls
- councillor influence over staff

Political donations

Political donations are a feature of our democracy, with people and organisations generally free to give financial support to the candidates and political organisations of their choosing. There is nothing inherently wrong with this.

However, political donations can be used as a means of buying access to public officials in order to influence them to make decisions on the basis that a donation to that person, or to the right people, has been made. This might happen in a direct way, where a donor

seeks personal access to a public official, or through other means, where a donation is made to a political party, which then represents to the relevant public official that they should support a particular issue.

Elected public officials are meant to represent, and be accessible to all their constituents, not just the ones who pay. They are meant to be fair, honest and objective when exercising their decision-making discretion, considering the merits of the matter in the context of policy, the law and with regard for the public interest.

When political donations are used as leverage on public officials, they can corrupt the democratic process. They can also create or reinforce perceptions that influence can be bought. This reduces public confidence in the system of local government.

Binding caucus votes on development applications

There was evidence before this investigation that, at the very least, consideration was given to binding the ALP members of RCC to a caucus decision on some development decisions. It should be noted, however, that the Mayor, an ALP Councillor, gave evidence that the NSW Branch of the ALP had instructed its members elected to Councils not to engage in caucusing and binding votes on planning decisions.

In the context of development applications, however, each councillor is a member of a consent authority. The consent authority is empowered to make decisions about development applications on the basis of the merits of each application.

Caucusing might be seen as an effective way of allowing councillors to come to grips with large amounts of material and to share views on the issues they must consider. However, binding caucus votes on development applications are inconsistent with the obligation of each councillor to individually consider the merits of a development application. And its potentially corrupting influence is underlined by the fact that without caucusing, the corrupt scheme that Councillors Smyrnis and McCormick created would have been much more difficult to realise. This is because a councillor acting corruptly need only win the caucus debate to deliver a number of votes in favour of a corrupt developer's application.

Furthermore, its undesirability is reinforced when the reality of factional politics is acknowledged. Binding caucus votes could mean that development decisions are made on the vote of a majority of the larger faction within a caucus, meaning – given that local Councils have no more than 15 elected members – that planning decisions are determined by the votes of as few as two, three or four members of the Council.

In several places throughout this report reference is made of caucusing to gain support for development applications. For example, when discussing their arrangement Smyrnis suggested that McCormick arrange for the ALP to have a binding caucus vote to shore up support for Chartofillis's development application.

Interestingly, in the United Kingdom, binding caucus votes on development applications by elected officials are considered to constitute maladministration. The political parties have apparently supported moves to stop this practice by specifically directing elected officials not to hold binding caucus votes on development applications.

Conflicts of interest

Problems can also arise when a councillor who has a pecuniary conflict of interest continues to be involved in caucusing with colleagues about a matter. Statutory measures for dealing with pecuniary conflicts of interest do not specifically prohibit a person who has a pecuniary conflict of interest from being involved in the matter outside of the council chamber. They are only precluded from participating in discussions and voting on the matter at meetings of council or council committees.

Councillors influencing staff

This investigation also revealed that there were a number of private conversations between planning staff and councillors about pending development applications or zoning changes. Although there are no findings that doing so was corrupt, these are a matter of concern, particularly when a perception is created that improper pressure has been brought to bear on the timing or nature of the officer's recommendations.

As already noted, when such communications take place, councillors leave themselves open to suggestions of compromising the officer's recommendation. While there is some guidance available to councillors and staff about such interaction, we will be reviewing present measures to see if they can be strengthened.

Need for reform

The observation that political donations can be a corruption risk is not new. In one of the Commission's first inquiries *Report on investigation into North Coast land development* (July 1990) over 12 years ago Assistant Commissioner Roden observed:

But if there is a form of payment that can be made, and accepted, without fear from the law, or from public opinion, then there is an obvious threat to fair and honest government.

There is a risk that if nothing is done now to address the problem, donations to political parties will fill that role.

Recommendations for reform of political donations from organisations outside the political process rarely recognise, let alone reflect or take into account, the realities and difficulties of achieving change in a system where the ultimate beneficiaries of political donations also make the rules. Without necessarily endorsing their views and proposals, it is acknowledged that some elected officials have already recognised, and advocated for the need for reform. However, broader acknowledgement of and commitment to reform is vital.

In response to a question in Parliament following this investigation and discussion I initiated on the issue of political donations, the Premier acknowledged concerns about donations made to political parties by developers and suggested that this matter should be discussed at a national level to prevent loopholes from being created by one state going it alone on reform.

The arguments for this approach are persuasive. Indeed, as I have indicated elsewhere, unless new controls are comprehensive, donors will be able to evade controls on donations by making their donations to another arm of the same political organisation subject to less stringent standards than those that might be adopted in response to this investigation.

A bipartisan approach at the State level is necessary to adequately review the way political donations operate in this State, specifically at the local government level. Such a review should not just look at property developers, but anyone wishing to use political donations as a means of leveraging influence over public officials in local government.

Any reform to the system of making political donations should embrace principles of maximising openness, transparency and accountability through disclosure and scrutiny. One option is that elected public officials must disclose, when discussing or voting on matters that have a clearly identifiable beneficiary (other than the general public), whether they have received any political donations from the people involved, or on their behalf. Consideration also needs to be given to appropriate means for disclosing any lobbying that has taken place prior to such votes.

