

I·C·A·C

INDEPENDENT COMMISSION
AGAINST CORRUPTION



**INVESTIGATION INTO
ALLEGED CORRUPT
CONDUCT INVOLVING
BURWOOD COUNCIL'S
GENERAL MANAGER
AND OTHERS**

**ICAC REPORT
APRIL 2011**



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Madam President
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into alleged corrupt conduct involving Burwood Council's General Manager and others.

Assistant Commissioner Theresa Hamilton presided at the public inquiry held in aid of this investigation.

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

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

Yours faithfully



The Hon David Ipp AO QC
Commissioner

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Summary of investigation and results

This investigation by the Independent Commission Against Corruption (“the Commission”) related to a wide range of allegations of corrupt conduct concerning Pasquale (Pat) Romano, the former General Manager of Burwood Council (“the Council”), and other Council officers. The allegations investigated spanned many years and many of them arose from complaints about Mr Romano made by Council staff to the Mayor of Burwood, the Commission and the *Sydney Morning Herald*.

In particular, the investigation examined:

1. allegations that Mr Romano improperly used his position as General Manager of Burwood Council to engage IPP Consulting Pty Ltd (“IPP Consulting”) to conduct surveillance for personal purposes on a work colleague of his wife between September and November 2007, and that he improperly caused Burwood Council to pay IPP Consulting over \$35,000 for that surveillance, when the surveillance did not relate to Council business
2. an allegation that Mr Romano improperly caused Burwood Council to pay \$650 to Nichola Tantarò, a Burwood Council contractor, for photographic work commissioned by Mr Romano in late 2007 for personal purposes
3. allegations that Mr Romano improperly used his position as General Manager of Burwood Council to arrange for the installation of security equipment at his own home and at the home of John Faker, then Mayor of Burwood, and for the payment by Burwood Council of the costs for this installation and equipment
4. allegations that Mr Romano used his position as General Manager of Burwood Council to engage the services of IPP Consulting to conduct surveillance on a number of candidates for election to the Council in 2008, for purposes not connected to Mr Romano’s official functions and duties, and caused Burwood Council to pay IPP Consulting \$15,485.80 for that surveillance
5. an allegation that John Faker, then Mayor of Burwood, was complicit in procuring the surveillance outlined in item 4 at Council expense
6. an allegation that Mr Romano improperly manipulated the recruitment process when his friend and business associate, Albert Becerra, gained employment as Principal Architect of Burwood Council in April 2007, and whether Mr Romano and Mr Becerra managed conflicts of interest that each had in relation to this process
7. an allegation that Mr Becerra was paid additional amounts (above his contracted remuneration), totalling \$41,400 in the first year of his employment, whether Mr Romano or anyone else manipulated the process that culminated in these additional payments being made, and the manner in which Mr Romano and Mr Becerra managed conflicts of interest that each had in relation to the process that led to these additional payments being made
8. an allegation that Burwood Council staff and a Burwood Council contractor were used to carry out private work on a driveway for Mr Romano and that Council resources were used during this process
9. an allegation that Mr Romano improperly accessed Burwood Council documentation to assist him to obtain approval from City of Canada Bay Council for the driveway work after it was completed
10. an allegation that Council staff were engaged to work and Council resources were used on the renovation of units in which Mr Romano and Mr Becerra had an interest, and that some of the work was done in Council time

11. an allegation that Mr Romano inappropriately used his position as General Manager of Burwood Council to cause two Council depot workers to attend a polling booth in Burwood on the Council election day held in September 2008 so that they could hand out election pamphlets for the Australian Labor Party
12. allegations that Mr Romano abused his entitlement to a Council-funded car for personal use, sold a Council car without first purchasing it from the Council as required under his contract and provided false or misleading material to the Council about the sale.

A number of these allegations arose from information provided by five Council officers, Robert Cummins, Stephen Child, Giuseppe (Joe) Giangrosso, Youssef (Joe) Saad and Ammar Issa. Within 12 months of the making of the allegations, each of these staff members had been the subject of some form of adverse managerial action by the Council. The Commission therefore also examined a number of allegations that reprisal action had been taken against the staff who had made protected disclosures about Mr Romano.

This action included:

1. the termination of the casual employment of Mr Saad by the Council on 27 April 2009
2. a letter sent by the Council to Mr Cummins in April 2009 about an investigation and a review with respect to the operation of an area formerly under Mr Cummins' control at the Council, requiring a response to specified issues and indicating that a failure to respond would be taken into account in considering whether the Council could continue his employment
3. the Council's response, and in particular Mr Romano's response, to Mr Cummins' claim for workers compensation
4. the surveillance conducted on Council depot workers, including Mr Child, after 7 April 2009
5. the Council depot reform process that led to Mr Child's position being substantially changed, in a way that adversely affected his interests, on and after 7 April 2009
6. an email sent by Mr Romano to senior Council officers on 25 April 2009, urging that consideration be given to immediate disciplinary and other adverse action in relation to Mr Child, Mr Giangrosso and Mr Issa
7. Mr Child's suspension from his position at Council from 17 August 2009
8. Mr Giangrosso's suspension from his position at Council from 4 September 2009

9. Mr Issa being stood down from 24 July 2009 on the basis that no suitable light duties could be found for him.

Results

A total of 17 findings of corrupt conduct have been made against Mr Romano.

In chapter 2 of this report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- using his position as General Manager of Burwood Council to engage IPP Consulting to conduct surveillance on a work colleague of his wife, knowing that the surveillance was being conducted for personal purposes and had nothing to do with Burwood Council or his functions and responsibilities as General Manager
- knowingly causing the invoices for the cost of this surveillance, which amounted to over \$35,000, to be paid by Burwood Council
- representing that an invoice for \$650 related to Burwood Council work, and approving its payment when he knew it related to photographic work that Mr Tantaro had performed for him for personal purposes.

In chapter 3 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- manipulating the approval process to obtain the installation of a security system in his home at Council expense, including by providing false and misleading information to his legal advisors and to his executive team.

In chapter 4 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- using his position as General Manager of Burwood Council to engage IPP Consulting on behalf of Burwood Council to conduct surveillance on candidates for election, knowing that this fell outside the proper performance of his functions as the General Manager
- knowingly causing the invoice in the amount of \$15,485.80 for this surveillance work, which he knew to have been procured by him outside the proper performance of his functions as General Manager under his employment contract and the *Local Government Act 1993*, to be paid for by Burwood Council.

In chapter 5 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- failing to manage appropriately his conflict of interest in the recruitment of and the settling of the terms of the contract of employment for his friend and business associate, Albert Becerra
- failing to manage appropriately his conflict of interest in initiating and promoting the payment to Mr Becerra of \$41,400 above his contracted remuneration package.

In chapter 6 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- using his position at Burwood Council to access the records of O'Brien Civil and applying them for personal purposes in obtaining retrospective authority for the construction of a driveway at his house.

In chapter 7 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- procuring work on units in which he had a personal interest from Council officers during Council time on three occasions.

In chapter 9 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- selling his Council car without first purchasing it from the Council, and misleading the Council in relation to the sale by producing a Certificate of Registration that falsely indicated that the total sale price was the same as the cheque that Mr Romano provided to the Council.

In chapter 12 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- initiating a review process that was directed at obtaining a report that could be used as a basis upon which to discredit Mr Cummins and remove him from the Council, such actions being taken substantially in response to allegations that Mr Cummins had made about Mr Romano's conduct as General Manager
- preparing and submitting a statement that he knew contained misleading statements about Mr Cummins' performance and false statements about when a report on the Council's Information Services section was commissioned, such actions being taken substantially in response to allegations that Mr Cummins had made about Mr Romano's conduct as General Manager.

In chapter 13 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- urging senior Council officers to take action against Mr Child by seeking an explanation in

writing for an alleged disciplinary breach of failing to obtain approval for secondary employment and by reporting him to the Australian Taxation Office, such action being taken substantially because Mr Romano believed or suspected that Mr Child had made a complaint about him to the Mayor and the Commission

- giving instructions after 7 April 2009 relating to surveillance activities targeting Mr Child, in particular, by photographing his house for evidence of possible theft of Council material, such action being taken substantially because Mr Romano believed or suspected that Mr Child had made a complaint about him to the Mayor and the Commission.

In chapter 14 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- urging senior Council officers to take action in relation to Mr Giangrosso by seeking an explanation in writing for an alleged disciplinary breach of failing to obtain approval for secondary employment and by reporting him to the Australian Taxation Office and the police, such action being taken substantially because Mr Romano believed or suspected that Mr Giangrosso had made a complaint about him to the Mayor and the Commission.

In chapter 15 of the report, the Commission finds that Mr Romano engaged in corrupt conduct in relation to:

- urging senior Council officers to take action in relation to Mr Issa by seeking an explanation in writing for an alleged disciplinary breach of failing to obtain approval for secondary employment and by reporting him to the Australian Taxation Office, suggesting that onerous conditions should be placed on Mr Issa in relation to his exercise breaks, and suggesting that disciplinary action should be taken against him if he did not do his stretching exercises during his breaks, such action being taken substantially because Mr Romano believed or suspected that Mr Issa was involved in the making of allegations against him.

Section 74A(2) statements

The report contains a number of statements pursuant to section 74A(2) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") that the Commission is of the opinion that the advice of the Director of Public Prosecutions (DPP) should be obtained with respect to the prosecution of Mr Romano for a number of offences, including four offences of giving false or misleading documents to the Council with intent to defraud the Council contrary to section 249C of the *Crimes Act 1900* ("the

Crimes Act”), four common law offences of misconduct in public office, one offence of obtaining financial advantage by false or misleading statements contrary to section 178BB of the Crimes Act, two offences of causing detrimental action to be taken against a person who made protected disclosures contrary to section 20 of the *Protected Disclosures Act 1994*, three offences of causing or procuring disadvantage to persons for or on account of those persons assisting the Commission contrary to section 93 of the ICAC Act and two offences of providing false or misleading evidence to the Commission.

As Mr Romano’s contract as General Manager has been terminated, the issue of taking disciplinary action against him does not arise.

Corruption prevention

Chapter 16 of this report sets out the Commission’s corruption prevention response to the conduct disclosed during the investigation.

Mr Romano, the General Manager of Burwood Council, was able to undertake the corrupt conduct detailed in this report by taking advantage of weaknesses in the controls applied to his position.

Deficiencies in policies and other internal control systems, the absence of internal audit, gaps in complaint handling, the absence of protection from reprisals and a lack of councillor knowledge of their authority and responsibilities produced an environment conducive to corrupt conduct.

The Commission has made the following recommendations to address the corruption prevention issues raised during this investigation:

Recommendation 1

That Burwood Council develops a policy for the payment of appropriate out-of-pocket expenses incurred by the General Manager and Council employees. Such a policy should incorporate the provisions of the NSW Government Expenses Policy.

Recommendation 2

That Burwood Council’s out-of-pocket expenses policy for staff and the General Manager includes protocols for the approval of out-of-pocket expenditure. The protocols should explicitly prohibit the General Manager or any other Council employee from approving expenses where there is an actual or perceived personal benefit derived from the expenditure. The protocol should also provide that the Mayor must approve the expense claims of the General Manager.

Recommendation 3

That Burwood Council modifies its Councillor Expenses and Facilities Policy to require the payment of expenses and the provision of facilities to Councillors only where specifically provided for in the Policy.

Recommendation 4

That Burwood Council modifies the Councillor Expenses and Facilities Policy to require the approval of significant Councillor expenses and facilities, where possible, at a full Council meeting. Where approval at a full Council meeting is not possible or appropriate then approval should be given jointly by the Mayor and the General Manager. If the Mayor requires approval, it should be given jointly by the Deputy Mayor or another Councillor and the General Manager.

Recommendation 5

That Burwood Council aligns its Motor Vehicle Management Policy to reflect key areas of NSW state government policy and practice, including preference for leasing, cars not exceeding the luxury car tax threshold, procedures for disposal and appropriate treatment of optional accessories.

Recommendation 6

That contracts and remuneration packages for the General Manager and senior staff at Burwood Council comply with the Council’s Motor Vehicle Management Policy.

Recommendation 7

That the NSW Division of Local Government be given the authority through legislative amendment to require councils in NSW to adopt policy and practice considered to be of state-wide significance by the Division’s Chief Executive. This amendment should include an appeal mechanism to the Chief Executive for councils seeking specific dispensation.

Recommendation 8

That non-compliance with the requirement for adoption of policy (as described in recommendation 7) be dealt with as a discipline issue for relevant council administrative officers under the Model Code of Conduct for Local Councils in NSW.

Recommendation 9

That the NSW Division of Local Government reviews all circulars and pronouncements by the Department of Premier and Cabinet for issues of relevance to NSW local councils and issues guidelines to councils accordingly.

Recommendation 10

That the NSW Minister for Local Government seeks legislative amendment to the *Local Government Act 1993* to establish internal audit for local authorities as a statutory function.

Recommendation 11

That Burwood Council establishes an internal audit function with an independent internal audit committee as a matter of priority. This committee should be chaired by a person independent of the Council.

Recommendation 12

That the elected body of Burwood Council receives regular updates on the outcome of internal audits.

Recommendation 13

That the NSW Minister for Local Government seeks legislative amendments to the *Local Government Act 1993* to require general managers to report to the elected council a decision to dismiss an internal auditor and the reasons for the decision.

Recommendation 14

That the NSW Minister for Local Government seeks legislative amendments to the *Local Government Act 1993* to provide internal auditors unfettered access to all documents and any council staff they deem necessary for the conduct of their role.

Recommendation 15

That the NSW Minister for Local Government amends Part 9.2(d) of the Model Code of Conduct for Local Councils in NSW to allow councillors to provide information to an internal auditor on any matter related to council business.

Recommendation 16

That the NSW Minister for Local Government seeks legislative amendment of section 376(2) of the *Local Government Act 1993* to remove the automatic entitlement of a general manager to attend an audit committee meeting.

Recommendation 17

That Burwood Council's internal audit function monitors compliance with the Councillor Expenses and Facilities Policy as part of its oversight role.

Recommendation 18

That Burwood Council's internal audit function monitors compliance with Council's (foreshadowed) policy for the payment of out-of-pocket expenses to the General Manager and staff.

Recommendation 19

That Burwood Council's internal audit function monitors compliance with Council's system for allocating work to legal practitioners.

Recommendation 20

That Burwood Council's internal audit function conducts audits of the authorisation, certification and approval processes for expenditure that is unusual by its nature or its infrequency.

Recommendation 21

That Burwood Council amends its Code of Conduct and the Employee's Handbook to clearly prescribe that all complaints concerning the General Manager be referred to the Mayor in the first instance. If the Mayor is also implicated, the complaint should be referred to the NSW Division of Local Government.

Recommendation 22

That Burwood Council policies be amended to prohibit the General Manager from having any involvement or giving directions to staff in relation to any formal or informal complaints where he/she is the subject of the complaint. This recommendation does not prohibit the General Manager from providing information or a statement as part of the investigation process.

Recommendation 23

That Burwood Council amends its Internal Reporting System to include an officer's line manager/supervisor as a designated officer to whom a protected disclosure can be made. All officers to whom a protected disclosure can be made under the policy should receive training on how they should deal with a protected disclosure.

Recommendation 24

That Burwood Council ensures that the handling and investigation of complaints about the General Manager are overseen by the Mayor and conducted by investigators who are independent of the Council.

Recommendation 25

That Burwood Council develops a suspension policy for all Council staff aligned to the intention and effect of Premier and Cabinet guidelines for the NSW public sector, as espoused in Premier's Memorandum 94/35.

Recommendation 26

That the Chief Executive of the NSW Division of Local Government amends the *Standard contract for the employment of general managers* to include specific provision for a council to suspend the general manager from duty

on a reasonable apprehension that he/she has engaged in corrupt conduct or serious misconduct.

Recommendation 27

That Part 3 of the Model Code of Conduct for Local Councils in NSW be amended to improve the guidance provided to mayors in managing complaints against a general manager. In particular, guidance should be provided about the consideration of the suspension of the general manager in appropriate cases. A duty should also be placed on the mayor to monitor decisions and actions of the general manager and other council officers for possible detrimental action against staff or contractors who have provided information about alleged misconduct.

Recommendation 28

That the NSW Division of Local Government endorses a core package of information for trainers to deliver to councillors. The package should be tailored to the needs of new and existing councillors.

Recommendation 29

That all NSW councillors undertake a foundation education and training program endorsed by the NSW Division of Local Government, at a minimum of once per term.

Recommendation 30

That all current Burwood Council Councillors undertake a foundation education and training program endorsed by the NSW Division of Local Government as a matter of priority.

Recommendation 31

That the NSW Division of Local Government promotes its capacity to provide information and assistance to councillors in the discharge of their role.

These recommendations are made pursuant to section 13(3)(b) of the ICAC Act and, as required by section 111E of the ICAC Act, will be furnished to Burwood Council and the Minister for Local Government.

As required by section 111E(2) of the ICAC Act, Burwood Council must inform the Commission in writing within three months (or such longer period as the Commission may agree to in writing) after receiving the recommendations, whether it proposes to implement any plan of action in response to the recommendations and, if so, of the plan of action.

In the event a plan of action is prepared, Burwood Council is required to provide a written report to the Commission of its progress in implementing the plan 12 months after informing the Commission of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the first report.

The Commission will publish the response to its recommendations, any plan of action and progress reports on its implementation on the Commission's website, www.icac.nsw.gov.au, for public viewing.

Recommendation that this report be made public

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

Chapter 1: Background

How the investigation came about

In March 2009, the Commission received information from Burwood Council depot workers, Stephen Child and Giuseppe (Joe) Giangrasso, alleging that Pat Romano had used their services, and the services of other depot staff and resources, to renovate the driveway of his home, and to perform renovations on a set of units in Edwin Street, Croydon, in which Mr Romano had an interest.

Shortly afterwards, in April 2009, the Commission received information from Robert Cummins, Director, Governance and Corporate Services of Burwood Council, making a number of allegations against Mr Romano. These included that he had improperly interfered in the recruitment and management of the employment of his friend and business associate, Albert Becerra, and that he had inappropriately directed that the expenses of a security system at his home be funded by the Council.

Why the Commission investigated

The matters reported to the Commission were serious and could, if established, constitute corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”).

Having regard to the seriousness of the allegations, and the fact that they related to the activities of the Council’s General Manager, the Commission determined that it was in the public interest to conduct an investigation.

The purpose of the Commission’s investigation was to establish whether any corrupt conduct occurred, and whether any corruption prevention issues needed to be addressed. The Commission’s role is set out in more detail in Appendix 1.

Conduct of the investigation

The Commission’s investigation involved accessing a substantial body of documentation from the Council and other individuals and institutions, using its powers under section 22 of the ICAC Act. Many witnesses were interviewed and nine compulsory examinations were held.

The public inquiry

The Commission reviewed the information it had gathered during its investigation. After taking this into account and each of the matters set out in section 31(2) of the ICAC Act, it determined it was in the public interest to hold a public inquiry. In making that determination the Commission had specific regard to the following considerations:

- there appeared to be compelling evidence of corrupt conduct
- there was substantial public interest in exposing the relevant matters that was not outweighed by any public interest in preserving the privacy of the persons concerned
- the allegations were serious and involved the most senior officer at Burwood Council
- public exposure of any inadequate systems and processes in relation to Burwood Council was necessary to encourage reform.

The public inquiry commenced on 22 March 2010 and continued for 26 days. After an adjournment, the final two weeks of hearings commenced on 24 May 2010 and finished on 11 June 2010.

There were 22 witnesses, many of whom gave evidence more than once during different segments of the inquiry.

Assistant Commissioner Theresa Hamilton presided at the inquiry. Chris Ronalds SC acted as Counsel Assisting the Commission.

At the conclusion of the public inquiry, Ms Ronalds prepared submissions that were circulated on 9 July 2010. Submissions in response were received from affected parties, with the majority of submissions being received on 27 September 2010. Further submissions on behalf of Mr Romano were subsequently received on 22 February 2011 and 8 April 2011. All submissions received were taken into account in preparing this report.

Burwood Council executive

Mr Romano was the General Manager of Burwood Council from September 2003 to June 2010. As General Manager, he was responsible for the efficient and effective operation of the Council's organisation and for ensuring the implementation of the decisions of Council.

Mr Romano was supported by a four-person executive. At relevant times these positions were held as follows:

- Les Hullick, Director, Executive Services
- Robert Cummins, Director, Governance and Corporate Services
- Ian Dencker, Director, Planning and Environment
- Khaled Azer, Director, Technical Services and Operations.

These people advised Mr Romano in relation to his management of the operations of the Council. They exercised delegated executive authority for the purposes of managing their own business divisions within Council.

Mr Romano and the executive were supported by two senior Council officers:

- Peter Macklin, Manager, Human Resources
- Matthew Walker, Chief Financial Officer.

Burwood Council depot

The Burwood Council depot comes within the responsibility of the Director, Technical Services and Operations, which at all times relevant to this investigation was Mr Azer. The depot is the focus of all civil maintenance work conducted by the Council.

The depot and its staff are supervised by the Senior Manager, Works and Operations. This position was previously referred to as the Depot Works Manager. The position reports to the Director, Technical Services and Operations.

Mr Child was at all relevant times the Civil Maintenance Supervisor. The name of the position was changed to Civil Maintenance Co-ordinator in January 2009. Mr Child was responsible for the coordination of all civil works, including capital works projects. He reported directly to the Depot Works Manager.

Mr Giangrasso, Mr Saad and Ammar Issa all worked, at times relevant to the investigation, at the depot.

Mr Romano's credit

Evidence given at the inquiry, and summarised in the following chapters, includes many instances where Mr Romano provided false information to his wife, his Executive team at the Council and his legal advisors, such as false and exaggerated claims about emails, threatening letters and packages delivered to his home and threatening telephone calls.

There was also substantial, and largely uncontested, evidence that Mr Romano had fabricated evidence by creating a staged photograph of his wife and a work colleague and by sending a number of emails containing false information purporting to be from a fictitious character created by Mr Romano.

As referred to below, the Commission finds that important evidence given by Mr Romano is false, in particular, information about why surveillance was undertaken on a colleague of Mr Romano's wife (see chapter 2) and why security equipment was installed in Mr Romano's house at Council expense (see chapter 3).

Mr Romano presented at the public inquiry as a witness who was not willing on any occasion to accept responsibility for his own actions and he gave evasive, self-serving and deliberately convoluted answers to questions put to him.

In these circumstances, the Commission considers that Mr Romano is a witness of no credit, and does not rely on any of the evidence given by him unless it is corroborated by credible documentary or other evidence.

Mr Romano provided a medical report to the Commission from a consulting forensic psychiatrist. The medical report is not contemporaneous and was obtained for the purposes of the inquiry.

The report expressed the author's view that Mr Romano was suffering from an obsessive compulsive disorder at the time of conduct relevant to this inquiry. The view was also expressed that, while this disorder would not have removed Mr Romano's capacity to distinguish right from wrong, it may have blurred "the boundary between reality and suspicion" for him. The report is based entirely on information provided by Mr Romano and says that

it proceeds upon the assumption that Mr Romano's description of his actions was "true and accurate". Some of the information provided by Mr Romano for the medical report has been found in this report to be false, including information about why surveillance was undertaken on a colleague of Mr Romano's wife and why security equipment was installed at Mr Romano's house at Council expense.

In these circumstances, the Commission places little weight on the conclusions in the medical report.

Chapter 2: Using Council funds to pay for surveillance and photography for personal purposes

This chapter examines allegations that Pat Romano improperly used his position as General Manager of Burwood Council to engage IPP Consulting Pty Ltd (“IPP Consulting”) to conduct surveillance for personal purposes on a work colleague of his wife between September and November 2007, and that he improperly caused Burwood Council to pay IPP Consulting over \$35,000 for that surveillance, when the surveillance did not relate to Council business.

The chapter also examines an allegation that Mr Romano improperly caused Burwood Council to pay \$650 to Nichola Tantaro, a Burwood Council contractor, for photographic work commissioned by Mr Romano in late 2007 for personal purposes.

Mr Romano’s use of his position to authorise surveillance on an individual for personal purposes unrelated to Council business could amount to corrupt conduct as it could involve a dishonest or partial exercise of official functions under section 8(1)(b) or a breach of public trust under section 8(1)(c) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could also involve the common law criminal offence of misconduct in public office.

Improperly causing Burwood Council to pay invoices, which related to personal purposes, not council business, could amount to corrupt conduct as it could involve a dishonest or partial exercise of official functions under section 8(1)(b) or a breach of public trust under section 8(1)(c) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could also involve the criminal offence of providing to those in Burwood Council responsible for paying invoices documents that were false or misleading in a material sense, with the intent to defraud Burwood Council, contrary to section 249C of the *Crimes Act 1900* (“the Crimes Act”).

Mr Romano’s role as General Manager

Mr Romano’s contract of employment relevant to this chapter was signed by him on 29 June 2007 and came into effect on 1 September 2007. The contract required him to carry out the functions specified for a council general manager under the *Local Government Act 1993* (“the LGA”) and its regulations.

Relevantly, section 335 of the LGA provides that the general manager is generally responsible for the efficient and effective operation of the council’s organisation, for the day-to-day management of the council, and for exercising such functions as are delegated to him or her by the council. Mr Romano had delegated financial authority to spend Burwood Council funds to facilitate the performance of his functions under the LGA.

Pursuant to Mr Romano’s contract of employment, he was required to comply with Burwood Council’s Code of Conduct. Clause 6.2 of the relevant Code required Mr Romano to “appropriately resolve any conflict of interest or incompatibility between [his] private or personal interests and the impartial performance of [his] public or professional duties”.

Clause 9.14 of the Code provided that he must “use council resources ethically, effectively, efficiently and carefully in the course of [his] public or professional duties, and must not use them for private purposes (except when supplied as part of a contract of employment) unless this use is lawfully authorised and proper payment is made where appropriate”.

Mr Romano organises surveillance

On or shortly after 5 September 2007, Mr Romano approached Richard Mailey, a consultant for IPP Consulting, to undertake surveillance work, purportedly in his official capacity as General Manager of Burwood

Council. He subsequently gave Mr Mailey a list of names of about three people whom he claimed might be responsible for alleged harassment of himself and his family. According to Mr Mailey, however, Mr Romano said that the only person on the list who was to be placed under surveillance at that time was a person who is referred to in this report as “Mr Brown”. Mr Brown is a work colleague of Mr Romano’s wife, Carmela Romano. During early to mid-2007, Mr Brown and Mrs Romano had developed a close friendship and met for lunch and on some occasions after work.

Mr Romano told the Commission of a number of incidents of harassment he claimed had occurred in August and September 2007. There was some limited corroboration from Mrs Romano for some of the minor alleged incidents. There was nothing, however, in any of the alleged incidents that linked them to Mr Brown.

In mid-2007, Mr Romano became aware of the friendship between his wife and Mr Brown, when he found Mr Brown’s name in his wife’s BlackBerry phone. In relation to what Mr Romano knew about Mr Brown as at 5 September 2007, Mrs Romano gave evidence that her close friendship with Mr Brown ended at the end of August 2007, after Mr Romano found out about it, while Mr Brown says it ended in either late-June or late-July 2007. When Mrs Romano told her husband about Mr Brown, in the week commencing 3 September 2007, she told him who Mr Brown was, where he worked, and the circumstances of her relationship with him. There was nothing in what she said to indicate that Mr Brown had any connection with Burwood Council or that he was responsible for any harassment. There is no doubt that Mr Romano well knew who Mr Brown was when he engaged IPP Consulting in September 2007 to carry out surveillance on him, and that his interest was not in any supposed harassment of him or his family, but in whether or not a relationship between Mr Brown and his wife was continuing.

This is supported by the emails that Mr Romano sent to himself and his wife under the fictitious email address he had created in the name of “bobbi.big”. At least one of these emails was sent before the surveillance of Mr Brown commenced and was directed at the existence of a possible relationship between Mrs Romano and Mr Brown.

Mr Romano also pretended to have had a telephone call from the office where Mr Brown and his wife worked on 12 September 2007, before the surveillance commenced.

In addition, on 4 October 2007, Mr Romano sent emails from bobbi.one@gmail.com to Mr Brown and senior management personnel at the firm where Mr Brown worked. Mr Romano has admitted that he sent all of the emails purporting to be from “bobbi.big” and “bobbi.one”. The first “bobbi.one” email contained a series of threats to Mr Brown, purported to be from a co-worker, and accused Mr Brown of being a “home wrecker” and a “scum bag”.

Finally, in either late August or early September 2007, again before the commencement of the surveillance, Mr Romano sent a letter to Mr Brown’s wife, alleging her husband was having an affair.

None of these actions shows any genuine belief or concern on the part of Mr Romano that Mr Brown had some connection with Burwood Council or that he was in any way responsible for any alleged harassment of Mr Romano or his wife. They all indicate that Mr Romano was concerned that a relationship may be continuing between Mr Brown and his wife, and the evidence that this was the real reason that Mr Romano commissioned surveillance on Mr Brown is overwhelming.

The Commission accepts Mr Mailey’s evidence that Mr Romano asked him in September 2007 to focus solely on Mr Brown. This is consistent with the considerable work performed by IPP Consulting in conducting searches to obtain information about Mr Brown and the commencement of surveillance by them on him only.

Surveillance was initially conducted by IPP Consulting operatives from 26 September 2007 to 1 October 2007, and there was further surveillance conducted between 18 October 2007 and 22 October 2007. Mr Mailey then made arrangements to contract the surveillance out to Control Group Pty Limited (“Control Group”). Control Group commenced surveillance on 24 October 2007 and its surveillance continued until 27 November 2007.

Nothing unusual happened during the time that the surveillance was being conducted and no evidence was identified showing that Mr Brown was responsible for any alleged harassment.

Mr Romano told the Commission that he was not aware that surveillance had commenced until he spoke to Mr Mailey on 19 October 2007. Mr Mailey disputed this and told the Commission that the surveillance was at all times conducted pursuant to Mr Romano’s instructions, and that he had spoken to Mr Romano directly and updated him regularly on surveillance developments.

On 25 October 2007 and 29 October 2007, surveillance reports, complete with surveillance photographs of Mr Brown, were emailed to Mr Romano.

Mr Romano told the Commission he spoke with Mr Mailey on 12 November 2007, at which time Mr Mailey told him that he had not found any evidence to link Mr Brown with any harassment of Mr Romano or his family. According to Mr Romano, he told Mr Mailey that if there were no results the surveillance should stop, but that Mr Mailey persuaded him to continue for another week. Mr Mailey agreed that he spoke to Mr Romano on 12 November 2007 but said that it was Mr Romano who requested that surveillance continue for a further week, as “he [Mr Romano] believed we could still get results, we believed we couldn’t get results”.

Mr Romano also told the Commission that when he spoke to Mr Mailey on 26 November 2007 he was surprised to find that surveillance on Mr Brown had continued. He claimed that he said, “What do you mean you still have officers in the field! I told you over a week ago to stop. Why do you still have people in the field?”. Mr Mailey denied Mr Romano’s version of this conversation.

The Commission accepts Mr Mailey’s version of the events. He has no reason to lie about his conversations with Mr Romano and there was no reason for him to commence or continue surveillance activities contrary to Mr Romano’s instructions as he might have risked not being paid for unauthorised activities. The Commission is satisfied that, when he spoke to Mr Mailey on 12 November 2007, Mr Romano instructed Mr Mailey to continue the surveillance, despite having been told

that there was no evidence to link Mr Brown with any harassment of Mr Romano or his family.

Invoices

Mr Mailey told the Commission that all the IPP Consulting invoices in relation to this matter were delivered by hand or email directly to Mr Romano. All relevant invoices were signed by Mr Romano as “Receiving Officer” or “Approving Officer”. These endorsements were required for the invoices to be paid by Council. All the invoices had bogus headings. The invoices made reference to the provision of services such as “investigating the unauthorised use of premises” or “providing TSCM security sweeps of Burwood Council buildings and residences”. Mr Mailey said that IPP Consulting sometimes adopted a practice of using false headings to conceal the circumstances of sensitive work that was done. In this case, it was Mr Mailey’s evidence that Mr Romano had requested the false descriptors on the invoices. Mr Romano denies this, but the Commission accepts Mr Mailey’s evidence on this issue. Further, it is clear that Mr Romano passed the invoices onto other Burwood Council staff for payment without telling them that the headings were false or giving them any honest account of the work that had been done.

In view of the Commission’s finding that the sole purpose of the surveillance of Mr Brown was to obtain information about his relationship with Mrs Romano, there was no connection between the surveillance work undertaken by IPP Consulting and Burwood Council and no proper basis upon which Mr Romano could submit the invoices to the Council for payment. The Commission is satisfied that Mr Romano submitted the invoices with false descriptions of the work undertaken to disguise the fact that the work had been undertaken for personal purposes, with the intention of causing the Council to pay accounts for which it was not liable.

All relevant invoices were ultimately paid for by Burwood Council. The amount initially identified through the invoices on the IPP Consulting file, as being paid for by Burwood Council for surveillance of Mr Brown, was \$44,341. During the public inquiry, some doubt emerged about whether one of these invoices related to the surveillance of Mr Brown or some other work for Burwood Council. It is clear, however, that there were payments of over \$35,000 made to IPP Consulting in relation to the surveillance of Mr Brown, which includes the fees paid to Control Group.

Mr Romano said that he provided the list containing Mr Brown’s name to Mr Mailey sometime in the week commencing 10 September 2007. The Commission is satisfied that at the time he provided the list containing

Mr Brown's name to Mr Mailey, Mr Romano was fully aware of who Mr Brown was, and that Mr Brown was not connected in any way with any alleged harassment.

Even if Mr Romano had had some legitimate reason to suspect that Mr Brown was harassing him or his family, it would have been a clear conflict of interest and a breach of the Council's Code of Conduct for him to authorise surveillance of Mr Brown himself. In such a case, the appropriate course of action would have been to seek approval from the Council or at least to consult with the other executives about the course of action he proposed. Mr Romano did neither of these things. Whilst he eventually gave some information to the Council's executive, at no stage did he reveal that surveillance of an individual was occurring, at significant cost to the Council, nor did he reveal the identity of the individual concerned.

The Commission is satisfied that Mr Romano caused invoices relating to the surveillance of Mr Brown to be paid for by Burwood Council, despite knowing that those expenses were of a personal nature and not connected in any way to Council business or his responsibilities as defined by his contract of employment, the Council's Code of Conduct and the LGA.

Corrupt conduct

Three steps are involved in determining whether or not corrupt conduct has occurred. The first step is to make findings of relevant facts. In making findings of fact, the Commission applies the civil standard of proof of reasonable satisfaction, taking into account the decisions in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.

The second step is to determine whether the conduct, which has been found as a matter of fact, comes within the terms of sections 8(1) or 8(2) of the ICAC Act. The third step is to determine whether the conduct also satisfies the requirements of section 9 of the ICAC Act.

Corrupt conduct is defined in sections 8 and 9 of the ICAC Act. These sections are set out in Appendix 2.

Mr Romano's conduct in using his position as General Manager of Burwood Council to engage IPP Consulting to conduct surveillance on Mr Brown, knowing that the surveillance was being conducted for personal purposes and had nothing to do with Burwood Council or his functions and responsibilities as General Manager, is corrupt conduct. This is because it was conduct that involved a dishonest exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act. It was

also conduct that could involve a common law offence of misconduct in public office for the purposes of section 9(1)(a) of the ICAC Act.

Mr Romano's conduct in knowingly causing invoices for the surveillance work, which he knew had been conducted for personal purposes and was not connected to Burwood Council or his functions and responsibilities as General Manager, to be paid for by Burwood Council is also corrupt conduct. This is because his conduct involved a dishonest exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act. For the purpose of section 9(1)(a) of the ICAC Act, it was conduct that could amount to an offence of providing to those in Burwood Council responsible for paying the invoices a document that was false or misleading in a material sense, with the intent to defraud Burwood Council, contrary to section 249C of the Crimes Act. The invoices were false or misleading as they were passed on to Burwood Council for payment on the basis that they related to the business or affairs of the Council.

The photographic work

In late 2007, Mr Romano gave some of the surveillance photographs of Mr Brown, which he had obtained from IPP Consulting, and some photographs he had of Mrs Romano to Mr Tantaro, a photographer who was a contractor to the Council. Mr Romano arranged for Mr Tantaro to digitally manipulate the photographs in order to create new photographs that showed Mr Brown and Mrs Romano together. On 15 November 2007, Mr Romano sent copies of the digitally manipulated photographs to Mr Brown's wife.

Mr Romano told the Commission that Mr Tantaro did the photo manipulation work for him for no fee, as a favour.

Mr Tantaro told the Commission that he submitted an account to Mr Romano for the photo manipulation work in the amount of \$650. This was ultimately paid for by Burwood Council. Mr Tantaro identified a copy of this invoice that the Commission obtained from Burwood Council records. The copy was signed by Mr Romano as the Council officer approving payment. Mr Romano wrote on the invoice, "This account to be paid from GM [General Manager] Budget" and "LH [Les Hullick, Director Executive Services] to sign". In endorsing the invoice in this manner, Mr Romano represented that the invoice related to Council work.

Mr Romano told the Commission that the invoice was for work Mr Tantaro did in connection with workshops being organised by the Council.

Vera Karpowicz, Mr Romano's personal assistant at the time the invoice was received by Burwood Council, told the Commission that she was responsible for the logistics associated with corporate workshops and that Mr Tantaro "did not do any work for any of the workshops".

Neither Mr Tantaro nor Ms Karpowicz gave oral evidence at the Commission and their evidence needs to be considered in the context of their not having been subjected to cross-examination by Counsel for Mr Romano.

There is nothing before the Commission, however, that indicates that either Mr Tantaro or Ms Karpowicz had any reason to lie. Mr Tantaro's evidence is corroborated by the invoice that was obtained from Burwood Council records. It was issued on 6 November 2007, which is consistent with the time when the relevant work was done. It also makes reference to "Photography and Digital Photo Manipulation", which accords with the work that Mr Tantaro performed for Mr Romano. In all the circumstances, the Commission accepts the evidence of Mr Tantaro and Ms Karpowicz.

The Commission is satisfied that Mr Romano knowingly caused Mr Tantaro's account to be paid for by Burwood Council, knowing that the work done had been for Mr Romano's personal purposes.

Corrupt conduct

Mr Romano's conduct in representing that Mr Tantaro's invoice for \$650 related to Burwood Council work, and in approving its payment when he knew it related to photographic work Mr Tantaro had performed for Mr Romano for personal purposes, is corrupt conduct. This is because his conduct involved a dishonest exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act. It was also conduct that, for the purposes of section 9(1)(a) of the ICAC Act, could amount to an offence of providing to Burwood Council a document that was false or misleading in a material sense, in that it was endorsed by him as an account that was appropriate for payment by Burwood Council, with the intent to defraud Burwood Council, contrary to section 249C of the Crimes Act. The invoice was false or misleading as it was passed on to Burwood Council for payment on the basis that it related to the business or affairs of the Council.

Section 74A(2) statement

In making a public report, the Commission is required by the provisions of section 74A(2) of the ICAC Act to include, in respect of each "affected" person, a statement as to whether or not in all the circumstances, the Commission

is of the opinion that consideration should be given to the following:

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

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

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano. Accordingly, he is a person who comes within the definition of an "affected" person for the purposes of section 74A(2) of the ICAC Act.

Mr Romano made very few concessions during the course of the evidence canvassed in this chapter. Any admissions or relevant statements that were made by Mr Romano were made subject to a declaration issued pursuant to section 38 of the ICAC Act. The effect of this declaration is that his evidence cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. Despite this, there is some documentary evidence and the evidence of other witnesses in relation to Mr Romano's relevant activities that will be available for use in a prosecution by the DPP.

In all the circumstances, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano in relation to the following criminal offences:

- a. using or giving a false document to Burwood Council with the intent to defraud Burwood Council, contrary to section 249C(1) of the Crimes Act in relation to:
 - i. the IPP Consulting invoices, submitted in relation to the surveillance of Mr Brown
 - ii. the invoice from Mr Tantaro, submitted in relation to the photography and photo manipulation work conducted by Mr Tantaro

- b. the common law offence of misconduct in public office in relation to his conduct in engaging the services of IPP Consulting in his capacity as the General Manager of Burwood Council, on the basis that he was procuring services legitimately for the benefit of Burwood Council and not for a personal purpose
- c. giving false or misleading evidence in a material particular at a public inquiry, contrary to section 87(1) of the ICAC Act in relation to:
 - i. his evidence during 22 March and 23 March 2010, when he claimed that he did not know whether Mr Brown had any connection with Burwood Council or the alleged harassment of the Romano family
 - ii. the evidence on 1 April 2010 that the invoice for \$650 for digital manipulation from Mr Tantaro was not for the manipulation of the photographs of Mrs Romano and Mr Brown but related to legitimate Council business, namely Council workshops.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act.

Chapter 3: Council expenditure on home security equipment

This chapter examines allegations that Pat Romano improperly used his position as General Manager of Burwood Council to arrange for the installation of security equipment at his own home and at the home of John Faker, then Mayor of Burwood, and for the payment by Burwood Council of the costs for this installation and equipment. The justification for the installation of the surveillance equipment was a number of incidents of harassment that Mr Romano and Mr Faker said had occurred. In the case of Mr Romano, the evidence canvassed in this chapter and the preceding chapter suggests that some of his claims of harassment were false or exaggerated. Ultimately, the Council paid \$30,732.90 for the installation of security equipment into Mr Romano's home and \$22,798.60 for the installation of security equipment into Mr Faker's home.

Mr Romano's use of his position to authorise the installation of surveillance equipment at his home and Mr Faker's home, and to arrange for Council to pay for the costs of such installation, could amount to corrupt conduct, as it could involve a dishonest or partial exercise of official functions under section 8(1)(b) or a breach of public trust under section 8(1)(c) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could involve the criminal offence of misconduct in public office.

Installation of security equipment

In chapter 2 of this report, the Commission canvassed assertions made by Mr Romano that his family had endured some harassment at their home in August and September 2007.

Mr Romano told the Commission that he had discussions with Richard Mailey about this alleged harassment on or shortly after 5 September 2007. These discussions culminated in the surveillance of Mr Brown, as outlined in chapter 2, although it is clear for the reasons outlined in that chapter that that surveillance had nothing to do with any alleged harassment concerns. According to Mr

Romano, there had been no discussion in relation to the installation of security equipment until a meeting he had had with Mr Mailey on 26 September 2007, at which Mr Mailey suggested, "we can have a look at your home security system and see if it needs an upgrade".

On 9 October 2007, Mr Romano discussed the possibility of upgrading security at his home at Council expense with David Baird, a lawyer with the Council's legal firm Maddocks, from whom he often sought advice about various issues. In an email to Mr David Baird dated 24 October 2007, Mr Romano referred to a discussion the two men had had two weeks earlier about his security system being upgraded at Council expense. In the email, Mr Romano asked Mr Baird to provide written legal advice on the issue. Mr Baird subsequently provided a draft advice dated 7 November 2007, and then a final advice dated 15 November 2007. The final advice was emailed to Mr Romano on 26 November 2007. The final advice is more detailed, however, for the purposes of the matters under consideration in this chapter, there were no relevant changes. Essentially, Mr Baird advised that Mr Romano, as General Manager, was responsible for the efficient and effective operation of the Council's organisation, and in particular the day-to-day management of the Council. As such, he had a responsibility pursuant to section 8 of the *Occupational Health and Safety Act 2000* ("the OHS Act") to "ensure the health, safety and welfare at work of all the employees" of the Council, including the Mayor and himself. Accordingly, in the circumstances described by Mr Romano in his instructions, "the installation of security systems at your home and that of the Mayor would likely be considered a reasonable Council expense under Council's Policy". As discussed later in this chapter, it is now apparent that many of the claims made by Mr Romano about threats to his security, upon which this advice was based, were false or exaggerated.

Mr Romano told the Commission that he relied on the final written advice from Maddocks to justify his decision to

authorise the use of Council funds to pay for the installation of surveillance equipment in his home. Mr Baird gave evidence that, in addition to providing a written advice, he gave verbal advice to Mr Romano that he should not authorise the installation of the equipment in his own home, but should have the Mayor authorise it.

Mr Mailey and Mr Romano told the Commission that the issue of upgrading Mr Romano's home security equipment arose during a visit by Mr Mailey to Mr Romano's home that took place, according to Mr Romano, on 24 October 2007. Mr Romano claimed that Mr Mailey told him at this time that he should have security cameras installed. Mr Mailey's evidence is equivocal on how the issue of cameras was raised, but he agreed that they were discussed. It is likely that they were discussed previously, as Mr Romano had been canvassing an upgrade in security at Council expense with Mr Baird prior to that meeting, and the core difference between the system already in the house and the upgraded system was the addition of digital cameras.

Mr Romano sent an email to Bob Howe on 24 October 2007. Mr Howe was a consultant to Burwood Council, and had previously advised the Mayor in relation to Mr Romano's appointment. Mr Romano's email confirmed that he had received advice from Mr Baird that he should install a security system at his home at Council expense. In the email, he seeks Mr Howe's advice as to the appropriateness of installing a security system at his home at Council expense. Mr Howe responded with a letter stating, "My understanding is that similar situations have occurred at other Councils and this has been the approach taken by those Councils". Like Mr Baird's advice, Mr Howe's view was based on assertions made by Mr Romano about threats to his security, some of which were false or exaggerated. In his email to Mr Howe, Mr Romano claimed that he and his wife had been receiving "harassing phone calls and emails" and "letters and packages in the mail which were hand delivered and caused much distress to my

family". Mr Romano has admitted that there were no suspicious packages, that he himself sent a number of the "harassing" emails and that the only "harassing" telephone call for which there is any corroboration is his wife receiving one "hang-up" call.

When Mr Howe was called to give evidence, the only recent example he could give of "similar situations" was a case where the council had in fact declined to provide security because there was no nexus shown between the threats and the officer's work. An example Mr Howe gave where security had evidently been provided involved a case in 1993 where the council offices had actually been bombed, which had no correlation to Mr Romano's situation.