Reform must also tackle steps that could be taken to work around a stronger disclosure system. Examples of this include making payments to third parties, trusts or companies or the like, with the intention of having benefits flow to a particular public official or their political party.

Political parties might consider making it a matter of policy and practice that payment of political donations, or the promise of any financial support from anybody or entity, will not be the basis on which political parties will support issues.

Clear statements from political parties about the independence of their members and elected representatives on development related matters would also assist in building a more corruption resistant development approval process in this State.

We will address issues of conflicts of interest and additional measures for dealing with staff in the guidelines and statutory reforms we will recommend over the next twelve months. There are some other issues besides donations, caucusing and conflicts of interest that we will also consider when looking at the following issues in our *Taking the devil* work:

- clear guidance to all about the ground rules for lobbying councillors
- training for Councillors about the planning system and their role

- guidelines for an extended code of conduct to cover councillors role
- better non-pecuniary conflict of interest guidelines for councillors.

Will anything really change?

Some will say that nothing could be done to prevent what happened at Rockdale Council – people inclined to act corruptly will find a way to do so. It is certainly true in our experience that there is no such thing as the perfectly incorruptible system.

It is with this understanding that we have raised these issues for discussion. We advocate a multidimensional approach to building resistance to the range of corruption risks in the development approval process. We believe that the measures we are suggesting, as part of a total package of improvements, will enhance corruption resistance.

Others will claim that suggestions like advocating alternative decision making models, guidelines for lobbying or that there be some change to the way people make political donations are attacks on democracy. Not so. ICAC has a charter that focuses on protecting the public interest and preventing breaches of public trust. We believe we are fulfilling this charter by raising difficult questions that need to be considered seriously.

There are problems with the system – that is evident. There are solutions needed – we are suggesting some. Further meaningful reform to address the problems identified here requires a nod to the realities of the system, and the reality is that bipartisan support and leadership is needed – and warranted – on such a significant issue of public interest.

There is already some evidence of this. As already indicated, there has been some statutory reform to give ICAC additional powers to deal more effectively with corruption. But more needs to be done.

We are committed to producing a range of guidelines and model approaches to the corruption risks we have already identified. We will do this by working with all interested and involved parties on building a better, more corruption resistant development application system for NSW.

APPENDIX 1 — THE ICAC'S ROLE

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 ICAC 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 ICAC believes should be taken or considered.

The ICAC 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 ICAC 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 s.3 of the Act. Rockdale City Council is a public authority.

The ICAC 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 ICAC 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 ICAC 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 ICAC, as specified in s.13 of the *ICAC Act*, include investigating any circumstances which in the ICAC'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.

It is not part of its function to prosecute for offences that an investigation undertaken by the ICAC may reveal. However, the ICAC may form and express an opinion as to whether or not any act, omission or decision which falls within the scope of its investigation has been honestly and regularly made, omitted or arrived at, and whether consideration should or should not be given to the prosecution or other action against any particular person or persons, be they public officials or not.

APPENDIX 2 — CORRUPT CONDUCT DEFINED AND THE RELEVANT STANDARD OF PROOF

Corrupt conduct is defined in s7 of the *ICAC Act* as any conduct which falls within the description of corrupt conduct in either or both subsections (1) or (2) of s8 and which is not excluded by s9 of the *ICAC Act*. An examination of conduct to determine whether or not it is corrupt thus involves a consideration of two separate sections of the *ICAC Act*.

Section 8 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. Such offences include:

- official misconduct (including breach of trust, extortion and imposition) (s8(2)(a));
- bribery (s8(2)(b));

- obtaining or offering secret commissions (s8(2)(d)); and
- any conspiracy or attempt in relation to any of the above (s.8(2)(y)).

Section 9(1) provides that, despite s8, 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 s8(1) and/or (2) of the *ICAC Act*. The third and final step is to determine whether the conduct also satisfies the requirements of s9 of the *ICAC Act*.

In applying the provisions of s9 of the *ICAC Act* it is appropriate to recall the approach outlined by Priestley JA in *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125. His Honour said that the word “could” was to be construed as meaning “would, if proved”. In the course of discussing the proper construction of s9(1)(a) of the *ICAC Act*, he said:

Despite s8, conduct does not amount to corrupt conduct unless, in the case of a criminal charge which could be tried before a jury, the facts found by the ICAC as constituting corrupt conduct would, if the jury were to accept them as proved beyond reasonable doubt, constitute the offence charged ...

Such a construction is applicable to ss9(1)(b), (c) and (d).

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 ICAC 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. ICAC investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the ICAC 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 in criminal matters. The civil standard is the standard which has been applied consistently in the ICAC. 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:

... reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. (at 362)

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

Also relevant are *Rejtek v McElroy* (1965) 112 CLR 517, the report of McGregor J into Matters in Relation to Electoral Redistribution in Queensland in 1977 and the report by the Hon W Carter QC into An Attempt to Bribe a Member of the House of Assembly (Tasmania) in 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.