It is apparent from Mr Romano's email to Mr Howe that during Mr Romano's discussion with Mr Baird on 9 October 2007 there had been discussion about providing security equipment at Mr Faker's home as well. In his email to Mr Howe, Mr Romano said, "I have consulted Council's solicitors (David Baird) who advised that I should contact the police and engage a private investigator. I was also advised by Council's solicitors that I should install at Council's expense a security system at my home. They also advise that this security system should be also installed at the home of the Mayor".

According to Mr Romano, the issue of the Council paying for security equipment in Mr Faker's home came up when he met with Mr Faker and Mr Baird in Mr Faker's office about two weeks before 24 October 2007. He claimed that at this meeting, after he had raised the issue of his family experiencing harassment "on [the] phone and at home", Mr Faker said, "That's amazing, because I am also having problems at my home". Mr Romano said that Mr Baird then provided advice in relation to Council-funded security at both homes. Mr Romano said that this was the only meeting that took place, involving Mr Faker, Mr Baird and himself, in relation to this issue.

Mr Faker's evidence as to how he became involved was quite different. Mr Faker was adamant that Mr Romano was the person who first raised the issue of him installing security alarms in his house at Council expense. Mr Faker said he was advised that the Council was doing a security audit, that there had been issues associated with Mr Romano and possible security threats that "could escalate" and that Mr Romano "had a duty under the Occupational Health and Safety Act to protect the Mayor".

Mr Faker told the Commission that he had then asked for legal advice, and Mr Faker, Mr Romano and Mr Baird all agreed. They later met to discuss the legal advice about this issue. Mr Baird puts this meeting as occurring on about 7 November 2007. Both Mr Baird and Mr Faker recall that Mr Baird had the draft legal advice on this issue with him and went through it in detail with them.

The Commission accepts the evidence of Mr Baird and Mr Faker on this issue, and is satisfied that Mr Romano promoted the installation of Council-funded security equipment to Mr Faker and spoke to Mr Faker and Mr Baird separately about this issue well before the three men met to discuss the issue in November 2007. After Mr Romano received the draft legal advice on 7 November 2007, he circulated it to senior Council staff.

In his capacity as Director, Governance and Corporate Services of Burwood Council, Robert Cummins responded with an email to Mr Romano, highlighting the "potential conflict of interest" the situation presented for Mr Romano. In the email, he "strongly" recommended the matter be taken "to Council, or an alternative independent body, for determination...". He also expressed the view that the draft legal advice from Maddocks was "extremely weak".

In an email in response to the matter, Matthew Walker, Chief Financial Officer of Burwood Council, supported the call for review and endorsement by an independent body or council. Peter Macklin, Human Resources Manager of Burwood Council, told Mr Romano by email that "[Mr Cummins] has thought long and hard about how to advise you on this matter" and "I think his advice is sound". Khaled Azer, Director of Technical Support and Operations of Burwood Council, also urged caution as the legal advice from Maddocks was not "the strongest" and he suggested that Mr Romano should "self-fund" the system if it was tax deductible.

Despite these senior officers expressing serious concerns about the proposed installation of the security equipment at Council expense, at least without the matter going to Council or some independent authority for decision-making, Mr Romano ignored their concerns and

indeed belittled those who spoke against the expenses being met by Council. His email response to Mr Cummins noted, "With all due respect my email is a directive and I did not seek your opinion".

The security systems were installed sometime after the receipt of the final advice from Maddocks on 26 November 2007.

The invoice for the installation of security equipment into Mr Romano's home is dated 27 June 2008 and is in the amount of \$30,732.90. It was received at Burwood Council on 18 July 2008 and was signed by Mr Romano, as the receiving officer, and by his subordinate, Les Hullick, as the approving officer.

The invoice records 25 June 2008 as the date the work was done. Mr Romano said that the equipment was installed sometime in early December 2007 but that work continued on it into the next year. It appears that the invoice's reference to 25 June 2008 as the date the service was provided may be a reference to a final function performed at the end of an installation process that took place over a number of months.

The invoice for the installation of the security equipment into Mr Faker's home is dated 6 March 2008 and is in the amount of \$22,798.60. It was received by the Council on 19 March 2008 and signed by Mr Hullick, as receiving officer, and Mr Romano, as approving officer. There is no reference on the invoice to when the work was performed.

Was the security installation a justifiable Council expense?

Under his contract of employment, Mr Romano was required to comply with Burwood Council's Code of Conduct.

Clause 9.14 provided that he must "use council resources ethically, effectively, efficiently and carefully in the course of [his] public or professional duties, and must not use them for private purposes (except when supplied as part of a contract of employment) unless this use is lawfully authorised and proper payment is made where appropriate".

Mr Romano admitted that he had himself sent many of the emails he claimed related to harassment and that he had told the Council executives about. He also admitted that he made up information about suspicious packages being delivered. The only other issues raised about security for which there is any corroboration at all were one "hang-up" telephone call, the power going off at his house one night, eggs being thrown at the house, and cars "revving up" in

the street outside the house. Carmela Romano agreed that local youths could well have accounted for these last two issues.

There is no evidence that would sustain any suggestion that there had been concerted harassment that would justify increased security arrangements for the Romano family home being paid for by the Council. There is also no evidence whatsoever that any incidents that may have occurred were related in any way to Mr Romano's position at the Council.

The situation was similar with Mr Faker. In his case, there had been some "ring and runs" at his home (that is, a ring or knock at the front door but nobody being there when the door was answered) sometime before and the occasional hang-up telephone call. He also later produced a newspaper report about two telephone calls he and his wife had received in September 2008 from unknown people, although this was after the installation of the security system. None of the earlier incidents had caused Mr Faker to take any steps to upgrade his security until Mr Romano had raised the issue with him.

Whatever Mr Romano's motives were for wanting an upgraded system, there is no evidence that any security concerns he may have had had any connection to his position as General Manager of the Council, and therefore the payment of the expense of the upgraded system by the Council could not be justified as a legitimate operational expense.

Mr Romano cannot rely on the legal advice he received from Maddocks to justify this as a legitimate operational expense because:

- the instructions that Mr Romano gave to Maddocks about the alleged threats to himself and his family were substantially false or misleading. In particular, the threatening emails to which reference is made were created by Mr Romano himself, and Mr Romano admitted that the reference to receiving "hand-delivered packages" was false and related in fact to one threatening letter, which he claimed to have received but thrown away
- he did not follow advice in the written advice from Maddocks that he and the Mayor should pay for the costs of the security systems initially, and then follow Council process to seek reimbursement
- he did not follow the advice that Mr Baird gave him verbally to have the expenses of his security upgrade authorised by the Mayor.

When Counsel Assisting asked Mr Romano directly why he did not take the matter to the Council, he said he made the decision to proceed only after receiving Maddocks' final advice on 26 November 2007 and he was not prepared to delay the expenditure for two months until the next ordinary Council meeting. When asked about the possibility of calling an extraordinary general meeting, he replied, "even in calling an extraordinary meeting it would need about a three day period for calling the meeting. I would have to have discussions with staff and other people that would have delayed the matter by at least a week".

The Commission does not accept that an additional week's delay would have made a significant difference in this matter. There was sufficient opportunity to arrange for prompt Council consideration of the expenditure. In all the circumstances, the Commission is satisfied that Mr Romano did not want to seek Council approval for the expenditure because he was concerned that that might lead to scrutiny of his claims of harassment, which would reveal that there was no real basis for installing surveillance equipment at Council expense.

Corrupt conduct

The Commission is satisfied that Mr Romano manipulated the approval process to obtain the installation of a security system in his home at Council expense, including by providing false and misleading information to his legal advisors and to his executive team. This conduct involved a dishonest exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act and involved a breach of trust for the purposes of section 8(1)(c) of the ICAC Act. His conduct could also involve the common law offence of misconduct in public office for the purposes of section 9(1)(a) of the ICAC Act.

In all the circumstances, the Commission is satisfied that the actions taken by Mr Romano in relation to the installation of and payment by Council of expenses for security equipment in his home, involved corrupt conduct as defined in the ICAC Act.

Mr Faker

Arrangements were made for the installation of security equipment at Council expense at Mr Faker's premises. The Commission accepts Mr Faker's evidence that the proposal was initiated by Mr Romano and that he left it to Mr Romano to manage.

Mr Faker told the Commission that he was advised by Mr Romano that the expenditure was an operational matter

to be managed by the General Manager and his executive. Mr Faker had no active involvement in the authorisation of the expenditure of Council funds on his own home. He also had no involvement in the authorisation of the expenditure of funds on Mr Romano's home.

Mr Faker's security system was entered into the Council's register as an asset (unlike Mr Romano's) and, in 2009, Mr Faker made a payment to the Council to cover the cost of the security equipment that remained in his premises.

In all the circumstances, the Commission is satisfied that Mr Faker was not involved in corrupt conduct as defined in the ICAC Act in relation to the installation of security equipment in his own premises or Mr Romano's premises.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano and Mr Faker. Accordingly they are people who come within the definition of "affected" person for the purposes of section 74A(2) of the ICAC Act.

Mr Romano

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano for misconduct in public office in relation to his conduct set out in this chapter.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

Mr Faker

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Faker in relation to his conduct set out in this chapter.

Mr Faker is a serving Councillor on Burwood Council. Pursuant to section 440B or section 440H of the LGA, the Commission may recommend that consideration be given to the suspension of a councillor for serious corrupt conduct or misbehaviour. No such recommendation is made with respect to Mr Faker in relation to this matter.

Chapter 4: Surveillance of electoral candidates

This chapter examines allegations that Pat Romano used his position as General Manager of Burwood Council to engage the services of IPP Consulting to conduct surveillance on a number of candidates for election to the Council, for purposes not connected to Mr Romano's official functions and duties, and caused Burwood Council to pay IPP Consulting \$15,485.80 for that surveillance. The surveillance was undertaken between 3 September 2008 and 19 September 2008 and the invoices submitted to the Council in respect of the surveillance contained false descriptions of the work undertaken.

This chapter also examines allegations that John Faker, then Mayor of Burwood, was complicit in procuring this surveillance at Council expense.

Mr Romano's conduct in authorising surveillance on candidates without proper authority could amount to corrupt conduct on the basis that it involved a dishonest and partial exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act and could involve a common law offence of misconduct in public office for the purposes of section 9(1)(a) of the ICAC Act. His conduct in arranging for the Council to pay for that surveillance could amount to corrupt conduct on the basis that it involved a dishonest exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act and could involve a criminal offence of providing for payment by Burwood Council an invoice that was false or misleading in a material sense, with the intent to defraud Burwood Council, contrary to section 249C of the Crimes Act.

If Mr Faker was involved in authorising the conduct of surveillance on candidates without proper authority, his conduct could amount to corrupt conduct on the basis that it involved a dishonest and partial exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act, and could involve a common law offence

of misconduct in public office for the purposes of section 9(1)(a) of the ICAC Act.

Mr Romano organises surveillance of electoral candidates

On 13 September 2008, local council elections were held across NSW. Prior to this election, the majority of Councillors on the Burwood Council were affiliated with the Australian Labor Party ("the Labor Party").

John Sidoti was a candidate for a Councillor's position on the Burwood Council. He was affiliated with the Liberal Party of Australia ("the Liberal Party"). Prior to the election, Mr Sidoti had lived with his family in Drummoyne, outside the Burwood Council area. He was able to qualify as a candidate for the Burwood Council, as he was on the Roll of Occupiers and Ratepaying Lessees (RORL). This is a registry of persons who, although they live outside the council area, occupy and lease premises within the council area and pay rates as part of their lease, thereby qualifying to participate in the council's political processes. The RORL is maintained by the general manager of the council, in accordance with the *Local Government Act 1993* ("the LGA"). The LGA also provides for the general manager to maintain a roll of non-residential owners of rateable land. It appears that, within Burwood Council, both rolls were routinely, collectively referred to as the Non-Residential Roll.

Mr Sidoti made an initial request to be placed on the RORL on 18 July 2008. Mr Romano, in a letter delivered to Mr Sidoti on 29 July 2008, indicated that he had allowed this claim.

The Residential Roll is a registry of persons who actually live in the council area. The Residential Roll is maintained by the NSW Electoral Commissioner.

Some weeks before the election, Mr Sidoti informed the Electoral Commissioner that he had moved to 9/10–12 Park Avenue, Burwood, within the Burwood Council area. He was placed on the Residential Roll by the Electoral Commissioner. On 8 August 2008, he provided Burwood Council with a statutory declaration stating that he was now on the Residential Roll, and asking to be taken off the RORL.

In the lead-up to the election, some concerns were raised about whether Mr Sidoti had really moved to 9/10–12 Park Avenue, Burwood, and whether he was legitimately on the Residential Roll. Maintaining the integrity of the Residential Roll was at all relevant times the responsibility of the NSW Electoral Commissioner and any concerns about its integrity should have been directed to his office.

Some weeks before the election, Mr Romano engaged the services of IPP Consulting to investigate where Mr Sidoti was living. This involved the conduct of physical surveillance on Mr Sidoti as well as other candidates for Burwood Council, namely Joe Alvaro, another Liberal Party candidate, and John Strik, an independent candidate, who was also recorded on the Electoral Roll as living at 9/10–12 Park Avenue, Burwood. Surveillance was also conducted by IPP Consulting in relation to the possible disbursement of improper electoral material attacking Labor Party candidates. This surveillance focused on the activities of Mr Alvaro, Robert Balzola and David Weiley. Mr Balzola and Mr Weiley were both independent candidates for Burwood Council. The distribution of improper electoral material was, again, at all relevant times a matter for the NSW Electoral Commissioner.

The initial conversation between Mr Romano and Richard Mailey of IPP Consulting in relation to this surveillance took place on 27 August 2008. The first surveillance records on the IPP Consulting file relate to surveillance conducted on 3 September 2008. Surveillance continued intermittently until 19 September 2008, six days after the election.

IPP Consulting submitted an invoice dated 23 September 2008 to Burwood Council in relation to this surveillance work. The invoice falsely described the work done as “To Provide Risk Assessments to Burwood Council and TSCM protection over the months of August and September 2008”. Mr Romano endorsed the invoice “Building Security and risk assessment: refer to LH” (LH was a reference to Les Hullick). Mr Hullick endorsed the invoice as the receiving officer. The Commission accepts that he was not aware of the true nature of the work done. Mr Romano endorsed the surveillance as the approving officer. The surveillance cost the Council \$15,485.80.

What was the purpose of the surveillance?

Mr Romano’s links with the Labor Party

Evidence emerged during the Commission’s investigation and public inquiry that suggested that Mr Romano was closely linked to the Labor Party and that he was interested to ensure that its candidates returned to power in the Council elections of September 2008.

In his statement to the Council’s workers compensation insurers dated 17 June 2009, Council officer Giuseppe (Joe) Giangrasso described the busy period the depot staff had in the lead-up to the September 2008 elections. He described how Mayor John Faker generated work requests, and Mr Romano issued instructions to get the requested work done:

Pat told me that we needed to keep the Labor Party in power at the Council or his job could be in jeopardy. He did not really explain how that would work. I understood that he did not have a good relationship with the Liberal or Independent councillors. Pat said that they could terminate his employment contract.

In his evidence at the public inquiry on 14 April 2010, Robert Cummins, Director, Governance and Corporate Services, told the Commission:

...during the 2008 election it became abundantly clear to myself and a lot of other staff that Mr Romano was extremely well-connected to the Labor Party and he was doing everything he could to ensure that they got the numbers back in the 2008 election.

There was also evidence that Mr Romano was involved in arranging for depot workers to attend a polling booth on election day in order to hand out Labor Party pamphlets. This is canvassed in chapter 8 of this report.

Chapter 10 of this report canvasses an incident where depot workers, Stephen Child and Mr Giangrasso, had a chance meeting with Liberal Party candidates, Mr Sidoti and Henson Liang, a few days after the election. They described how, after Mr Romano found out about this incident, he remonstrated with them and accused them of being disloyal.

Mr Romano claimed that at all times during his tenure as General Manager he operated impartially. He claimed that the surveillance of candidates was arranged for legitimate reasons, associated with the proper conduct of his functions as the Council’s General Manager.

Mr Romano's explanation for the surveillance of Mr Sidoti

Mr Romano told the Commission that he instructed IPP Consulting to undertake surveillance in relation to one individual, Mr Sidoti, and two other candidates that were on his ticket. The surveillance was directed at determining whether Mr Sidoti was in fact living at 9/10–12 Park Avenue, Burwood. Mr Romano explained his reasons for this as follows: "As part of the election process I am responsible, as General Manager, to prepare and provide a Non-Residential Roll as part of the electoral process".

He suggested that the surveillance was in furtherance of these responsibilities.

Under section 303(2) of the LGA, Mr Romano, as General Manager, had a responsibility to determine whether a claim to go on the RORL should be allowed. As mentioned above, Mr Romano allowed Mr Sidoti's claim for inclusion on or around 29 July 2008.

Pursuant to section 300(3) of the LGA, Mr Romano, as General Manager, was required to certify, after the closing date for inclusion, that those on the RORL were qualified to be there. Accordingly, while Mr Sidoti remained on the RORL, Mr Romano was entitled to take action to clarify whether certification of the RORL with Mr Sidoti's name on it was warranted.

Mr Sidoti notified Burwood Council through a statutory declaration on 8 August 2008 that he had been placed on the Residential Roll on the basis that he was living at 9/10–12 Park Avenue, Burwood. He withdrew his claim for inclusion on the RORL. As far as Mr Romano was concerned, that should have been the end of the matter. While the LGA gave Mr Romano responsibility for deciding whether claimants should be placed on the RORL, it makes no provision for a general manager to have any discretion about taking a person off the RORL when they seek removal. Formal notification of the desire to be removed is all that is required and this had been given.

Mr Romano suggested there was uncertainty as to what roll Mr Sidoti was on, thereby justifying his continued involvement. He told the Commission, "We had discussions with Mr Sidoti about that [Mr Sidoti's alleged inclusion in both the RORL and the Residential Roll] and he was to provide documents to us withdrawing his listing on the Non-Residential Roll. That never happened".

As mentioned above, this withdrawal did, in fact, occur on 8 August 2008, a number of weeks prior to any surveillance, when Mr Sidoti filed his statutory declaration.

The statutory declaration was tendered as an exhibit to the Commission's public inquiry on 12 April 2010, after Mr Romano had given evidence on the matter.

The statutory declaration was accompanied by a file note by Pina Viney, Governance Coordinator at Burwood Council, which was also dated 8 August 2008. Ms Viney was responsible for the administration of the RORL. In her file note, Ms Viney recorded that she had been contacted by a person from the NSW Electoral Commission who told her Mr Sidoti was on the Residential Roll and that he should be removed from the RORL. The file note records that Ms Viney then contacted Mr Sidoti and asked him to come into the Council to complete a statutory declaration urgently. Mr Sidoti asked that Ms Viney draft a declaration for him so that he could come in and sign the statutory declaration "with minimal delay". The file note records that Mr Sidoti came into the Council on 8 August 2008 and read the draft declaration before signing it in the presence of a Justice of the Peace.

Following the tender of Mr Sidoti's statutory declaration and Ms Viney's file note on 12 April 2010, Mr Romano provided a statement dated 2 June 2010 in relation to the surveillance. This was tendered on 7 June 2010, in the last week of the public inquiry. In this statement, Mr Romano said that in early- to mid-August 2008, he spoke to Ms Viney. Ms Viney told him, "I rang John Sidoti. He said that he would write to us and request that his name be removed from the Non-Residential Roll". Mr Romano said that later, on 20 August 2008, he had a telephone conversation with Ms Viney and asked, "Have you heard back from John Sidoti in relation to his request for removal from the non-residential roll?". Ms Viney replied, "No".

This account is in direct conflict with Ms Viney's contemporaneous file note, which states:

I then contacted Mr Sidoti to clarify that he had actually moved into the area and he stated that he had. I then asked him to come into Council urgently to complete a Statutory Declaration for Council to that effect to finalise my records.

Mr Sidoti asked that I complete the declaration for him so that he could come in sign [sic] the Statutory Declaration with minimal delay.

Mr Sidoti came and read the declaration before signing it in the presence of a Justice of the Peace.

Ms Viney's file note is dated 8 August 2008 and Mr Sidoti's statutory declaration was signed and witnessed by a Justice of the Peace on the same date.

The alleged conversation between Mr Romano and Ms Viney on 20 August 2008 took place only 12 days after the issue of Mr Sidoti's removal from the RORL had been resolved. Ms Viney had no reason to lie to Mr Romano. The process described in the file note was a substantial one, and Ms Viney was unlikely to forget that this had all taken place in the short period between that process and the alleged conversation with Mr Romano on 20 August 2008. Having regard to these circumstances, the variation in the accounts of Ms Viney's dealings with Mr Sidoti as between the file note and Mr Romano's statement, and overall concerns the Commission has about Mr Romano's credibility, the Commission rejects Mr Romano's account of his conversation with Ms Viney on 20 August 2008. The Commission also rejects Mr Romano's assertion that, when he organised the surveillance with Mr Mailey on 27 August 2008, there was still confusion in relation to which roll Mr Sidoti was on and that he believed he still had some lingering responsibility with respect to Mr Sidoti's position on the RORL.

Even if Mr Romano did believe that Mr Sidoti remained on the RORL, the appropriate clarification was to determine whether he had been placed on the Residential Roll. Once this was clarified, this should have been the end of the matter as far as Mr Romano was concerned. It was never his responsibility to determine whether Mr Romano was legitimately placed on the Residential Roll. This was a matter for the NSW Electoral Commissioner. Any information concerning a fraud on the NSW Electoral Commissioner should have been referred to that office.

In the IPP Consulting file in relation to this surveillance, there is a handwritten note, apparently made by Andrew O'Reilly, a senior consultant at IPP Consulting. This records:

8:15am 27/8/08 Pat Romano called RTM [Mr Mailey] out re anon tip of poss fraud future councillors.

Following the election, on Monday 15 September 2008, Todd Neal, solicitor for the legal firm Maddocks, sent an email to Craig Leggatt SC, seeking assistance in obtaining advice sought for by Burwood Council. The email recorded:

We are instructed that the candidate was on the residential electoral roll, but does not live within the Burwood Local Government Area, and our client wishes to aggressively pursue options, including injunctions etc.

There is no direct evidence that Mr Romano gave these instructions. Mr Romano, however, routinely instructed Maddocks on behalf of the Council and Mr Romano

was the only person at the Council who was privy to the investigation into Mr Sidoti's residence. In all the circumstances, the Commission is satisfied that Mr Romano was responsible for these instructions.

The fact that Mr Romano told no one else in the Council about his actions, even Mr Hullick, the person he arranged to sign as having received the supposed services from IPP Consulting, is indicative of Mr Romano's understanding of the improper nature of his conduct in arranging this surveillance.

The disingenuous nature of Mr Romano's attempt to justify his conduct was highlighted as he attempted to explain his own endorsement, "Building Security and risk assessment", on the IPP Consulting invoice.

Q. *Even if we accepted your version of events, and you had some statutory or other role in relation to that, how does it come under "Building Security and risk assessment"?*

A. *Well, I suppose, a poor choice of words. I don't know ... sometimes my choice of words, as you see from my emails, isn't quite right. But that doesn't mean I am trying to hide anything.*

Investigation into the distribution of improper electoral material

According to Mr Mailey and Mr O'Reilly, there was a second limb to the investigation commissioned by Mr Romano. This related to an enquiry into the possible distribution of improper electoral material denigrating ALP candidates. Such an allegation falls within the responsibility of the NSW Electoral Commissioner. This investigation focused on the activities of Mr Alvaro, Mr Balzola and Mr Weiley. Both Mr Mailey and Mr O'Reilly described how this was a distinct investigation issue, separate from the enquiry into Mr Sidoti's place of residence.

On the IPP Consulting file, there was a handwritten note prepared by Mr O'Reilly recording advice conveyed to him by Mr Mailey about a meeting he had with the Mayor and Mr Romano either on 4 September 2008 or 9 September 2008 (the date recorded by Mr O'Reilly is difficult to decipher; it is either a 4 or a 9). Surveillance commenced on 4 September 2008, which suggests that the date of the meeting was 4 September. The note recorded the names Weiley, Balzola and Alvaro. Underneath these names was recorded, "follow to see if dispersing leaflet drops hate mail". Mr Mailey confirmed that these were the instructions he received from Mr Romano and on which IPP Consulting acted.

In his evidence of 23 March 2010, Mr Romano denied any recollection of this part of the investigation:

Q. *Do you recall any issue about leaflet drops from those three Councillors that may have warranted surveillance?*

A. *I can't recall at the moment, no.*

...

Q. *And I would suggest to you that those names are written there because they were the instructions you gave Mr Mailey, would you agree?*

A. *Well no, I don't agree because I can't recall.*

Later the same day, he gave the following evidence:

Q. *If there was an issue about leaflet drops that were unauthorised in any way, that's the role of the Electoral Commissioner?*

A. *That's correct, yes.*

...

Q. *If there was a complaint, even from a resident for example, you refer it don't you, to the Electoral Commissioner?*

A. *That's correct. That's correct.*

Subsequently, in his statement dated 2 June 2010, Mr Romano acknowledged that he had instructed IPP Consulting to investigate the possible distribution of defamatory pamphlets. He described a conversation with Mr Mailey on 4 September 2008, where they had agreed they would "split the operation in two", with Mr Mailey managing "the pamphlet issue" and Mr O'Reilly looking after "the unit issue". In this statement, however, Mr Romano claimed that he did not give instructions to conduct surveillance on any electoral candidates for this purpose. He claimed that any surveillance of electoral candidates conducted on his instructions was incidental to the surveillance of the Park Avenue unit.

The Commission rejects this assertion. It is inconsistent with the evidence of Mr Mailey and Mr O'Reilly, the nature of the note dated 4 or 9 September 2008 and the surveillance records, which indicate that Mr Alvaro, Mr Weiley and Mr Balzola were focused on specifically in the surveillance operation and for the purposes of assessing whether improper electoral material was being circulated.

Was Mr Faker involved in arranging for the surveillance of electoral candidates?

The note on the IPP Consulting file dated 4 or 9 September 2008, as discussed above, suggests that Mr Faker was involved in the arrangement of surveillance on electoral candidates prior to the election. The note records "RTM [Mr Mailey] met Mayor and P Romano". The note goes on to detail instructions about the surveillance of electoral candidates. Mr O'Reilly told the Commission that he was the author of this note. In it, he recorded information that was provided to him by Mr Mailey either by telephone or "face to face". He acknowledged that he was not present at any meeting with the Mayor or Mr Romano on 4 or 9 September 2008.

Mr Mailey told the Commission he could not recall having such a meeting with Mr Faker and Mr Romano. Mr Romano told the Commission he could not recall this meeting. Mr Faker was asked about this:

Q. *And you were present when Mr Romano gave instructions to Mr Mailey to conduct surveillance of Councillors Weiley, Balzola and Mr Alvaro?*

A. *Absolutely not.*

Mr Faker said he could not recall any meeting with Mr Mailey and Mr Romano on 4 September 2008. He was not asked about 9 September 2008.

Mr O'Reilly was a credible witness and the Commission is satisfied that he made the record relating to the meeting on 4 or 9 September 2008 in good faith. Mr O'Reilly's note, however, was roughly prepared and his recollection of the circumstances in which it was prepared was vague. There is no direct evidence of this meeting. In all the circumstances, the Commission is not satisfied to the requisite standard that Mr Faker was privy to giving instructions to Mr Mailey on 4 or 9 September 2008.

In his statement dated 2 June 2010, Mr Romano recorded that during a telephone call on a day between 8 September 2008 and 12 September 2008, he told Mr Faker that he had engaged IPP Consulting to do some investigative work in relation to electoral roll irregularities. According to Mr Romano, he did not elaborate on what these irregularities were or what investigative work was being done. Rather, he made arrangements to meet Mr Faker and Council lawyers in relation to this matter on 16 September 2008.

Mr Faker told the Commission that he could not recall this conversation.

Mr Faker did meet with Mr Romano and David Baird on 16 September 2008. This was three days after the election, where the Labor Party lost its majority on the Council.

Mr O'Reilly was also present at the meeting on 16 September 2008. There is some evidence that Sam Dastyari, a Labor Party official, and Bob Nanva, a Labor Party Councillor, were also present. If they were there, it appears that they left prior to any substantive discussion.

At this meeting, there was discussion about the matters that had been investigated by IPP Consulting. Mr O'Reilly told the Commission that he gave a report on this investigation. This was confirmed by Mr Romano in his statement dated 2 June 2010. Mr O'Reilly told the Commission that it was quite clear from his report that surveillance had been undertaken in the course of the investigation.

Mr Faker's evidence was vague and inconclusive in relation to whether he was told at this meeting about the conduct of surveillance. Initially, he gave the following evidence:

Q. Did the General Manager ever discuss with you the surveillance of candidates after the election?

A. Yes.

Q. And when did he do that?

A. There was a meeting on, straight after the election, I think on the 16th or around that time.

Later, Mr Faker said that he could not recall finding out at this meeting that Mr Sidoti had been followed by a private investigator. He said that he could not recall any discussion as to the investigative methods used.

Mr Baird said that he could not recall Mr O'Reilly's briefing or the results of the surveillance. However, his recollection of this meeting was vague.

In all the circumstances, the Commission is satisfied that Mr O'Reilly did disclose the circumstances of the investigation to those in attendance, including Mr Faker.

The meeting was arranged to determine whether action should be taken with respect to alleged electoral irregularities, not to facilitate the investigation. Although there was further surveillance conducted after this meeting, there is no evidence that any arrangements for this were made or discussed at this meeting.

Accordingly, although Mr Faker was aware that surveillance was conducted on electoral candidates, the

Commission is not satisfied to the requisite standard that he was involved in arranging this.

Corrupt conduct

In all the circumstances, the Commission is satisfied that Mr Romano arranged for surveillance of a number of non-Labor Party candidates for the 2008 Burwood Council election, in circumstances where this fell outside his responsibilities under the LGA and his employment contract, and in circumstances where he knew this fell outside those responsibilities.

It is not necessary for this Commission to be satisfied that this was done for any specific purpose. It is sufficient that the Commission is satisfied that the surveillance was knowingly procured for a purpose that fell outside the proper performance of Mr Romano's responsibilities under his employment contract and the LGA. In the Commission's view, however, it is likely that Mr Romano's conduct was motivated by his desire to prevent the election of relevant non-Labor Party candidates to Burwood Council.

Neither Mr Romano nor Mr Mailey specifically stated that these instructions were provided to Mr Mailey by Mr Romano in his capacity as General Manager of Burwood Council. The Commission, is, however, satisfied that these instructions were provided in this capacity. This is consistent with the nature of Mr Romano's dealings with Mr Mailey generally, the circumstances in which the instructions were provided as described by Mr Romano and Mr Mailey, and the fact that IPP Consulting ultimately forwarded an invoice to Burwood Council for the conduct of this surveillance work.

Mr Romano's conduct in using his position as General Manager of Burwood Council to engage IPP Consulting on behalf of Burwood Council to conduct surveillance on candidates for election, knowing that this fell outside the proper performance of his functions as the General Manager, is corrupt conduct. This is because it was conduct that involved a dishonest and partial exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act. It was also conduct that could involve a common law offence of misconduct in public office for the purposes of section 9(1)(a) of the ICAC Act.

Mr Romano's conduct in knowingly causing the invoice for this surveillance work, which he knew to have been procured by him outside the proper performance of his functions as General Manager under his employment contract and the LGA, to be paid for by Burwood Council is also corrupt conduct. This is because his conduct

involved a dishonest exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act. For the purposes of section 9(1)(a), it was conduct that could amount to an offence of providing to those in Burwood Council responsible for paying invoices an invoice that was false or misleading in a material sense, with the intent to defraud Burwood Council, contrary to section 249C of the Crimes Act. The invoice was false and misleading on the basis that it included a misleading description of the work done by IPP Consulting that was not explained by Mr Romano to any relevant person in the Council, that it included a misleading endorsement by Mr Romano, and that it was presented for payment on the basis that it related to work performed properly in relation to the affairs of Burwood Council.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano and Mr Faker. Accordingly they are people who come within the definition of "affected" person for the purposes of section 74A(2) of the ICAC Act.

Mr Romano

Mr Romano made very few concessions during the course of the evidence canvassed in this chapter. Any admissions or relevant statements were made subject to a declaration issued pursuant to section 38 of the ICAC Act and cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. Despite this, there is some documentary evidence and the evidence of available witnesses in relation to Mr Romano's relevant activities that will be available for use in a prosecution by the DPP, in particular the evidence of Mr Mailey and Mr O'Reilly.

In all the circumstances, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano in relation to the following criminal offences:

- a. using or giving a false document to Burwood Council with intent to defraud Burwood Council contrary to section 249C(1) of the Crimes Act in relation to the IPP Consulting invoice, submitted in relation to the surveillance of electoral candidates in the lead-up to and after the 2008 Burwood Council election
- b. the common law offence of misconduct in public office, in relation to his conduct in procuring the services of IPP Consulting in his capacity as the

General Manager of Burwood Council, on the basis that he was procuring services legitimately in the proper performance of his functions as the General Manager of that Council

- c. giving false or misleading evidence in a material particular at a public inquiry contrary to section 87(1) of the ICAC Act in relation to:
 - i. the answers on 23 March 2010, that the reason for the surveillance of Mr Sidoti in September 2008 related to an issue concerning the RORL and that the surveillance of the five electoral candidates related to that issue
 - ii. paragraphs 14 and 32 of his statement dated 2 June 2010, relating to the reasons that the surveillance of candidates for the election was authorised by him.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

Mr Faker

Mr Faker gave evidence to this Commission, however, this evidence was also subject to a declaration issued pursuant to section 38 of the ICAC Act. The effect of this is that his evidence cannot be used against him in any criminal, disciplinary or civil proceedings. There is other evidence of relevant activity by Mr Faker that would be available in the conduct of such proceedings, including the evidence of Mr O'Reilly.

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Faker in relation to any criminal offence with respect to his conduct canvassed in this chapter.

Mr Faker is a serving Councillor on the Burwood Council. Pursuant to sections 440B or 440H of the LGA, the Commission may recommend that consideration be given to the suspension of a councillor for serious corrupt conduct or misbehaviour. No such recommendation is made with respect to Mr Faker in relation to this matter.

Chapter 5: Recruiting Albert Becerra as Burwood Council's Principal Architect

This chapter examines:

- the circumstances in which Pat Romano's friend and business associate, Albert Becerra, gained employment as Principal Architect of Burwood Council in April 2007
- whether Mr Romano or anyone else improperly manipulated the recruitment process
- the manner in which Mr Romano and Mr Becerra managed conflicts of interests that each had in relation to this process
- the circumstances in which Mr Becerra was paid additional amounts (above his contracted remuneration), totalling \$41,400 in the first year of his employment, and whether Mr Romano or anyone else manipulated the process that culminated in these additional payments being made
- the manner in which Mr Romano and Mr Becerra managed conflicts of interest that each had in relation to the process that led to these additional payments being made.

A failure by Mr Romano to manage a conflict of interest arising from his personal and business relationship with Mr Becerra, in the context of Mr Romano's involvement in settling the terms of Mr Becerra's recruitment, employment and remuneration, could amount to corrupt conduct as it could involve a dishonest or partial exercise of official functions under section 8(1)(b) or a breach of public trust under section 8(1)(c) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could involve a disciplinary offence under clause 6.2 of the Burwood Council's Code of Conduct in relation to appropriately resolving conflicts of interest.

After Mr Becerra was appointed as an employee of the Council, his conduct in failing to manage a conflict of

interest arising from his personal and business relationship with Mr Romano could amount to corrupt conduct on the same basis.

The relationship between Mr Romano and Mr Becerra

Mr Romano and Mr Becerra have known each other for more than 20 years. After meeting in a professional capacity, they became friends and then business associates. In around 2000, the Romano family and the Becerra family combined to purchase a property in Edwin Street, Croydon. They subsequently sold the property at a considerable profit. In the second half of 2006, they commenced discussions with another friend, Tony Fasanella, with a view to engaging in a further property investment, using funds from the three families. The proprietary company Befaro Pty Ltd (a combination of the three family names) was established on 22 January 2007 for this purpose. The directors and shareholders were the wives of Mr Romano, Mr Becerra and Mr Fasanella: Carmela Romano, Poppy Becerra and Maria Fasanella, respectively. The directors appointed Mr Romano, Mr Becerra and Mr Fasanella as agents to conduct the business of the firm.

The aim of the group was to purchase an investment property and improve this through renovations. It was anticipated that each family would contribute some funds towards the purchase. The majority of the property would be funded through a mortgage over the property itself. Additional funds would then be contributed by each family to meet ongoing costs.

On or around 1 June 2007, Befaro Pty Ltd purchased units at 187 Edwin Street, Croydon ("the Befaro Units"), for \$1,260,000, with a mortgage to St George Bank for \$1,008,000. Befaro Pty Ltd holds the property in trust for

the Befaro Property Trust. This is a unit trust that originally issued 90 units. Thirty units were issued to entities associated with each family, being superannuation trust funds and family trust funds.

Albert Becerra

Mr Becerra is an architect. In about 2003, he commenced work at the architectural firm, Baker Kavanagh & Associates (BKA), as an employed architect. He was quickly appointed as a director due to the amount of work he was bringing in to the firm. In 2005, Burwood Council adopted a proposal for a redevelopment of the central Burwood Council precinct, which would incorporate a new Council Chambers and a new library ("the Precinct Project"). Mr Romano secured the services of Mr Becerra's firm to assist in the preliminary stages of this project. At the time, BKA was on a panel that the Council had established through a tender process for the provision of architectural services.

On 18 April 2005, at a preliminary meeting of the Library Project Control Group, a disparate group of people involved in the conduct of the project, Mr Romano advised the group that "one of the directors [Mr Becerra] of the proposed architects [BKA] was a close friend" and that he "had also had prior business dealings with him".

A declaration had already been forwarded to the project group by Mr Becerra on 14 April 2005, stating that Mr Becerra had "known Pat Romano for some years and [had] had business dealings with him prior to his appointment as General Manager of Burwood Council".

Mr Becerra sent a further letter dated 7 July 2005 to "Burwood Council", advising of his association with Mr Romano. It is not known who received this or where it was filed.

Mr Becerra's recruitment

Towards the end of 2006, Mr Becerra became dissatisfied with his position at BKA, and started to think about leaving the firm. He discussed this with Mr Romano at either the end of 2006 or the beginning of 2007.

There is no doubt that Mr Romano wanted to secure the services of Mr Becerra for Burwood Council. There were arguably good reasons for this:

- Burwood Council was in need of the services of a capable architect for the implementation of the Precinct Project
- by all reports, Mr Becerra was a capable architect who was well placed to meet the Council's needs.

There were also personal reasons:

- Mr Becerra was a friend who wished to move out of his existing business arrangements
- at the time of the recruitment, the Romano, Becerra and Fasanella families were embarking on a joint business project involving the purchase and the development of expensive real estate. There was a collective interest in Mr Becerra having a stable financial platform to sustain his family's initial involvement in the venture and its capacity to meet ongoing, additional payments.

The fact that Mr Romano wanted to engage Mr Becerra for Burwood Council Operations was highlighted by his dealings with the legal firm, Maddocks, in order to explore whether Mr Becerra could be engaged on a consultancy basis.

After approaching David Baird for this purpose, Mr Romano was provided with a comprehensive advice, including a draft consultancy agreement. The advice cost Burwood Council approximately \$3,000.

It is clear that this advice was obtained without the involvement or even knowledge of any other staff from the Council, including Les Hullick, who had executive responsibility for the Precinct Project, and Peter Macklin, who was responsible for the Council's human resources processes.

The problem that emerged for Mr Romano from the advice provided was that if Mr Becerra's consulting services cost more than \$100,000, the position would have to go out to public tender. This would not have allowed the remuneration to be set at the level of \$140,000 per annum, as it eventually was.

Following receipt of this advice, Mr Romano met with Mr Baird and Mr Becerra at Bar Capola, a cafe near Mr Baird's office, on 14 March 2007.

The meeting at Bar Cupola

The accounts of the three attendees at the Bar Cupola meeting were generally vague and conflicting. Despite this, it is apparent that at this meeting there was consensus that consultancy was not an option and there was discussion about Mr Becerra being employed by the Council as an alternative means of engagement.

It is apparent that there was also some discussion of the terms on which Mr Becerra might be employed; in particular, Mr Becerra's desire to be entitled to conduct his own private practice at the same time.

The Commission obtained a note written by Mr Becerra that clearly relates to this meeting. This records:

Meeting 14/03/07.

> *David B. / Pat / *B*

. *NOT - Prelim disc. B.C.*

exploring in house [indecipherable]

team / Arch employee

P Arch [Principal Architect]

- *interest for AP [Could be AB]*

- *right of private practice...*

Mr Becerra told the Commission that the letters "NOT" in this note are a reference to industrial lawyers Nash O'Neill Tomko (that is, the acronym NOT), who were assisting Mr Becerra with his separation from BKA. He told the Commission that notes next to "NOT" related

to advice provided by that firm.

It is clear from this contemporaneous note that Mr Becerra's desire for a right to private practice was raised in the meeting at Bar Cupola. Mr Becerra acknowledged this in his evidence. The Commission also gained access to a file note from Maddocks that appears to contain notes made at the time of this meeting. In his statement dated 25 May 2010, Mr Romano said he believed this file note "may be a note recorded by Mr Baird" during the meeting. This note also makes reference to "right of private practice – no exclusiveness". It is significant that the right to private practice was raised at this early meeting. This was an important and favourable condition of employment, which was not mentioned in the advertisement eventually placed for the position of Council architect, but that was later incorporated in Mr Becerra's contract of employment.

The recruitment process

After this meeting, the emphasis moved away from engaging Mr Becerra as a consultant and towards employing a Principal Architect to the Council. Responsibility for the recruitment process was formally passed on to Mr Hullick.

Two recruitment agencies, Drake International ("Drake") and Recruitment Edge, were approached to assist. An advertisement for the full-time position of Principal Architect of Burwood Council, with a salary package of \$140,000, was placed on the recruitment website, SEEK.com. Drake was not able to produce any candidates. Recruitment Edge could put forward only two candidates, Mr Becerra and one other. An interview of both candidates took place. The panel was made up of Mr Hullick, Ian Dencker and Mr Macklin from the Council, and Tania Kapell from Recruitment Edge. The panel unanimously selected Mr Becerra and put his name up to Mr Romano for confirmation, in his capacity as General Manager.

There was little interest in the job as advertised, although there may well have been more if the terms, as eventually settled with Mr Becerra, had been included in the advertisement for the position. In the view of the panel, the only other applicant lacked experience in the kind of project that was to be the principal focus of the position, and Mr Becerra had substantial experience and was the superior candidate.

The Commission was required to consider whether this recruitment process was contrived so that Mr Romano's friend and business associate could leave an undesirable workplace situation to go into a position that offered

a stable base income and favourable private practice arrangements. There is a firm basis for suspicion about this process because:

- there were personal business reasons for Mr Romano to seek a beneficial outcome for Mr Becerra
- Mr Romano was clearly focused on securing the services of Mr Becerra rather than the services of a principal architect generally, as evidenced by the original proposal to take Mr Becerra on as a consultant
- Mr Romano controlled the process of bringing Mr Becerra into Burwood Council. He did this by himself, initially, in isolation from others in the Council who should have been involved. When recruitment responsibility was passed on to Mr Hullick, relevant lawyers and recruitment agencies continued to deal directly with Mr Romano
- the recruitment process was flawed, as the advertisement was for a very different position from that ultimately gained by Mr Becerra. This precluded a more competitive selection process
- Mr Becerra was privy to arrangements to establish and fill the principal architect position. He had at least some prior notice of the more favourable conditions the position would eventually secure.

Mr Hullick denied Mr Romano's suggestion that it was he who first suggested the appointment of an in-house architect and says that at all times it was Mr Romano's idea. His evidence on this issue is preferred, as it is consistent with all the other steps taken by Mr Romano in this process.

While Mr Romano contends that his aim in pursuing a possible consultancy or other employment for Mr Becerra was to preserve the knowledge that Mr Becerra had about the Precinct Project, the project was at an early stage of development and Mr Becerra could have been replaced by another qualified architect.

The evidence supports a conclusion that, once Mr Becerra advised Mr Romano that he wanted to leave his firm, Mr Romano set in train a process to provide employment for him at the Council.

Contract of employment

According to Mr Romano, upon receiving the recruitment panel's recommendation, in a discussion with Mr Hullick he said he would appoint Mr Becerra on the following terms:

- Mr Becerra would enter a renewable contract for one year
- Mr Becerra would be retained to provide architectural services for the Precinct Project only
- Mr Becerra would perform work for the Council for as many hours as were reasonable and necessary to deliver the Precinct Project
- at least eight hours a week of this work would be performed on Council premises
- his pay would be \$140,000 per annum, subject to annual review
- Mr Becerra would have a right to private practice.

These conditions were generally incorporated into a letter of offer dated 13 April 2007, signed by Mr Romano, which was accepted by Mr Becerra on 16 April 2007. That letter of offer relevantly provided:

Position and Commencement

*You will be employed in the position of In-House Principal Architect for Council (**Position**) commencing on 16 April 2007 (**commencement date**).*

*Your duties in this Position will primarily involve the management of Council's Civil Centre Library Project (**Project**).*

Term of Employment

*Your term of employment will be for a fixed term of 12 months from your commencement date, concluding on the 16 April 2008 (**expiry date**).*

A further term of employment will be offered under a new contract if your performance remains at a satisfactory level during the term and the Position continues to exist. You acknowledge that unless your employment is extended under a new contract, your appointment and employment will automatically terminate on the expiry date, and upon such expiry you are not entitled to severance monies as if the Position were redundant.

Duties and Responsibilities

Your duties and responsibilities will be explained to you by Les Hullick and me at another time and may be varied from time to time by Council.

As part of your Position, within 7 days from your commencement date, you are required to present to the General Manager of Council a work plan

documenting each stage for the delivery of the Project. Such work plan must include:

- a date of lodgement for the Development Application for the Project of no later than 15 August 2007; and
- a construction commencement date of no later than 1 February 2008.

It is agreed that during your employment you are free to be employed or engaged in a business related or advisory capacity with any person or other business, on the basis that:

- Council is your predominate client; and
- there is no conflict or likely conflict with the requirements of the Position or your ability to perform your duties and responsibilities.

You must notify the General Manager in writing of any private employment or contract work that relates to the business of Council or that might conflict with the Position.

Reporting Arrangements

You will report to Les Hullick or any other person Council nominates from time to time. You must comply with all reasonable directions of your supervisor and any other person in authority.

Remuneration

Your total remuneration package is \$140,000 per annum less applicable tax, comprising:

1. base salary;
2. superannuation contributions as prescribed by the Superannuation Guarantee (Administration) Act 1992, currently set at 9%;
3. all benefits you may be entitled to under any statute, industrial award or agreement or other instrument applicable to your employment either now or in the future, which is not otherwise provided for in this letter (including payment of loadings, penalty rates, overtime, allowances and any other like payments) to the extent permitted by law; and
4. compensation for any reasonable additional hours that you are required to work in

addition to your ordinary hours of work, including on the weekend or a public holiday.

Your base salary will be paid on a fortnightly basis in arrears by electronic funds transfer into a bank account nominated by you.

...

Hours of Work

Your ordinary working hours will be the hours reasonably required to effectively and efficiently manage the Project with a minimum 8 hours per week to be worked in Council's offices. You agree that your hours of work in Council's offices are to be recorded and signed off by Les Hullick or any other person we nominate from time to time.

You agree that Council may require you to work reasonable additional hours to meet its operational requirements and to effectively perform your duties and responsibilities. You agree that working these additional hours to fulfill these obligations is reasonable and that your total remuneration package includes compensation for these additional hours.

The letter of offer said that Mr Becerra would "primarily" work on the Precinct Project, not that it would be his only work.

It had been advertised as a full-time position, yet the contract of employment as settled contained the extraordinary condition that "your ordinary working hours will be the hours reasonably necessary to effectively and efficiently manage the project with a minimum of 8 hours per week to be worked in the Council's offices".

Mr Becerra told the Commission that he was not looking for a full-time job. He had a quantity of private work that would follow him from BKA and that he wanted to develop his own private practice.

One of the favourable conditions set by Mr Romano was the specification in the letter of offer that Mr Becerra was entitled to engage in private practice, separate from his employment at the Council. This was not referred to in the advertisement, but Mr Becerra would have been aware of it because it was discussed at the Bar Cupola meeting on 14 March 2007. Other applicants would not have understood that they would have any entitlement to private practice. In any event, for other potential applicants there would have seemed limited opportunity for private practice, considering the full-time nature of the advertised position.

If other prospective applicants had been aware that, despite the advertisement, the position could be conveniently operated alongside a private practice, there may have been far more interest in the position. Mr Becerra may not have been successful in a more competitive selection process.

Managing conflicts of interest

Clause 6.2 of Burwood Council's Code of Conduct, operating at all times relevant to this chapter, provided:

You must appropriately resolve any conflict or incompatibility between your private or personal interest and the impartial performance of public or professional duties.

Mr Romano had a personal interest in supporting Mr Becerra in his pursuit of a stable income. Mr Becerra was a friend and business associate. Mr Becerra's family was financially linked with Mr Romano's family through the activities of Befaro Pty Ltd, which was established to pursue joint financial investments, and which eventually purchased the Edwin Street units in June 2007 with a substantial mortgage.

This personal interest was in conflict with Mr Romano's responsibility, as the Council's General Manager, to ensure that all possible applicants for the provision of architectural services to the Council were fairly and equally treated and to ensure that the Council obtained the best architectural support at the most competitive rate.

Although Mr Romano was not directly involved in the selection process, his involvement in setting the recruitment framework and then settling favourable conditions for Mr Becerra after his selection, were inimical to a fair and proper recruitment process.

The Code of Conduct provided guidance as to how to manage non-pecuniary conflicts such as this. It specified that such a conflict should be disclosed and appropriately managed. Management of conflicts may include:

- doing nothing if the "potential for conflict is minimal"
- having "no involvement or absents yourself" from the debate or decision making in the relevant area or
- including an independent, informed person to ensure probity.

Mr Romano had made a disclosure previously in relation to his friendship and prior business dealings with Mr Becerra at a meeting of the Library Project Control Group in

2005 and to the Council's probity auditor for the Precinct Project. These disclosures were inadequate for the purposes of the Becerra recruitment process. They were out of date, as they made no reference to the Befaro Pty Ltd enterprise that was then being mooted.

In addition, the Council officers involved in the recruitment process were never made aware of any ongoing business relationship between Mr Romano and Mr Becerra.

This was not a matter where doing nothing was an appropriate management response.

Mr Romano did not absent himself from the process of setting the framework for recruitment and then settling conditions for the successful applicant.

There was no independent, informed observer who could ensure the probity of Mr Romano's involvement. Other involved persons, such as Mr Hullick, Mr Macklin and Mr Dencker, who may have been able to monitor the implications and management of this conflict, were unaware of Mr Romano's previous or current business dealings with Mr Becerra.

Mr Romano should have disclosed his then current personal and business relationship with Mr Becerra and had nothing to do with settling the terms of his contract of employment.

In the end, Mr Romano failed comprehensively to manage his conflict of interest in this matter. This culminated in a situation where the public could have no confidence in the probity of Mr Becerra's recruitment, the very situation that clause 6.2 seeks to avoid.

Corrupt conduct

In all the circumstances, the Commission is satisfied that Mr Romano's conduct in this respect amounted to corrupt conduct as defined in the ICAC Act. Mr Romano's failure to appropriately manage his serious conflict of interest involved a partial exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act. It could also constitute or involve a disciplinary offence as a breach of clause 6.2 of Burwood Council's Code of Conduct for the purposes of section 9(1)(b) of the ICAC Act.

Mr Becerra was aware of this conflict and should have taken steps to ensure that it was appropriately managed. He was not, however, a public officer at the time of the recruitment process and was certainly not in the same position as Mr Romano to control and appreciate the Council process that was taking place. He also did

not carry the same level of responsibility for the proper management of this conflict as Mr Romano did as the General Manager of the Council. In all the circumstances, the Commission is not satisfied that Mr Becerra's conduct in this respect amounted to corrupt conduct as defined in the ICAC Act.

Additional payments

In the early part of 2008, Mr Romano became aware that Mr Becerra was providing architectural services to the Council in areas outside the Precinct Project. He asked Mr Becerra to submit invoices for this work at a rate of \$200 an hour. He gave directions to relevant Council staff, including Mr Hullick and Mr Dencker, that this work fell outside Mr Becerra's contract of employment and warranted separate payment by the Council, in addition to Mr Becerra's annual remuneration of \$140,000. In this way, Mr Romano facilitated the payment of an additional \$41,400 in fees for work done by Mr Becerra in the first year of his employment. In subsequent years, Mr Becerra also received additional payment for work purportedly done outside the scope of his contracted remuneration.

Mr Becerra had no legal entitlement to the additional payments for work he performed outside the ambit of the Precinct Project during his first year of employment at Burwood Council.

Mr Becerra's position was defined by the letter from Mr Romano dated 13 April 2007, offering him the position. On Mr Becerra's acceptance of the position of this offer, Mr Romano's letter became his contract of employment. Additional conditions may have been inferred through the operation of awards, legislation or the common law. There is nothing, however, in the contract or otherwise that facilitated additional payment for non-Precinct Project-related work.

The contract specified "your duties in this position will primarily involve the management of Council's civil centre library project CCLP". The use of the word "primarily" conveys an inference that Mr Becerra might be required to perform other work. The contract leaves his specific duties vague and variable: "your duties and responsibilities will be explained to you by Les Hullick and [Mr Romano] at another time and may be varied from time to time".

The plain meaning of the relevant terms of the contract, as set out earlier in this chapter, was that any additional hours worked by Mr Becerra were included in his remuneration package of \$140,000 per annum. In respect of additional hours worked, the contract in fact specified as follows:

You agree that Council may require you to work reasonable additional hours to meet its operational requirements and to effectively perform your duties and responsibilities. You agree that working these additional hours to fulfill these obligations is reasonable and that your total remuneration package includes compensation for these additional hours.

When the contract was renewed, through Mr Romano's letter sent in April 2008, a clause was added that attempted to ratify the arrangement that Mr Becerra could be paid for additional work, with the following words:

Your total remuneration package is \$145,000 per annum less applicable tax, comprising:

1. ...
2. ...
3. ...
4. *compensation for any reasonable additional hours that you are required to work in addition to your ordinary hours of work, including on the weekend or a public holiday and projects outside the scope of the Civil Precinct Project. This is to be invoiced at a rate of \$200 per hour and will be subject to agreement prior to commencement of works.*

As Mr Becerra did not apparently have "ordinary hours of work", as evidenced by the unusual terms in his original contract already referred to, this additional clause is difficult to understand and Mr Hullick agreed that it did not seem to make any sense. The addition of this clause was clearly an attempt to provide that Mr Becerra could be paid at an hourly rate in addition to the remuneration package that his contract specified.

This change to the contract, however, post-dated the period for which Mr Becerra was paid \$41,400 in addition to his employment contract wage, and could not justify that payment.

The involvement of Mr Hullick, Mr Dencker and other Council staff

Mr Hullick, Mr Dencker and others involved in the payment of these invoices essentially followed directions given to them by Mr Romano. While they are generally required to follow directions from their General Manager, they are not entitled to facilitate an improper payment being made if they are aware that this is happening. None of these officers was legally trained. However, the concept of an employed person

being paid additional amounts in circumstances such as these was inconsistent with established workplace practice. All these people were familiar with situations where employee responsibilities had been extended beyond their position description. Mr Dencker, who was the Director, Planning and Environment, found himself responsible for the reform of the Council's depot in 2009. As Director Executive Services, Mr Hullick was supposed to focus solely on the conduct of the Precinct Project. In 2009, he found himself responsible for the Council's management of worker's compensation proceedings relating to his fellow executive, Robert Cummins. Neither of these extensions to either person's responsibility entitled that person to render invoices for additional work done. Neither person would have expected such an entitlement. Allowing Mr Becerra to submit additional invoices in similar circumstances should have been a cause for concern to the officers involved in these circumstances.

It would have been prudent for those involved to make some further enquiry as to the propriety of the additional payments. Mr Hullick, Mr Dencker and other relevant staff, however, were largely unaware of the personal and business association that existed between Mr Romano and Mr Becerra. They were also entitled to expect that the directions made quite forcefully by Mr Romano as General Manager were soundly based. The Commission is not satisfied that Mr Hullick, Mr Dencker or other Council staff involved in making payments in accordance with Mr Romano's directions engaged in any corrupt conduct in this respect.

Mr Romano's involvement

Mr Romano did not seek legal advice in relation to whether there was a proper basis for the additional payments made to Mr Becerra, despite his propensity for obtaining legal advice on all kinds of issues from the Council's lawyers at substantial cost to the Council. He was in a position of significant conflict of interest in relation to these payments and his friend and business associate, Mr Becerra. He directed that these payments be made contrary to the plain terms of Mr Becerra's employment contract.

Mr Becerra's contract was re-negotiated less than a month after the initial invoices seeking additional payments were submitted. As discussed above, the new contract attempted to make specific provision for additional payments, arguably some acknowledgement that there was no provision that allowed additional payments in the previous contract.

Corrupt conduct

Garth Blake SC, senior counsel for Mr Romano, conceded in his submissions that Mr Romano had a perceived non-pecuniary conflict of interest in this matter, but

submitted that it was appropriately managed. For the reasons outlined in the preceding sections, the Commission does not accept that the conflict was appropriately managed.

Mr Romano initiated and promoted the payment to Mr Becerra of \$41,400 above his contracted remuneration package. Mr Romano had a conflict of interest in this issue between his personal interest in supporting his friend and business associate and his public duty to ensure due economy for Burwood Council, and failed to appropriately manage this conflict. This culminated in a situation where the public can have no confidence in the probity of these payments. In all the available circumstances, the Commission is satisfied to the requisite standard that Mr Romano's conduct in this respect amounted to corrupt conduct as defined in the ICAC Act. Mr Romano's failure to manage a serious conflict of interest involved a partial exercise of his official functions for the purposes of section 8(i)(b) of the ICAC Act and could involve a disciplinary breach of clause 6.2 of the Code of Conduct for the purposes of section 9 of the ICAC Act.

Mr Becerra also had access to relevant materials and could have made some appropriate enquiries in relation to the legitimacy of these payments. He is more culpable than Mr Hullick, Mr Dencker and other involved Council staff, as he was aware of Mr Romano's position of conflict. He did not, however, have the heightened level of responsibility that Mr Romano had as General Manager of the Council, and he, like Mr Hullick, Mr Dencker and others, was generally responding to Mr Romano's promotion of this process for additional payments. In all the circumstances, the Commission is not satisfied that Mr Becerra's conduct in relation to this issue amounted to corrupt conduct, as defined in the ICAC Act.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano and Mr Becerra. Accordingly they are people who come within the definition of "affected" person for the purposes of section 74A(2) of the ICAC Act.

Mr Romano

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano or Mr Becerra in relation to matters canvassed in this chapter.

Neither Mr Romano nor Mr Becerra now work for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

Chapter 6: Work done on Mr Romano's driveway

This chapter examines the circumstances in which three Burwood Council depot workers and a Burwood Council contractor were involved in the replacement of Pat Romano's driveway at his home. Mr Romano's home is situated at Russell Lea, which is within the City of Canada Bay Council area.

All witnesses agree that work on the driveway was done by these four persons, however, there are significant differences between the accounts given by the four workers and that given by Mr Romano.

The chapter canvasses whether the replacement of Mr Romano's driveway involved corrupt conduct on the part of any person. In particular, it canvasses:

- whether the use of Burwood Council staff and a Burwood Council contractor to carry out private work for Mr Romano involved corrupt conduct, on the basis that it involved a breach of public trust under section 8(1)(c) of the ICAC Act and could, for the purpose of section 9 of the ICAC Act, involve a disciplinary offence of failing to appropriately manage a conflict of interest
- whether any person engaged in corrupt conduct through the use of Burwood Council resources in the course of the replacement process, which could amount to corrupt conduct on the basis that it involved a dishonest exercise of official functions for the purposes of section 8(1)(b) of the ICAC Act and could, for the purpose of section 9 of the ICAC Act, involve a disciplinary offence of using Council property for personal purposes
- whether Mr Romano engaged in corrupt conduct when he accessed Burwood Council documentation to assist him in obtaining approval for the work, after it was completed, from City of Canada Bay Council. This could amount to corrupt conduct on the basis that it involved a

breach of public trust under section 8(1)(c) of the ICAC Act and could, for the purposes of section 9 of the ICAC Act, involve a criminal offence of misconduct in public office or a disciplinary offence of obtaining an improper advantage from information had by virtue of Mr Romano's position at the Council.

The evidence of Mr Giangrasso

Giuseppe (Joe) Giangrasso is a team leader for a construction gang at Burwood Council and, at all relevant times, his direct supervisor was Stephen Child, the Civil Maintenance Supervisor at the Council.

Mr Giangrasso told the Commission that Mr Romano approached him in August 2007 about the driveway at his home in Russell Lea. Mr Romano had obtained a quote for its replacement but thought it was excessive and he asked Mr Giangrasso to come and have a look at the driveway. According to Mr Giangrasso, he inspected the old driveway, measured it and assessed what was needed to have it replaced. Mr Romano asked him to make arrangements to replace the driveway. He said it needed to be done in one day, as he did not want City of Canada Bay Council to be aware of it.

Mr Giangrasso spoke to Mr Child and Ammar Issa, another depot worker, and arranged for them to attend and assist. He also spoke to Council contractor Shane O'Brien, of O'Brien Civil Pty Limited ("O'Brien Civil"), and asked him to come to assist. Mr O'Brien had a backhoe and this was needed to dig up the old driveway. When he spoke to Mr O'Brien, he told him that he did not know whether or not Mr O'Brien would get paid for this work. He said that Mr O'Brien was not concerned about this as "it would be good for him if he done [sic] the job for the General Manager because that could mean ongoing work".

Mr Giangrasso described how they all attended Mr Romano's home on 15 September 2007. Mr O'Brien used the backhoe to remove the old driveway. Mr O'Brien and Mr Giangrasso loaded the waste into Mr Giangrasso's truck and took it to the Burwood Council depot. On their return, Mr O'Brien left and Mr Giangrasso, Mr Child and Mr Issa waited for the concrete truck. Mr Child paid for the concrete in Mr Romano's absence with a cheque previously supplied by Mr Romano. The three depot workers poured and set the concrete. At some stage, a barbecue lunch was supplied by Mr Romano. The work was completed, and Mr Giangrasso, Mr Child and Mr Issa left sometime between 2.30 pm and 3.00 pm.

Mr Giangrasso told the Commission that, in the following week, he returned to Mr Romano's home and retrieved the formwork used for laying the concrete. He also applied topsoil to fill in gaps left by the formwork and spread some topsoil over the remainder of the grass at the front of Mr Romano's house.

According to Mr Giangrasso, apart from payment for the steel used for reinforcement and the concrete, no other cost was incurred by Mr Romano. Mr Giangrasso, Mr Child and Mr Issa all provided their labour for free and Mr O'Brien provided his labour and the use of his backhoe at no cost.

A few weeks later, on 19 October 2007, Mr Romano took Mr Giangrasso, Mr Child, Mr Issa and Mr O'Brien to lunch at Il Buco restaurant in Enfield. Mr Giangrasso said this lunch had been promised to them by Mr Romano as a thank you for the work done on the driveway.

The evidence of Mr Child, Mr Issa and Mr O'Brien

Mr Giangrasso's account received substantial support through the evidence given by Mr Child and Mr Issa, and

the evidence provided by Mr O'Brien through a video conference link to Ireland, where Mr O'Brien was living at the time of the Commission's public inquiry.

Mr Child said that Mr Giangrasso initially approached him and told him that he had spoken to Mr Romano and "[Mr Romano] wanted a driveway laid". Mr Child agreed with Mr Giangrasso's evidence about the arrangements for the driveway and denied that there was a commercial contractual arrangement between Mr Romano and Mr O'Brien.

Mr Issa said that he was approached by Mr Giangrasso to assist with the job. He said Mr Giangrasso did not say anything about being paid and he presumed he was not going to be paid as "it was for the General Manager". Mr Issa denied that he had attended as part of an arrangement with Mr O'Brien and said he had never worked for Mr O'Brien. He confirmed the evidence of Mr Child and Mr Giangrasso that Mr O'Brien had left after the old driveway had been dug up and removed. Mr Issa also agreed that the Il Buco lunch was a thank you lunch for the work on the driveway.

Mr O'Brien described how he was approached by Mr Giangrasso "to dig out this driveway for Pat Romano". He understood that this work was "just a favour for the boss". He said he did not expect to get paid, he just hoped that it would win him favour and "hopefully we'll get some more work". He told the Commission he received no payment. He said that Mr Giangrasso and Mr Child had done some private work for O'Brien Civil, but that this was not the arrangement on that day.

Mr O'Brien dug up the driveway, went with Mr Giangrasso to dispose of the waste, and on their return put the excavator on the back of his truck and went home. He was not present for the barbecue later in the day. He attended the lunch at Il Buco, which he

understood was a thank you lunch for work on the driveway.

The evidence of Mr Romano

Mr Romano provided the Commission with a number of statements about this matter and gave evidence at the public inquiry.

He acknowledged that his driveway was replaced on 15 September 2007 by the four people referred to above. His account, however, conflicted with the other accounts detailed above in a number of significant ways.

Mr Romano said that the arrangements were made through Mr Child, not Mr Giangrasso, and that the arrangement made was for O'Brien Civil to replace the driveway on a commercial basis. He said he paid Mr O'Brien \$900 on the day, and then a further \$800 through Mr Child a few days later, when the formwork had been removed.

Mr Romano said that he was surprised and concerned to see Council staff, Mr Giangrasso and Mr Issa, in attendance on 15 September 2007. He said that he was assured by Mr Child that "they work for O'Brien Civil weekends. It's not a big deal".

Mr Romano confirmed that he had taken Mr Child, Mr Giangrasso, Mr Issa and Mr O'Brien to lunch at Il Buco restaurant on 19 October 2007. He stated, however, that he did this "to thank them for the long hours they had performed on Council projects".

In relation to the substantive conflicts between Mr Romano's evidence and the evidence of the others with respect to this matter, the Commission rejects the evidence of Mr Romano for the reasons outlined below.

Mr Romano's evidence that all arrangements were made through Mr Child and that he had no direct dealings with Mr Giangrasso in relation to his driveway is inconsistent with other evidence.

Telephone records indicate that Mr Romano spoke by telephone with Mr Child on 3 September 2007 and 9 September 2007, 12 days and 6 days respectively before the work was done at Mr Romano's home. On 14 September 2007, however, the day before the work was done, Mr Romano spoke to Mr Giangrasso on two occasions, once at 8.52 am for two minutes and 12 seconds, and then again at 9.07 am for one minute and 29 seconds. Mr Romano's attempts to explain these contacts were unconvincing.

Mr Romano has repeatedly denied having any significant dealings with Mr Giangrasso, both personally and for work purposes. At all relevant times, they were separated by many layers within the Council's authority hierarchy. This was the day before Mr Giangrasso and other Council staff were involved in replacing Mr Romano's driveway. It is highly unlikely that these calls were not in relation to the planned works on the driveway. It is unlikely that Mr Romano would even have access to Mr Giangrasso's phone number in his car unless there was some arrangement in place.

Mr Child, Mr Issa and Mr O'Brien all described being approached by Mr Giangrasso to participate in the work. It is difficult to see why they would collectively contrive to lie about this minor detail.

Documentation obtained from the concrete supplier confirms that the concrete was ordered on Mr Giangrasso's account, consistent with Mr Giangrasso's management of the process.

Mr Romano claimed that he paid Mr O'Brien \$900 on the day the work was done and a further \$800 through Mr Child on about 19 September 2007. He said he passed the money to Mr Child at his (Mr Romano's) office.

Mr O'Brien and Mr Child both deny that any money was paid to Mr O'Brien for the driveway work. In view of Mr Romano's general lack of credit and the evidence of all witnesses except Mr Romano that this work was done as a favour, the Commission rejects Mr Romano's evidence that he paid Mr O'Brien \$1,700 for work on his driveway.

Lunch at Il Buco

Mr Giangrasso, Mr Child, Mr Issa and Mr O'Brien all described being taken to lunch at Il Buco restaurant on 19 October 2007 as a thank you for the work done on the driveway. Mr Romano rejects this but his evidence is weak and at times inconsistent.

In a statement dated May 2010 Mr Romano claimed, "I decided to take some Council staff members out to lunch (after persistent requests to do so) to thank them for the long hours they had performed on Council projects, mostly in night shifts and on weekends, which meant they were away from their families". Mr Child's civil construction team consisted of 28 people, yet the only people invited to the lunch were those Council staff involved in replacing Mr Romano's driveway.

Even more extraordinary was the inclusion of Mr O'Brien in the invitation. He was not employed by the Council and Mr Romano told the Commission that he had never met Mr O'Brien prior to 15 September 2007.

Mr Romano's evidence shifted slightly at the public inquiry. He initially confirmed the account he gave in a May 2010 statement. He then qualified his account to some extent.

- Q. *Well, what do you say the reason for the lunch was, Mr Romano?*
- A. *Mr Child has been a very obliging employee ... I did want to thank him for the work on the Saturday, that's true, but I also felt that I wanted to show appreciation for generally the dedication to the job that he had.*

This suggests that the lunch partially related to the work done on the driveway. The changing nature of Mr Romano's evidence further diminishes his credibility on this issue.

Mr Romano's dealings with Kate McClymont of the Sydney Morning Herald

The circumstances in which Mr Romano's driveway was replaced were canvassed publicly in an article published in the *Sydney Morning Herald* on 4 April 2009. In relation to the driveway work, in this article, journalist Kate McClymont recorded, "Mr Romano said he used private contractors on his driveway and was not aware of any Council staff being involved". Of course, this is inconsistent with the account provided by Mr Romano to this Commission at least as early as a statement dated May 2010, which indicated that he was well aware of the involvement of Council workers. When confronted with this inconsistency at the public inquiry on 30 March 2010, Mr Romano claimed that the statement recorded by Ms McClymont was taken out of context: "I was responding to her claim that I used Council staff on the units [Edwin Street] that we were involved with". It is difficult to make any sense of this answer. It suggests that the answer was given by Mr Romano to Ms McClymont, but in relation to work done on the Befaro Pty Ltd units, and not the work done on his driveway. Mr Romano, however, has told the Commission that he was aware of Council staff being involved in the work done on the Befaro units. Accordingly, the only available interpretation of Mr Romano's assertion to the Commission is that he did not lie to Ms McClymont in relation to the work done on his driveway, but rather he lied to her in relation to the work done on the units in Edwin Street.

Subsequent to Mr Romano's evidence on 30 March 2010, Ms McClymont provided the Commission with contemporaneous typed notes that she prepared in relation to the relevant conversation. This records the following:

Did you ever get Council staff to do any OWRK [sic] on your own driveway? I don't know what you're talking about there. I've employed [sic] contractors to do work on my driveway. Taht [sic] was many many months ago.

But not Council staff? Not that I'm aware of, no it was a civil contract.

After his evidence on 30 March 2010 and the admission of Ms McClymont's notes on 12 April 2010, Mr Romano provided a different explanation in a statement he prepared and submitted to the Commission, dated 18 May 2010. He abandoned his assertion that Ms McClymont had taken his response out of context. Now he claimed that his response was in relation to the driveway, however, Ms McClymont had erroneously recorded what he said.

In all the circumstances, including the contemporaneous nature of Ms McClymont's notes, the manner in which Mr Romano moved his explanation for his comments from being accurate comments taken out of context to being inaccurately recorded comments that were misunderstood, and the lack of any contemporaneous record to support Mr Romano's version of the conversation, the Commission is satisfied that Mr Romano did mislead Ms McClymont in relation to the role played by Council staff in the replacement of his driveway. This indicates that Mr Romano was aware that it was inappropriate to use Council staff for this purpose and undermines his contention that the work on the driveway was a normal commercial arrangement with Mr O'Brien.

City of Canada Bay Council pursues Mr Romano in relation to the new driveway

According to Mr Giangrasso, Mr Romano asked for the driveway work to be done in one day, as he did not want the City of Canada Bay Council to be aware of it.

Mr Child told the Commission that Mr Romano had also indicated to him that he did not want "to go through Council approval".

In his statements to the Commission, Mr Romano made it clear that he was aware of the need for Council approval. He claimed he expected this to be managed by O'Brien

Civil and was concerned when he learned on 15 September 2007 that it was likely that nothing had been done. Despite his alleged concern, Mr Romano apparently did nothing to rectify the problem.

The article in the *Sydney Morning Herald* on 4 April 2009 alerted City of Canada Bay Council to the fact that a driveway had been constructed in its area without Council approval. On 12 May 2009, the Council sent a letter to Mr Romano asking him to provide the relevant documentation to secure approval for the driveway reconstruction. Through a letter dated 16 May 2009, Mr Romano provided this documentation together with a \$360 application fee. In the "Driveway Construction and Ancillary Works in the Road Reserve: Private Contractor Works" form, Mr Romano recorded the private contractor responsible for the driveway replacement as O'Brien Civil. He included details about O'Brien Civil that he obtained from Burwood Council records.

Mr Romano's letter to City of Canada Bay Council also enclosed O'Brien Civil's Certificate of Insurance and Certificate of Currency. These had been accessed from Burwood Council records without Mr O'Brien's knowledge or approval. Mr Romano's overall response to City of Canada Bay Council, incorporating these certificates, gave the impression that O'Brien Civil was legitimately engaged and assisted in the approval process, with the provision of business details and copies of relevant insurance certificates.

Mr Romano conceded that he obtained O'Brien Civil records from Burwood Council holdings. He had no authority to copy Mr O'Brien's private records, as retained at Burwood Council, for his own personal purposes.

The Commission is satisfied that Mr Romano engaged in an ongoing course of obfuscation, prevarication and manipulation in relation to the true circumstances in which his driveway was replaced. He sought to mislead Ms McClymont, he sought to mislead City of Canada Bay Council, and he attempted to mislead this Commission.

In all the circumstances, this Commission is satisfied that Mr Romano engaged the services of Council staff to replace his driveway. He had no commercial relationship with Mr O'Brien and paid him no money. The lunch at Il Buco was provided as a reward for this work done for Mr Romano's private purposes.

Corrupt conduct

The General Manager engaging Council staff to work on his driveway

There is nothing intrinsically wrong with doing a favour for a work colleague. Mr Romano, however, was the General Manager of Burwood Council. As such, he was in a position of authority with respect to depot employees, Mr Giangrasso, Mr Child and Mr Issa. He was also in a position of significant influence with respect to Mr O'Brien, who was a regular contractor with the Council. In these circumstances, there was a significant conflict between Mr Romano's personal interest in obtaining a replacement driveway quickly and inexpensively, and his public responsibility to deal with Council staff and contractors objectively and fairly. Mr Romano's corporate capacity to benefit or damage the interests of these people in the context of their work had the potential to affect the nature of any commercial or volunteer arrangements he may form with them. Mr O'Brien openly referred to this, "as a contractor, we just did a little favour for the boss, hopefully we'll get some more work". The performance of the work also had the potential to create a form of indebtedness on Mr Romano's part to the relevant staff and contractor that could interfere with the impartial performance of his executive responsibilities.

The Commission is satisfied that Mr Romano was aware of the inappropriate nature of this arrangement and this is why he took steps to present the work as a commercial arrangement with Mr O'Brien.

Clause 6.4 of Burwood Council's Code of Conduct, operating at the time of these developments, provided:

It is essential that you properly address conflicts of interest issues that may arise. You must:

- *try to understand the concept and practical implications of conflict of interests issues.*
- *accept that failure to resolve an actual or reasonably perceived conflict of interest is unacceptable in Local Government.*
- *take timely and appropriate action to avoid, or if not, to disclose any actual, potential or reasonably perceived conflict of interest.*

Mr Romano, Mr Giangrasso, Mr Child and Mr Issa failed to comply with this provision. Accordingly, the conduct of all these men could involve a disciplinary offence for the purposes of section 9(1)(b) of the ICAC Act.

The critical issue for the Commission is whether their conduct could amount to corrupt conduct as a breach of public trust for the purposes of section 8(1)(c) of the ICAC Act.

In the Commission's view, there was a distinction between the circumstances of Mr Romano and those of the three depot workers. His senior office brought with it significantly greater responsibility to manage these situations appropriately. Despite this, the Commission is not satisfied that Mr Romano's conduct was so serious as to amount to a breach of public trust for the purposes of section 8(1)(c). The Commission is also not satisfied that such a finding is warranted, in these circumstances, in relation to Mr Giangrasso, Mr Child or Mr Issa.

Use of Council resources

According to Mr Giangrasso, Council resources were used in the process of replacing Mr Romano's driveway: Council tools and formwork were used, waste was disposed in Council bins at Mr Romano's direction and topsoil was accessed from Council supplies.

There is some corroboration of Mr Giangrasso's evidence from Mr Child.

Having regard to the robust standard of proof required following the decision of *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362, the Commission is not satisfied to the requisite standard of proof that Mr Romano was privy to any unauthorised use of Council resources.

In all the circumstances, the Commission is also not of the view that a finding of corrupt conduct against Mr Giangrasso is warranted.

Accessing O'Brien Civil records

Mr Romano's conduct in using his position at Burwood Council to access the records of O'Brien Civil and apply them for personal purposes, in obtaining retrospective authority for the driveway construction, involved a breach of public trust for the purposes of section 8(1)(c) of the ICAC Act. Clause 10.8 of Burwood Council's Code of Conduct, operating at the time, provided, "you must not seek to obtain, either directly or indirectly, any financial benefit or other improper advantage for yourself, or any other person, or body, from any information to which you have by virtue of your office or position within the Council". On this basis, Mr Romano's actions could involve a disciplinary offence of obtaining improper advantage for himself from information had by virtue of his position at Council, for the purposes of section 9(1)(b) of the ICAC Act. His actions could also involve the common law offence of misconduct in public office for the purposes of section 9(1)(a) of the ICAC Act. Accordingly, the Commission is satisfied that the conduct in this matter did amount to corrupt conduct as defined in the ICAC Act.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano and Mr Giangrasso. Accordingly they are people who come within the definition of "affected" person for the purposes of section 74A(2) of the ICAC Act.

Mr Romano

Mr Romano made some concessions during the course of the evidence in relation to his accessing of documentation held by Burwood Council concerning O'Brien Civil Pty Ltd. Any admissions or relevant statements were made subject to a declaration issued pursuant to section 38 of the ICAC Act, and cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. Despite this, there is some relevant documentary evidence obtained from City of Canada Bay Council and the evidence of available witnesses in relation to Mr Romano's relevant activities that will be available for use in a prosecution by the DPP.

In all the circumstances, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano in relation to the common law offence of misconduct in public office in relation to his conduct in removing two documents without authorisation from Burwood Council records and using them for an improper purpose; that is, to provide false or misleading information to City of Canada Bay Council about the involvement of O'Brien Civil Pty Ltd in relation to the reconstruction of his driveway.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

Mr Giangrasso

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Giangrasso in relation to matters canvassed in this chapter.

In all the circumstances, the Commission is not of the opinion that consideration should be given to taking action against Mr Giangrasso with respect to any disciplinary offence or taking action against him with a view to dismissing him, dispensing with his services or otherwise terminating his services in relation to matters canvassed in this chapter.

Chapter 7: Renovation of the Befaro Units

This chapter examines the circumstances in which a number of Burwood Council employees performed renovation work on residential units owned by Befaro Pty Ltd (“the Befaro Units”), a company associated with the families of Pat Romano, Albert Becerra and Tony Fasanella.

While there is no dispute about the fact that Burwood Council employees were involved in the renovation of these premises, there are a number of differences between the accounts of various witnesses in relation to the circumstances in which this took place.

The chapter will examine the evidence about which Council employees were involved in the renovation of the Befaro Units, who knew about the Council employees’ involvement and whether any council time or resources were used for the renovation. It will then consider:

- whether any person has engaged in corrupt conduct as a result of Council staff being engaged to work or Council resources being used on units in which senior council officers had an interest. This could involve corrupt conduct on the basis that it involved a breach of public trust under section 8(1)(c) of the ICAC Act and could, for the purpose of section 9 of the ICAC Act, involve a disciplinary offence of failing to appropriately manage a conflict of interest
- whether any person has engaged in corrupt conduct through the involvement of Council staff in renovation work while they were supposed to be working for the Council and were being paid by the Council. This could involve corrupt conduct on the basis that it involved a breach of public trust under section 8(1)(c) of the ICAC Act and could, for the purpose of section 9 of the ICAC Act, involve the common law offence of misconduct in public office.

Background

In 2007, the families of Mr Romano, Mr Becerra, and their friend, Mr Fasanella, combined to establish the property investment company, Befaro Pty Ltd. The directors of this company were the wives of the three men, Carmela Romano, Poppy Becerra and Maria Fasanella. While the wives played minor roles and attended some meetings about the business of Befaro Pty Ltd, it is obvious from the documentary evidence (including emails) that the husbands performed most of the work associated with the conduct of that business.

The company purchased units at 187 Edwin Street, Croydon (the Befaro Units), on or around 1 June 2007 for \$1,260,000, with a mortgage to the St George Bank for \$1,008,000. Befaro Pty Ltd held the property in trust for the Befaro Property Trust. This was a unit trust that originally issued 90 units. Thirty units were issued to entities associated with each family, being superannuation trust funds and family trust funds. The directors of Befaro Pty Ltd appointed Mr Romano, Mr Becerra and Mr Fasanella as agents for the company to manage the refurbishment of the property (“the Befaro Agents”).

Who knew Council staff were working on the Befaro Units?

In the second half of 2007, Mr Fasanella and Mr Becerra arranged for renovations to Unit 3 and Unit 6 of the Befaro Units. By the end of that year, the majority of these renovations had been completed, but some minor renovation work was still required. Mr Fasanella and Mr Becerra were having difficulties finding tradespeople to perform this work and looked to Mr Romano to play a greater role.

In about June 2008, the tenants in Unit 2 left and this unit also became available for renovation at that time.

Giuseppe (Joe) Giangrosso told the Commission that in early 2008 he was approached by Mr Romano who asked him to assist a “friend” with renovations, and this friend turned out to be Mr Becerra. Ultimately, Mr Giangrosso arranged with Mr Becerra for John Vadala, a Council carpenter, to do carpentry and gyprocking work at the units. Mr Becerra said that he paid Mr Vadala \$800, and then \$200. Mr Vadala said he was paid \$900, and then \$150.

Mr Giangrosso also removed waste at this time, and Mr Becerra paid him \$400 for this work. Mr Becerra denied paying Mr Giangrosso \$400, although Mr Romano told the Commission subsequently that he understood this money was paid to Mr Giangrosso.

Mr Becerra said that he was aware that Mr Vadala and Mr Giangrosso were Council employees. Mr Romano was adamant that he never met with Mr Giangrosso in January 2008. He recalled a meeting with Stephen Child and Mr Becerra at the units, “And it’s possible that either I or Child might’ve given Mr Becerra the phone number [of Mr Giangrosso]”. Mr Romano said this meeting took place between 14 and 19 January 2008. In his statement dated 26 May 2010 in relation to this issue, he said, “I do not recall ever having a discussion with Mr Giangrosso regarding the Befaro property or instructing him to carry out work on the Befaro property”.

There is telephone evidence that points strongly to Mr Romano having significant dealings with Mr Giangrosso at the time. It is clear that arrangements were being made with Mr Giangrosso in relation to the Befaro Units in the last two weeks of January 2008. Mr Becerra spoke by telephone with Mr Giangrosso on 22, 25, 28 and 29 January 2008. These calls must all relate to the units, as Mr Becerra had no other reason to contact Mr Giangrosso. Over this time, Mr Romano also had a series of lengthy telephone conversations with Mr Giangrosso, including calls on 22, 25, 26 and 29 January 2008. Mr Romano explained

these calls as being related to Council business while Mr Child was away and Mr Giangrosso was acting in his position. Even when acting in Mr Child’s position, however, Mr Giangrosso was a number of management levels below Mr Romano. Mr Romano’s explanation for the calls is inconsistent with further calls made to Mr Giangrosso on 16 February 2008, 29 February 2008, 8 March 2008, 1 April 2008 and 11 June 2008, after Mr Child had returned from leave. These calls lasted 8.5 minutes, 10 minutes, 8 minutes, 19 minutes, and 30 seconds, respectively.

Mr Child told the Commission that in February 2008, after he had returned from a cruise in the last two weeks of January 2008, Mr Romano called him into his office and told him that Mr Giangrosso and Mr Vadala had not been able to complete work on the units and that he wanted Mr Child to look after the rest of the job. Mr Child then met with Mr Romano and Mr Becerra at the Units and settled a list of remaining work needed for Unit 3 and Unit 6, which he recorded in his diary. This list was provided to the Commission.

Mr Becerra agreed that there was a meeting with Mr Romano and Mr Child at the units, although he gave varying evidence about when this occurred. He was shown Mr Child’s list and acknowledged that it related to work that was to be done on Unit 3 and Unit 6. Mr Becerra also acknowledged that he dealt with Mr Giangrosso in relation to getting a tradesperson to the units.

Mr Child said that when Unit 2 became available for renovation in June 2008, Mr Romano asked him to also project manage this renovation. Mr Romano said, “the words project manager are probably too prescriptive for what he [Mr Child] was doing ... he was helping us in obtaining trades people for the purpose of activities at Befaro”. The evidence, however, suggests that this was a substantial understatement of Mr Child’s role.

In his statement dated 26 May 2010, Mr Romano described how he met with Mr Child and Mr Becerra on or around

2 June 2008 to discuss the renovation of Unit 2. The work identified as needing to be done included:

- removing the carpet
- demolishing and rebuilding the kitchen
- removing and replacing the floor and wall tiles in the bathroom
- removing and replacing the toilet, bath and shower facilities, and hand basin in the bathroom
- removing the linen cupboard
- removing and replacing light fittings.

Mr Romano said that during this discussion, Mr Child indicated he had “mates” who could perform various functions.

The next day, 3 June 2008, Mr Romano sent the following email to Mr Fasanella:

Unit 2 has vacated. Vera gave Albert keys on Monday.

Met with Steve and Albert at site yesterday. Steve to commence stripping unit this week. Have given him an 8 week deadline for entire project.

This evidence is all consistent with Mr Child’s claim that he was effectively acting as project manager for the renovations.

Details of prospective tradespeople were sent by the Befaro Agents to Mr Child so that he could obtain quotes. In an email dated 16 June 2008, Mr Child informed Mr Romano of a quote he obtained from an electrician for \$4,000. On the same day, Mr Romano responded that this was too high and provided Mr Child with details of another electrician so that Mr Child could get an alternative quote.

Once quotes were obtained, Mr Child was responsible for getting the work done. On 17 June 2008, Mr Child sent Mr Romano the following email:

Hi Pat

I have received a quote for plumbing for Unit 2 - \$3,300 plus GST.

Mr Romano responded on 19 June 2008, “ok, go ahead”.

Mr Child organised the kitchen and bathroom to be stripped by Mr Giangrasso and Mr Saad, respectively.

On 1 July 2008, Mr Child sent the following update to Mr Romano.

Hi Pat

Just a [sic] update on the unit 2

** the plumber is laying pipes at this moment.*

** the kitchen will be quoted tomorrow.*

** I should know the cost of tiling and waterproofing tonight.*

** Windows have been ordered.*

** Good news – I’ve spoken to Paul the electrician and he will be starting this coming Friday.*

** Painter is organised.*

Mr Romano responded on 3 July 2008, “great work thanks”.

It is clear from the various emails that the Befaro Agents treated Mr Child as a resource available and on call to address the needs of the renovation process.

In an email to Mr Romano on 22 July 2008, Mr Becerra described how damage had been incurred at the property. He assured Mr Romano, however, that “Steve will clean up the mess tomorrow”.

In an email to tile suppliers on 24 July 2008, Mr Fasanella asked them to arrange delivery on 28 July 2008. He provided Mr Child’s mobile phone number as “contact details for receipt of goods”. He then commented, “Steve will not be on site and therefore requires a call of at least 30 minutes prior to delivery”.

In his statement dated 26 May 2010, Mr Romano described how in mid-September 2008, towards the end of the renovation of Unit 2, Mr Becerra provided Mr Child with a list of outstanding work. Mr Child provided the Commission with access to a text message he received from Mr Romano in relation to this, “Steve, have you completed list of outstanding matters at Unit yet?”

Mr Romano claimed that he had little knowledge of the involvement of Council employees other than Mr Child in the renovations. He said that he became aware that other Council staff were working on the Units only on two occasions during the renovations: when he came across Mr Vadala doing gyrolocking work in February 2008, and when Mr Child advised him in June 2008 that Mr Giangrasso had done some rubbish removal.

Mr Giangrasso and Mr Child told the Commission that Mr Romano was well aware of the involvement of Council staff and indeed was routinely directing their involvement.

In his statement dated 26 May 2010, Mr Romano described how Mr Child had said, “I have a mate that can do the

gyprocking work needed for units 3 and 6". In relation to the renovation of Unit 2, Mr Child told him, "I've got a mate who can do all the demolition and removal". In relation to the work done in the gardens at the units, Mr Child told Mr Romano, "I got one of my mates to do it". All this work was done by Mr Child and other Council employees from the depot. There was no suggestion that Mr Child ever intended to get anyone else to do the work. Consistent with Mr Romano's close involvement with the depot, he generally knew, or knew of, all these Council employees. It is highly unlikely that Mr Child would speak generally about "mates" when he was referring to people who worked for Mr Romano, and who Mr Romano generally knew or knew of.

According to Mr Romano, he repeatedly directed Mr Child not to involve Council employees in the conduct of private work for Mr Romano's benefit. Mr Child denied that he was ever given such a direction by Mr Romano.

Mr Romano's asserted concern about Council staff being used for private work is inconsistent with his willingness to use Mr Child, Mr Giangrasso and Ammar Issa to work on the replacement of the driveway in his home (as found in chapter 6).

In his compulsory examination evidence, Mr Fasanella told the Commission that when he saw Mr Vadala working at the Units, he raised the issue of Council staff working on the renovations with Mr Romano. According to Mr Fasanella, Mr Romano told him that Council employees were entitled to work a second job (Mr Fasanella could not be sure of the precise term Mr Romano used in this respect) as long as they filled in the appropriate declaration, and that there was a process in place in this respect. Mr Fasanella did not give evidence at the public inquiry and Mr Romano had no opportunity to challenge his evidence in that forum. It seems unlikely, however, that Mr Fasanella would manufacture this evidence against his business associate Mr Romano.

In all the circumstances, the Commission is satisfied that Mr Romano did not give Mr Child instructions not to use Council employees. The Commission accepts the evidence of Mr Child and Mr Giangrasso, and, in the case of Mr Becerra, his own admission that Mr Romano and Mr Becerra were generally aware that Council staff were being engaged in the renovation works on the Befaro Units from early 2008.

Conclusion

The evidence shows that, with the exception of the specific incidents canvassed in the following section, Council staff who worked on the Befaro Units did so in their own time, in return for payment or on a voluntary basis.

In chapter 6, relating to the replacement of Mr Romano's driveway, this report discussed the inherent conflict of interest that emerges when a senior official, such as Mr Romano, engages junior staff to perform work for private purposes. With respect to work done by Council staff in their own time, the circumstances canvassed in this chapter mirror those canvassed in chapter 6. The Commission is of the view that, in engaging Council staff to work on the Befaro Units, Mr Becerra and Mr Romano acted in breach of Burwood Council's Code of Conduct in a manner that could involve a disciplinary offence for the purposes of section 9(1)(b) of the ICAC Act. The Commission, however, is not of the view that any person engaged in conduct in this respect that was sufficiently serious so as to amount to a breach of public trust for the purposes of section 8(1)(c) of the ICAC Act. Accordingly, the Commission is not satisfied that any person engaged in corrupt conduct in relation to work performed on the Befaro Units by Council employees voluntarily or on a commercial basis in the workers' own time.

Did Council staff work on the Befaro Units during Council time?

There are only limited times when there is clear evidence that Council employees worked on the Befaro Units when they were being paid by the Council. On these occasions, they received no payment from Befaro Pty Ltd. These occasions include:

1. When Mr Vadala worked on a Friday, as part of a block of three days work (Friday, Saturday and Sunday).

Mr Giangrasso described the circumstances that led to Mr Vadala working on a Friday during Council time:

...once John Vadala started that work on the units he approached me one day and told me that he couldn't perform those duties anymore because of family commitments ... so I said to him, well you'd better phone Albert Becerra and tell him what you've told me ... a few days later I was in conversation with Pat Romano and he told me what's happened with John Vadala, why did he pull the plug on doing the works there, and I said to him, "I don't really know but I think it was because of family commitments". So he was a bit upset about that ... he was telling me that they needed to get this going because they, they were losing money, because they weren't rented out.

According to Mr Giangrasso, Mr Romano told him that if Mr Vadala could not do the work in his own

time, he would have to do it during Council time.

Mr Vadala told the Commission that Mr Giangrasso had told him that Mr Romano wanted the work done quickly, so work had to be done on a block Friday, Saturday and Sunday, and a couple of afternoons in his own time, to get it done. It was his understanding that they were acting with the authority of the General Manager.

2. When Mr Giangrasso and Mr Issa worked during a night shift to lay self-levelling concrete the day before carpet was to be laid in one of the units.

Mr Child told the Commission that he was contacted by Mr Romano the day before new carpet was due to be laid in one of the units. Mr Romano directed Mr Child to have Mr Issa and Mr Giangrasso lay self-levelling concrete so that this could proceed. Mr Child told Mr Romano that Mr Giangrasso and Mr Issa were working a night shift, and asked if he wanted the work done in this time. Mr Romano said he did. Mr Child then arranged for Mr Giangrasso and Mr Issa to do the work in the course of their night shift.

3. When Council employee, Barry Webb, attended the Units with the Council's backhoe to dig up gardens.

In relation to this work, Mr Child said:

Well, I got the instruction from Mr Romano, he told me he wanted a part dug out of the, some grass dug out of the, the garden was there, he wanted to make it a garden and yeah, he instructed me to use Mr Webb.

Mr Child said he arranged for Mr Giangrasso to organise this work.

Mr Issa told the Commission about work he and Mr Vadala performed at the Befaro Units on 7 February 2009 and 29 February 2009, involving fixing skirting boards, hanging doors, and other miscellaneous carpentry work. He told the Commission that this was done during Council time. Mr Vadala also gave evidence about the occasions when he worked at the units with Mr Issa, but he recalled that the work was done early in the day, in their own time. In these circumstances, the Commission cannot be satisfied to the requisite standard that this work was done during Council hours.

There was no suggestion by Mr Giangrasso, Mr Child or anyone else that Mr Becerra was privy to Council employees doing work on the Befaro Units during Council hours.

Mr Romano told the Commission that, during the currency of the renovations, he only became aware of Council employees, besides Mr Child, working on the units on two occasions, as discussed above. It was inherent in his evidence that he denied any knowledge of, or role in, Council employees working on the units on occasions when they were being paid by the Council.

In assessing Mr Giangrasso's credit on this issue, it is noted that he appears to have lied in a statement he made for the Council's workers compensation insurers on 17 June 2009, where he said:

I had not undertaken any work whatsoever while I have been on sick leave.

In his evidence to the Commission on 27 April 2010, Mr Giangrasso acknowledged that he had been engaged in secondary employment while he was on sick leave.

There were also some deficiencies in the evidence of Mr Child, in particular that he gave a number of different responses when asked why he agreed to assist Mr Romano with the renovations.

When asked about his reasons by Counsel Assisting, Mr Child said, "I was probably a bit flattered that he actually asked me, and I was also fearful for my job". Mr Child then commented, "Mr Romano was a robust person and yeah, if you didn't be on the right side of Mr Romano, yeah, you might as well say goodbye". This last comment would seem to be inconsistent to some degree with Mr Child's later evidence that, when he told Mr Romano in October 2008 that he would no longer assist with the renovations, he had no obvious expectation that this would cost him his job.

At various stages of his evidence, Mr Child gave other reasons for agreeing to do the work:

Q. *Why were you prepared to do work unpaid?*

A. *I don't really know why but I, I was, I was (not transcribable) a good relationship with Mr Romano. It made it a lot easier for me to, to obtain the equipment that we needed for work. Where normally you'd have to go through the right protocol, and it could take some time, but I'd make a phone call to Mr Romano.*

These differences could well be the result of Mr Child's reasons for assisting Mr Romano changing over time. It is also not inconceivable that Mr Child was both flattered and intimidated by Mr Romano's initial request for assistance.

The presence of some weaknesses in Mr Child's and Mr Giangrasso's evidence, which covered a substantial number of matters and a substantial period of time, is not surprising. Mr Giangrasso's lie to the workers compensation insurers is of particular concern. Despite these deficiencies, however, the Commission found their evidence to be generally credible. Their specific evidence in relation to the three episodes of staff performing renovations during Council time was convincing. As mentioned above, the Commission is satisfied that Mr Romano was closely involved in arrangements for Council staff to work on the units. The context of each incident was consistent with Mr Romano's complicity:

- Mr Vadala worked on a Friday on account of an urgency promoted by Mr Romano to complete the work so the unit could be leased
- the self-levelling concrete was laid in urgent circumstances, conveyed by Mr Romano, where carpet was to be laid the next day
- the digging up of the garden required the use of the Council's excavator, which was only available during work hours.

In all the circumstances, the Commission is satisfied to the requisite standard that Mr Romano was actively involved in arranging for Council staff to work on the Befaro Units on some occasions when they were being paid by Council.

Corrupt conduct

The Commission is satisfied that Mr Romano, Mr Child, Mr Giangrasso, Mr Vadala, Mr Issa and Mr Webb were all complicit in some respect on the three occasions when Council staff worked on the Befaro Units, when they were supposed to be working for the Council and they were being paid by the Council.

The Commission is satisfied that Mr Romano's conduct in procuring this work during Council time constituted corrupt conduct as defined in the ICAC Act. The Commission is satisfied that his conduct involved a breach of public trust for the purposes of section 8(1)(c) of the ICAC Act. It also could involve the common law criminal offence of misconduct in public office for the purposes of section 9(1)(a) of the ICAC Act.

The Commission is satisfied that the conduct of the remaining persons came about because of directions given by Mr Romano.

Mr Issa, Mr Vadala and Mr Webb were junior staff being given directions by their immediate supervisors on the understanding that the work was being sought for by the Council's General Manager.

The Commission has discretion as to whether to proceed to a finding under the ICAC Act. In all the circumstances, the Commission is not satisfied that findings of corrupt conduct in relation to Mr Vadala, Mr Issa and Mr Webb are warranted.

Mr Giangrasso and Mr Child are in a different category. They were more senior within the Council, and they played a coordinating role, procuring the involvement of those under their authority. The use of Council staff during Council time, however, was clearly exceptional, and generally took place in circumstances of urgency and under pressure from the General Manager of the Council that employed them, a person who was powerful in the context of their employment at the Council. Mr Giangrasso and Mr Child were also instrumental in bringing these matters to the attention of the Commission and, as canvassed in chapters 13 and 14, suffered detriment as a result. In these circumstances, the Commission is not of the view that it is in the public interest for those who came forth with reports of corrupt conduct to themselves be the subject of findings in circumstances where their conduct occurred on a few occasions, was of moderate seriousness, and took place under the direction of Mr Romano. Accordingly, it does not make a finding of corrupt conduct in relation to Mr Giangrasso or Mr Child.

It is clear that Mr Child also performed work to facilitate the Befaro Units renovation during Council time. Mr Becerra and Mr Romano each tried to downplay the extent to which their demands on Mr Child required this. Their evidence, however, in this respect was unconvincing.

It was inevitable that Mr Child's conduct in liaising with the Befaro Agents, contacting prospective tradespeople, facilitating the access of tradespeople to the units for quotation and work purposes, and overseeing the work performed by these persons, would take place primarily during work hours. Mr Becerra acknowledged that he would meet Mr Child at the units during business hours. His suggestion that others would meet Mr Child at the units outside business hours was implausible.

Mr Romano routinely sent Mr Child emails in relation to the Befaro Units renovation during business hours. Mr Child had access to an email account only through his work email account, and only on his work computer. Mr Romano denied that he met Mr Child at the units during business hours. This conflicted with Mr Becerra's evidence. Mr Romano told the Commission, "it was never my expectation that he [Mr Child] would do anything within the working hours that he attributed to the Council". In the Commission's view, this evidence was disingenuous.

Specific occasions when Mr Child engaged in Befaro Pty Ltd work by responding to emails and accessing text messages can be identified by the date and time of each electronic communication. These, however, involved only minor distractions from his work for the Council. The details of Mr Child's more extensive involvement of meeting tradespeople at the units, conversing with Mr Romano and Mr Becerra in relation to the renovation and performing renovation functions himself, cannot be accurately quantified.

In these circumstances, the Commission is not satisfied that the evidence about this issue can base findings of corrupt conduct against Mr Becerra, Mr Romano or Mr Child under the ICAC Act. The evidence does, however, highlight the manner in which Mr Romano and Mr Becerra exploited Mr Child for their personal benefit, their disregard for the integrity of Council resources, and the manner in which they were prepared to tailor their evidence in order to reduce their personal culpability.

Use of Council resources

There is some evidence of Council tools being used by Council employees in the renovation process at the units. Council tools were allowed to be used by staff for private purposes. There was a "sign out" process that facilitated this. It is unclear whether or not this process was applied in these circumstances. In any event, this is a relatively minor matter and does not warrant a finding of corrupt conduct against any person under the ICAC Act.

Mr Giangrasso told the Commission that he disposed of renovation waste from the units using Council resources at the depot. He claimed that this occurred at Mr Romano's direction, although Mr Romano denies this. The evidence about this issue is vague and relies largely upon Mr Giangrasso's recollection. In all the circumstances, the Commission is not satisfied that the available evidence warrants a finding of corrupt conduct against Mr Romano or Mr Giangrasso.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano, Mr Becerra, Mr Child, Mr Giangrasso, Mr Vadala, Mr Issa and Mr Webb. Accordingly, they all come within the definition of "affected" person for the purposes of section 74A(2) of the ICAC Act.

Mr Romano

It was Mr Romano's evidence that he was not aware of any Council staff member performing work on the Befaro Units when they were supposed to be working for the Council

and were being paid by the Council. Any prosecution of Mr Romano in relation to the three incidents where it is clear that Council staff did work during Council time would rely on the evidence of Mr Child and Mr Giangrasso, and to a lesser extent, the evidence of Mr Vadala, Mr Issa and Mr Webb. In criminal proceedings, the more rigorous criminal standard of proof would apply. While there are some issues that may affect the credit of Mr Child and Mr Giangrasso, as discussed earlier in this chapter, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP in relation to the prosecution of Mr Romano for the common law offence of misconduct in public office in relation to Mr Romano's conduct in procuring work by Mr Vadala, Mr Issa, Mr Giangrasso and Mr Webb with respect to the Befaro Units, in circumstances where they were supposed to be working for Burwood Council and were being paid by Burwood Council.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74(2)(c) of the ICAC Act.

Mr Becerra

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Becerra in relation to matters canvassed in this chapter.

Mr Becerra no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74(2)(c) of the ICAC Act.

Mr Child, Mr Giangrasso, Mr Vadala, Mr Issa and Mr Webb

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Child, Mr Giangrasso, Mr Vadala, Mr Issa or Mr Webb in relation to matters canvassed in this chapter.

In all the circumstances, the Commission is not of the opinion that consideration should be given to taking action against Mr Child, Mr Giangrasso, Mr Vadala, Mr Issa or Mr Webb with respect to any disciplinary offence in relation to matters canvassed in this chapter or with a view to dismissing them, dispensing with their services or otherwise terminating their services in relation to matters canvassed in this chapter.



Chapter 8: Using Council depot workers at a polling booth on election day

This chapter examines allegations that Pat Romano inappropriately used his position as General Manager of Burwood Council to cause two Council depot workers to attend the Comer Street polling booth in Burwood on the Council election day of 13 September 2008 so that they could hand out election pamphlets for the Australian Labor Party (“the Labor Party”).

This conduct could amount to corrupt conduct as it could involve a partial exercise of official functions for the purposes of section 8(1)(b) of the ICAC Act and could, for the purposes of section 9(1)(b) of the ICAC Act, involve a disciplinary offence of carrying out Council functions in way that was likely to bring the Council into disrepute in breach of clause 6.1 of the Burwood Council’s Code of Conduct.

There is no doubt that two depot workers attended the polling booth to hand out pamphlets. Stephen Child told the Commission that he brought about their attendance, but said that he did so at Mr Romano’s direction.

Mr Romano denied that he was involved in causing the attendance of the workers at the polling booth.

The request for workers to attend the polling booth

Mr Child told the Commission that Mr Romano called him the night before the Council election of 13 September 2008 and asked him to arrange for two staff members to hand out pamphlets for the Labor Party at a polling booth the following day. Mr Romano told him the staff members were not to wear Council uniforms, that Mr Child should pay them, and that Mr Romano would pay him back. Mr Child then contacted Ammar Issa and Youssef (Joe) Saad who agreed to do this extra work. Mr Romano contacted Mr Child again and indicated where the men were to go. Mr Child passed this message on to Mr Issa and Mr Saad.

Both men attended the Comer Street polling booth. Mr Child paid them \$150 each. Mr Romano never paid him back.

On Mr Child’s account, there were a number of calls between himself and Mr Romano in relation to this matter; the first from Mr Romano to Mr Child, asking that he arrange for two depot workers to be made available, the second when Mr Child rang back to confirm that Mr Issa and Mr Saad were available, and possibly a third when Mr Romano called back with details about where the men had to go. None of these calls appear on the call charge records of the Council-issued mobile services in the possession of Mr Romano and Mr Child. These calls may have been made from other telephone services, in particular landline services available to each person.

Mr Issa agreed that Mr Child contacted him the night before the election and told him, “Mr Romano needs two people for voters cards, hand out how to vote cards”. According to Mr Issa, Mr Child said that Mr Issa would be paid for his work and he agreed to go. The following day Mr Issa attended the Comer Street polling booth in the company of Mr Saad and handed out Labor Party pamphlets for five hours. Mr Issa was later paid \$150 by Mr Child.

Mr Saad told the Commission that he was approached by Mr Child at work and asked to go and hand out “leaflets for the Mayor, for John Faker”. He said Mr Child made no reference to Mr Romano and told him he would be paid for his attendance. Mr Saad attended the following day and handed out leaflets in the company of Mr Issa. Mr Child subsequently paid him \$150.

According to Mr Romano, it was Mr Child who contacted him by telephone and spoke about handing out leaflets for the Labor Party. Mr Child said the unions had asked members to volunteer to assist the Labor Party on election day, “I approached some of the boys about this, but they want to get paid to do the work”. When Mr Romano was

resistant to this, Mr Child said, “Pat they really want to do it because they want to support the Mayor”.

Mr Romano said he would get legal advice about this. At 4.27 pm, Mr Romano called David Baird of the legal firm Maddocks and asked for advice as to whether Council staff could work for the Labor Party at polling booths on election day. Mr Baird told him, “You shouldn’t have anything to do with it”.

Mr Romano said he then contacted Mr Child at about 5.00 pm. He told Mr Child that the lawyers “basically said I had no role in this” and “if they really want to do this, they should do it outside the area”. According to Mr Romano, Mr Child responded, “but Pat, the boys really want to help John [Faker] and I don’t know that I can stop them from doing that”. Mr Romano then told them that if they wanted to do this, “they shouldn’t be doing this in Burwood Council uniforms, and they can’t do it in Council time”.

Mr Baird told the Commission that Mr Romano called him on 12 September 2008 “or thereabouts” and said, “some of the Councillors, and I think he might have said some of the Labor Councillors, wanted me to get a couple of boys from the depot to go down and hand out how to vote cards”. Mr Baird told him, “this is ridiculous ... you can’t do it. You know it’s unlawful. Tell them it’s just ridiculous”.

Mr Romano’s assertion that the proposal came from Mr Child is inconsistent with Mr Baird’s account of his conversation with Mr Romano. According to Mr Baird, Mr Romano spoke of discussions with “some of the Councillors”. This is consistent with decisions being made at a level above Mr Child and being passed down to him. Although he did not make any notes of this discussion, Mr Baird told the Commission that he had a clear recollection of what happened on this occasion.

There is an inherent inconsistency in Mr Romano’s description of Mr Child emphasising that staff really wanted to support the Mayor, but at the time saying that they would be paid for doing so. As Mr Faker told the Commission, there is a long history of union representatives providing voluntary support in these circumstances. This is what might be expected from staff that were keen to participate.

According to Mr Romano, Mr Child presented the involved staff as pushing for the proposal to go ahead. This is inconsistent with the accounts of Mr Issa and Mr Saad whose evidence was that they were merely following directions. The Commission accepts the accounts of Mr Child, Mr Issa and Mr Saad in this respect.

The Commission is satisfied that Mr Romano discussed the proposal with Mr Faker. He also called Mr Baird for legal advice. The accounts of these witnesses are inconsistent with Mr Romano’s assertion that Mr Child raised the possibility of Council staff handing out leaflets for the Labor Party.

In all the circumstances, the Commission is satisfied that Mr Romano requested Mr Child to provide Council staff to hand out how-to-vote cards for the election and that, at Mr Romano’s direction, Mr Issa and Mr Saad were paid by Mr Child to do so.

Conclusion

In his statement dated 16 September 2009, Mr Saad told the Commission that Mr Child had told him that he had to do it “and if I didn’t do it I would be gone. I took this to mean I would be sacked”. The Commission rejects this evidence. Mr Saad was in dispute with the Council at the time in proceedings at the Anti-Discrimination Board, alleging racial discrimination and other abuse by Mr Child. He was making allegations against Mr Child at every opportunity. For reasons canvassed later in this report about these incidents, the Commission does not accept Mr Saad’s reliability on the question of Mr Child’s actions.

Mr Issa gave evidence that he was “asked” to work.

The Commission is not satisfied that either Mr Saad or Mr Issa was directed to work. The Commission is satisfied that both men chose to work to earn the money on offer. Accordingly, the Commission is not satisfied that Mr Romano exploited the authority of his position at the Council to secure this service.

Clause 6.1 of Burwood Council’s Code of Conduct operating at that time specified, “You must not conduct yourself in carrying out your functions in a manner that is likely to bring the Council ... into disrepute”. The Council’s General Manager or the Civil Works Maintenance Supervisor facilitating political support for one political party may be conduct that “is likely to bring the Council ... into disrepute”. The Commission is not satisfied that Mr Romano was involved in “carrying out his functions” for the Council, as specified in the clause, although this requirement may be construed broadly, especially in the case of the General Manager. The Commission is therefore not satisfied that Mr Romano’s conduct involved a partial exercise of his official functions for the purposes of section 8 (1)(b) of the ICAC Act. His conduct may have constituted a breach of discipline, but not to the extent that it constituted a

breach of public trust for the purposes of section 8(1)(c) of the ICAC Act.

In all the circumstances, the Commission is not satisfied that Mr Romano engaged in corrupt conduct as defined in the ICAC Act in respect of this issue.

Mr Faker's involvement

Mr Romano said he never spoke to Mr Faker about this issue or any related issue.

In his evidence, Mr Faker said that Mr Romano had attended his office and told Mr Faker that "he had become aware of the Union wanting to organise delegates or Union members to volunteer on the day [election day] as volunteers". Mr Faker told him this was not unusual. Mr Romano then said he was going to get legal advice. Mr Faker said to Mr Romano "if the advice you get is okayed, would you mind giving me the names of those volunteers". Mr Faker said that he ended up with a postit note, "I think it had two names". He believed this had come from Mr Romano. He passed it on to "my campaign volunteers that arranged the booth".

According to Mr Baird, Mr Romano told him "some Councillors" wanted him to get depot workers to hand out how-to-vote cards. Mr Romano denied speaking to Mr Faker at all and denied the conversation asserted by Mr Baird. Ultimately, information did pass to Mr Child and the depot workers as to where they should go to assist the Labor Party campaign.

Conclusion

This vague and inconsistent evidence may provide some basis for suspicion in relation to the role of Mr Faker, but no more. It was insufficient to establish that he was actively involved in arranging for the attendance of Mr Issa and Mr Saad at the Comer Street polling booth.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano and Mr Child. Accordingly they are people who come within the definition of "affected" person for the purposes of section 74A(2) of the ICAC Act.

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr

Romano or Mr Child in relation to matters canvassed in this chapter.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

In all the circumstances, the Commission is not of the opinion that consideration should be given to taking disciplinary action against Mr Child or action with a view to dismissing him, dispensing with his services or otherwise terminating his services in relation to matters canvassed in this chapter.

Chapter 9: Use of Council funds and entitlements

This chapter examines allegations that Pat Romano and John Faker abused their access to Burwood Council funds or entitlements to obtain benefits improperly for personal purposes.

The primary allegations are that:

- Mr Romano abused his entitlement to a Council-funded car for personal use, which could amount to corrupt conduct on the basis that it involved a partial exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act and could, for the purposes of section 9 of the ICAC Act, provide reasonable grounds for dismissal
- Mr Romano sold a Council car without first purchasing it from the Council, as required under his contract, and provided false or misleading material to the Council about the sale. This could amount to corrupt conduct on the basis that it involved a dishonest exercise of official functions under section 8(1)(b) of the ICAC Act and could, for the purposes of section 9 of the ICAC Act, involve the offence of giving his principal a document containing false or misleading material with intent to defraud that principal contrary to section 249C of the Crimes Act.

This chapter also examines the following ancillary matters:

- whether Mr Romano engaged in extravagant and inappropriate expenditure of Council funds in the performance of his functions as General Manager
- whether Mr Faker inappropriately obtained reimbursements of childcare expenses that he incurred during his tenure as Mayor
- whether Mr Romano abused salary sacrifice arrangements that were available to him under his contract of employment

- the manner in which the legal firm HWL Ebsworth Lawyers was included in the Council's Legal Services Panel, in breach of the Council's obligations pursuant to section 55 of the *Local Government Act 1993* ("the LGA"), which requires the Council to invite tenders before entering into a contractual arrangement involving expenditure in excess of \$150,000.

Mr Romano's expenditure of Council funds

In the course of the Commission's investigation and public inquiry, it closely examined Mr Romano's expenditure of Council funds as General Manager. There were numerous examples where Mr Romano charged hospitality and other expenses to the Council. These included:

- \$561.60 for coffees and lunches shared by Mr Romano and Albert Becerra, since Mr Becerra's commencement at the Council in April 2007
- \$1,917.80 for lunches and coffees with the legal firms Maddocks or HWL Ebsworth Lawyers, generally with David Baird, since January 2007. This included paying for meals at the following restaurants, Otto's Ristorante (for \$153.00), Machiavelli Ristorante Italiano (for \$184.50), the Pier Restaurant (for \$347.00), and the Summit Restaurant (for \$198.90)
- parking at Maddocks from January 2007 at a cost of \$2,977.98, when Maddocks provided vouchers for clients to park for free. Mr Romano was asked why he did not accept vouchers, but incurred a cost for the Council, and he responded, "I like to pay my own way".

Section 12(2) of the *Public Finance and Audit Act 1983* provides, "An officer of an authority who commits or incurs expenditure shall be responsible for the exercise of due economy".

Conclusion

It is arguable that Mr Romano's charges to the Council for entertainment costs, particularly in relation to the expensive lunches with Mr Baird, fall short of the requirement under the LGA to ensure due economy. In the Commission's view, however, it does not constitute corrupt conduct as defined in the ICAC Act. This is in part because, unlike Councillors' expenses, the expenses that Mr Romano as General Manager could claim were never the subject of properly identified and specific guidelines. While the payment of expenses and provision of facilities to councillors is governed by a guideline issued under section 23A of the LGA, no equivalent guideline exists for the payment of expenses and provision of facilities to general managers and senior staff of councils. This issue is addressed more fully in chapter 16 of this report, which deals with corruption prevention issues.

Mr Faker's expenditure of Council funds

The Commission's investigation also examined the expenditure recouped from the Council by Mr Faker in his capacity as Mayor and as a Councillor. The Burwood Council Councillors Expenses and Facilities policy provides:

Burwood Council Councillors will be reimbursed for expenses reasonably incurred in the performance of their role as Burwood Council Councillors.

and

Burwood Councillors will be reimbursed expenses incurred for the items outlined in table two.

Table Two provides:

Reimbursement will be made for expenses incurred due to the need to attend commitments at Council Meetings, Committee meetings or other official Council business.

From October 2007 to January 2008, Mr Faker claimed in the order of \$6,000 as reimbursement for childcare expenses he had incurred. Essentially, this involved a claim for regular, ongoing bookings of two days per week. On six of those days, the child was not in attendance at the centre. The standard practice at childcare centres is that payment is required to retain a child's place, even if the child is absent because of illness, holidays or for some other reason.

The documentation provided by Mr Faker did not adequately detail the Council duties that formed the basis of his claim for reimbursement. Mr Faker's explanation for making the claim on occasions when he did not have specific Council functions to attend was that he was still performing Council duties in some form. Such duties may fall outside the policy's specification of "expenses incurred to attend commitments at Council Meetings, Committee meetings or other official Council business". Payment under the policy for days when the child is absent, so as to retain the child's place at the centre, is also of questionable legitimacy.

Conclusion

It is difficult to organise satisfactory childcare arrangements on a one-off basis, which may provide some justification for payments being made to ensure that a child's place in childcare is secured despite absences that may occur. The general reference in the policy to the right to be reimbursed for expenses incurred in the course of "other official Council business" makes it difficult to determine whether the non-specific other duties, which Mr Faker says he was carrying out when his child was in day care, come within the terms of the policy.

In all the circumstances, the Commission is not satisfied that any finding of corrupt conduct against Mr Faker is warranted on account of the claims made to Council for this expenditure.

Mr Romano's Council-issued cars

On 1 August 2005, Mr Romano signed a new contract of employment with Burwood Council. This contract provided that "any vehicle being packaged as part of this contract will be available to the employee to purchase at any point in the contract ... for a figure equivalent to the purchase price less depreciation (as per ATO schedules)". The clause specified that "a car allowance" of \$5,000 would be deducted from Mr Romano's total remuneration package. This would constitute Mr Romano's contribution to the running costs of the car, which were otherwise to be met by the Council. The contract also provided that additional deductions from his gross remuneration could be made at Mr Romano's discretion, and the additional amounts so deducted could be credited to the purchase of the car, if Mr Romano elected to exercise his right under the contract to purchase the packaged car.

The Honda CRV

On 2 August 2005, Mr Romano ordered a new car for his personal use under this new contractual arrangement. This was a Honda CRV ("the CRV"), a black wagon costing \$34,239.10, with a further \$7,554.90 worth of extras, including tinted windows, premium plates, a satellite navigation system, metallic paint and roof racks. The total cost to the Council, including registration, was \$42,331.

In November 2007, Mr Romano asked the Council's Chief Financial Officer for a payout figure on the CRV. The payout figure, taking account of depreciation, was \$19,945.

Also in November 2007, Mr Romano arranged for a private sale of the CRV. The agreed sale price was \$26,000. The purchaser paid a holding deposit of \$500, which Mr Romano kept for himself. Subsequently, at Mr Romano's direction, the purchaser provided two cheques to complete the transaction: one for \$19,945 made out to Burwood Council, and one for \$5,555 made out to "P & C Romano". The second cheque was banked into Mr and Mrs Romano's private bank account.

The transfer section of the Certificate of Registration was completed at the time of sale. According to the purchaser and her husband, Mr Romano put the purchase price down as \$19,945, saying that the cheaper sale price would keep the stamp duty down. Mr Romano's evidence was particularly inadequate on this point. At the public inquiry, his attention was drawn to this reference on the Certificate of Registration transfer section:

Q. *Sale price \$19,945. See that?*

A. *Yes.*

Q. *Signed by you?*

A. *Yes.*

Q. *That was a false statement wasn't it?*

A. *I didn't believe so at the time.*

The Commission is satisfied that Mr Romano well knew that this was a false statement at the time.

Mr Romano was later asked about the implications of this false entry:

Q. *Now, by undervaluing the price of the car, that meant there was less stamp duty to be paid. Would you agree?*

A. *I, I don't know that I can answer that question, because I'm aware there was stamp duty applicable. But I don't know.*

The Commission accepts the evidence of the purchaser and her husband that Mr Romano suggested that specifying a lower, and inaccurate, purchase price would reduce the stamp duty payable, and rejects Mr Romano's assertions of ignorance on this matter.

The transfer section of the Certificate of Registration is signed by the purchaser, Mr Romano and John Alsop, the Council's Fleet Manager. It is unclear whether this document was retained by Mr Romano or the purchaser. It is also unclear whether Mr Alsop signed the transfer before or after the transaction with the purchaser.

Mr Romano subsequently passed on the following documents to the Council's Chief Financial Officer:

- the cheque for \$19,945
- a photocopy of the Certificate of Registration with the transfer details completed, indicating a sale price of \$19,945, and a copy of the purchaser's driver's licence
- a copy of a handwritten receipt from Mr Romano dated 14 November 2007, recording "I, Pat Romano, certify that I have received payment in full for the purchase of black CRV rego AUG38H from [purchaser's name] on 14 November 2007".

No document provided to the Council made any reference to the actual sale price of \$26,000. Mr Romano did not advise the Chief Financial Officer of the true circumstances of the sale.

The Audi A6

Also in November 2007, arrangements commenced for the purchase of an Audi A6 turbo, oyster grey motor vehicle ("the Audi") for Mr Romano's personal use. A number of

extra features were requested, including metallic paint, electronic sunroof, tinted windows and 17" 9 spoke wheels, at a cost of \$8,468.48. The total purchase price was \$84,810.46. As Chair of the Council's Fleet Management Committee, Khaled Azer signed off on the purchase. He told the Commission that he did so after having been, in effect, directed to do so by Mr Romano.

The Audi was retrieved by Council from Mr Romano shortly after his contract was terminated in June 2010.

Mr Romano's August 2005 contract of employment proceeded on the basis that he was entitled to package a car as part of his remuneration arrangements, and that the Council would purchase such a car, without stating so in specific terms. The arrangement was formalised in 2007, with the introduction of the Burwood Council Vehicle Management Policy, which provided that the General Manager was entitled to a vehicle for private use as part of his or her salary package. There was still, however, no provision in this policy for any process by which this car would be obtained. As General Manager, Mr Romano had control over all of the processes associated with obtaining the CRV and subsequently the Audi for his own private use. Mr Romano's personal interest was in direct conflict with his responsibility to ensure due economy for the Council. No attempt was made to manage this conflict of interest. The matter was not referred to the Council or any other separate authority for independent consideration. The absence of any specific processes or guidelines in the policy meant that Mr Romano was able to authorise the purchase of a luxury car at Council expense for his personal use that was double the value of his first Council-supplied car.

When viewed against equivalent NSW public sector motor vehicle policies (which are recommended but not mandatory for councils) the cost incurred by the Council for the purchase of the Audi was excessive. The Motor Vehicle Policy for NSW Government Agencies requires cars to be leased, not purchased, unless an exemption from Treasury is obtained. The standard leasing arrangement for cars provided for NSW senior public sector employees favours Australian-made cars, and cars packaged under the arrangement must not cost above the NSW luxury tax level (\$57,009 at the time of this report). Extras, such as sunroofs and wheel packages, are generally discouraged, and are permitted only if the officer involved pays the full cost of these extras and forfeits the right to remove them at the end of the lease.

Corrupt conduct

Mr Romano had an entitlement under his 2005 contract of employment to purchase the CRV from the Council. If he sold the car, however, without first purchasing it, he had no entitlement to any part of the sale price. Support for the proposition that Mr Romano was aware that he had not

followed the correct procedure is provided by the statement dated 8 June 2010 that he submitted to the Commission. In this statement, Mr Romano said that he had done nothing inappropriate regarding the disposal of the CRV and falsely stated that when his contract had come to an end he "took up the option of buying and selling the vehicle". Mr Romano admitted at the public inquiry that this statement was false, as he had never bought the vehicle from the Council.

The way in which Mr Romano went about selling this car involved more than just a "process error", as asserted by Mr Romano. He gained the following significant benefits through his illicit sale process:

- he did not have to use his personal funds to pay the Council \$19,945 as the price of the car
- he did not carry any risk in the transaction. If he had purchased the car himself first, as he should have, he would have carried a risk with respect to when his funds would be recovered by a second sale, and there was no guarantee as to what amount he would have received through that sale
- he did not have to pay the \$600 stamp duty that would have been incurred through an initial purchase by him from the Council, pursuant to the option in his contract of employment.

The Commission is satisfied that Mr Romano's purpose in proceeding as he did was to overcome these risks and any inconvenience to himself that following the proper procedure would have caused, and that he sought to conceal these actions from the Council. This was highlighted by his insistence on recording the sale price as \$19,945 on the transfer section of the Certificate of Registration. He misled the purchaser and her husband by claiming he was doing this for their benefit. He misled the Council, as he produced a completed Certificate of Registration that falsely indicated that the total sale price was the same as the cheque Mr Romano provided to the Council. The Commission is satisfied that this conduct amounted to corrupt conduct as defined in the ICAC Act. It involved the dishonest exercise of Mr Romano's official functions for the purposes of section 8(1)(b) of the ICAC Act. It could also involve a criminal offence of giving his principal a document containing false or misleading material with intent to defraud that principal contrary to section 249C of the Crimes Act.

In relation to the purchase of the CRV and the Audi, Mr Romano's failure to manage this conflict of interest in 2005, and then 2007, was arguably in breach of Burwood Council's Code of Conduct operating at relevant times. However, in view of the inadequacy of any guidelines or policies in Council about how such purchases should be handled, the Commission is not satisfied that either

purchase involved a sufficiently dishonest exercise of Mr Romano's official functions or a sufficient breach of public trust so as to amount to corrupt conduct as defined in the ICAC Act.

Salary packaging

Successive employment contracts provided that Mr Romano could salary sacrifice additional funds that would be accumulated and could later be used by him if he exercised his option to purchase his Council-issued car. Accordingly, Mr Romano arranged for \$10,000 of his gross wage to be paid into a Burwood Council ledger account, to be held in trust for his use when he exercised his purchase option. Over the period from September 2005 to April 2010, additional deductions of \$47,729.19 from Mr Romano's gross salary passed into this fund. When Mr Romano sold the CRV in November 2007, the accumulated funds were not used, as no purchase of the vehicle from the Council took place.

On 16 August 2007, three months before the sale of the CRV, Mr Romano sent the following email to Adrian Dillon, the Finance Manager of Burwood Council:

Adrian

As discussed, please transfer from my car trust \$5,500 to my personal account.

This was done on 20 August 2007. The money then blended generally with the Romano family funds. A week later, on 27 August 2007, a payment of \$5,832.66 was made from this personal account towards Mr Romano's Visa card debt. Further funds were transferred from the trust fund to Mr Romano's personal account following directions given by Mr Romano on 16 January 2008, 1 December 2008 and 2 September 2009.

No tax was paid on any of the funds transferred in this way. In all, \$43,491.23 of tax-free funds passed into Mr Romano's personal account for his general use.

Mr Romano's evidence in relation to this matter was unsatisfactory. He initially agreed that he knew what salary sacrificing meant and that he did not pay tax on funds "tagged as salary sacrifice money". However, when asked, "...I'd suggest to you that you were not entitled to draw down that money [the car trust] and use it as income. Would you agree?", Mr Romano responded, "I'm not sure about that. I'm not a tax expert". It is straight forward and logical that if funds are tax free under a salary sacrificing arrangement, they are not available for general use. In fact, the only purpose for which these funds could be used tax free was to form part of the purchase price of a car, which Mr Romano had packaged under his contract.

When asked whether he had declared these funds as income to the Australian Tax Office (ATO), Mr Romano responded, "I'm not sure. I'd have to check with my accountant".

The likelihood, however, that any appropriate adjustment had taken place dissipated in the context of Mr Romano's later evidence. He assured the Commission, "my intention was to buy the cars" and finally, "...from time to time I did draw on the money and had I purchased the Audi I would have done a reconciliation of the amounts that I'd drawn and made the appropriate arrangements with my tax agent and the ... ATO if there was a discrepancy". This last comment suggests that no adjustment had been made at the time of his evidence.

The Commission is not satisfied that Mr Romano was planning an appropriate tax reconciliation when or if he purchased the Audi. There was never any purchase of the CRV, and there is no reason to believe Mr Romano would endure the cost and inconvenience of following the correct procedure when he disposed of the Audi. There was also no attempt made by him when he disposed of the CRV to account for the unpaid tax from the salary sacrifice funds he had withdrawn at that time.

Conclusion

The Commission is not satisfied that Mr Romano's actions in this respect amount to corrupt conduct. Section 8(2)(m) of the ICAC Act provides that corrupt conduct includes any conduct that adversely affects the exercise of official functions by a public authority and could involve tax evasion. The failure to pay tax on funds that were initially earmarked for salary sacrifice purposes, but were ultimately subsumed into Mr Romano's general funds, may have adversely affected the official functions of the ATO. The ATO, however, is not a public authority for the purposes of the ICAC Act.

In all the circumstances, the Commission is of the opinion that evidence in relation to this matter should be referred to the ATO.

Legal Services Panel

Section 55 of the LGA, in conjunction with Regulation 163 of the Local Government (General) Regulation 2005, provides that a council must invite tenders before entering into a contract for services involving an estimated expenditure in excess of \$150,000. Legal services are generally captured by this provision as they routinely involve costs in excess of the threshold. Burwood Council responded to this in 2008 by holding a tender process to establish a Legal Services Panel for the provision of legal services. The legal firm Maddocks was placed on the Panel

through this process. Under this arrangement, the Council procured substantial services from Maddocks, primarily through a Maddocks partner, David Baird.

In 2009, Mr Baird left Maddocks and became a partner of HWL Ebsworth Lawyers. In a letter dated 4 June 2009 to the General Manager, Mr Baird asked that HWL Ebsworth Lawyers be placed on the Panel.

This needed to be done either through a fresh tendering process or, as required by the LGA, through the passing of a Council resolution that, “because of extenuating circumstances”, a satisfactory result would not be achieved by inviting tenders. Neither approach was applied. Les Hullick, Director Executive Services, arranged for the Council to affirm HWL Ebsworth Lawyers’ placement on the Panel. Such an approach was contrary to section 55 of the LGA.

Mr Hullick received no legal advice in relation to the management of this issue. Mr Baird, the Council’s usual source of legal advice, had an obvious conflict of interest that prevented him from assisting on this issue.

Conclusion

In all the circumstances, although the approach facilitated by Mr Hullick was flawed, the Commission is not satisfied to the requisite standard that his actions warrant a finding of corrupt conduct against him or any other person. The Commission is not satisfied that his conduct involved a dishonest or partial exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act. The Commission is also not satisfied that his actions involved a breach of trust for the purposes of section 8(1)(c) of the ICAC Act.

Section 74A(2) statement

In the course of the Commission’s inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano and Mr Faker. Accordingly, they are people who come within the definition of “affected” person for the purposes of section 74A(2) of the ICAC Act.

Mr Romano

Mr Romano made very few concessions during the course of the evidence canvassed in this chapter. Any admissions or relevant statements that were made by Mr Romano were made subject to a declaration issued pursuant to section 38 of the ICAC Act. The effect of this declaration is that his evidence cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. Despite this, there is some documentary evidence and the evidence of other witnesses in relation

to Mr Romano’s relevant activities, including the evidence of the purchaser of the CRV and her husband and the evidence of Burwood Council Chief Financial Officer Matthew Walker, which will be available for use in a prosecution by the DPP.

In all the circumstances, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano in relation to the following criminal offences:

- a. using or giving a false document to Burwood Council with the intent to defraud Burwood Council contrary to section 249C(1) of the Crimes Act by providing a car registration transfer stating the purchase price of the Honda CRV was \$19,945 when the actual price was \$26,000, and keeping the difference of \$6,055 for his personal benefit with no legal entitlement to that amount
- b. obtaining a financial advantage by making a false or misleading statement contrary to section 178BB of the Crimes Act in relation to the motor vehicle registration transfer for an amount of \$19,945 and not \$26,000 as the actual price, and so not paying any stamp duty himself and facilitating lower stamp duty to be paid by the purchaser.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

Mr Faker

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Faker in relation to matters canvassed in this chapter.

Chapter 10: Reprisal: legal issues

In the 12 months following the emergence of allegations against Pat Romano, adverse managerial action was taken by Burwood Council against each of the five persons who had made the allegations.

Chapters 11–15 will canvass the evidence in relation to allegations that Robert Cummins, Stephen Child, Giuseppe (Joe) Giangrasso, Ammar Issa and Youssef (Joe) Saad were subjected to adverse managerial action on account of complaints of corrupt conduct made about Mr Romano and Albert Becerra to Council officers, the Mayor of Burwood, the *Sydney Morning Herald* and the Commission.

Such adverse managerial action could amount to corrupt conduct as it could involve a partial exercise of official functions under section 8(1)(b) or a breach of public trust under section 8(1)(c) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could also involve the criminal offence of taking reprisal action under section 20 of the *Protected Disclosures Act 1994* (“the PDA”)¹ and, in the case of assistance provided to the Commission, the criminal offence of injury to a person assisting the Commission under section 93 of the ICAC Act or the criminal offence of prejudice to an employee in his or her employment for or on account of the employee assisting the Commission under section 94 of the ICAC Act. It could also, for the purposes of section 9 of the ICAC Act, involve a disciplinary offence or reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

This chapter will canvass some general legal issues relevant to those allegations, including the reprisal provisions in the PDA and the ICAC Act. It will also address legal issues raised by Mr Romano’s counsel in relation to the proper interpretation of some of these provisions.

ICAC Act provisions

Sections 93 and 94 of the ICAC Act make it an offence to injure or prejudice the employment of a person for or on account of that person assisting the Commission, in the following terms:

93 Injury to witness or person assisting Commission

- (1) *A person who uses, causes, inflicts or procures, or threatens to use, cause, inflict or procure, any violence, punishment, damage, loss or disadvantage to any person for or on account of:*
 - (a) *his or her assisting the Commission, or*
 - (b) *any evidence given by him or her before the Commission,**is guilty of an indictable offence.*
- (2) *In this section, a reference to a person assisting the Commission is a reference to a person who:*
 - (a) *has appeared, is appearing or is to appear as a witness before the Commission, or*
 - (b) *has complied with or proposes to comply with a requirement under section 21 or 22, or*
 - (c) *has assisted, is assisting or is to assist the Commission in some other manner.*

94 Dismissal of witness, or person assisting Commission, by employer

- (1) *An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Commission is guilty of an indictable offence.*
- (2) *In this section, a reference to a person assisting the Commission is a reference to a person who:*

¹ The name of the *Protected Disclosures Act 1994* has changed to the *Public Interest Disclosures Act 1994* as of 3 March 2011.

- (a) *has appeared, is appearing or is to appear as a witness before the Commission, or*
 - (b) *has complied with or proposes to comply with a requirement under section 21 or 22, or*
 - (c) *has assisted, is assisting or is to assist the Commission in some other manner.*
- (3) *In any proceedings for an offence against this section, it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reasons mentioned in subsection (1).*

In relation to section 93, Mr Blake has submitted that a person who makes a complaint about corrupt conduct to the Commission is not a person “assisting” the Commission for the purposes of the section, as it must be read as relating to a person who assists the Commission in the course of an investigation of a complaint. No authority is provided for this construction, and the Commission considers that there is no justification to limit the concept of “assisting” in this manner. First, as a matter of the ordinary meaning of assisting, a person who provides a complaint about suspected corrupt conduct to the Commission assists the Commission to carry out its statutory function of investigating corrupt conduct. Section 10 of the ICAC Act relevantly provides that a person “may make a complaint to the Commission about a matter that concerns or may concern corrupt conduct”. Accordingly, a person who makes a complaint about corrupt conduct provides assistance to it. Secondly, sections 93 and 94 of the ICAC Act are couched in broad and general terms. These sections indicate a general intent to confer protection on persons who assist the Commission without restricting the concept of “assisting” in any way (see section 93(2)(c), in particular). There is no justification for excluding persons who make complaints to the Commission about corrupt conduct from the benefit of this protection.

PDA provisions

The PDA protects certain disclosures made by public officials and also specifies to whom a disclosure must be made to be protected, in the following terms:

8 Disclosures must be made by public officials

- (1) *To be protected by this Act, a disclosure must be made by a public official:*
 - (a) *to an investigating authority, or*
 - (b) *to the principal officer of a public authority or investigating authority or officer who constitutes a public authority, or*
 - (c) *to:*
 - (i) *another officer of the public authority or investigating authority to which the public official belongs, or*
 - (ii) *an officer of the public authority or investigating authority to which the disclosure relates,*

in accordance with any procedure established by the authority concerned for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money by that authority or any of its officers, or
 - (d) *to a member of Parliament or to a journalist.*
- (2) *A disclosure is protected by this Act even if it is made about conduct or activities engaged in, or about matters arising, before the commencement of this section.*
- (3) *A disclosure made while a person was a public official is protected by this Act even if the person who made it is no longer a public official.*

- (4) A disclosure made about the conduct of a person while the person was a public official is protected by this Act even if the person is no longer a public official.

It should be noted that, in relation to a disclosure to a member of Parliament or a journalist under section 8(1) (d) of the PDA, the disclosure is not protected unless the public official making the disclosure has already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority, and that authority has declined to investigate or has not investigated in a timely manner (section 19(2) of the PDA). This is relevant to the disclosures which were made in this matter to a journalist from *the Sydney Morning Herald*.

10 Disclosure to Commission concerning corrupt conduct

To be protected by this Act, a disclosure by a public official to the Commission must:

- (a) be made in accordance with the *Independent Commission Against Corruption Act 1988*, and
- (b) be a disclosure of information that shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct.

14 Disclosures to public officials

- (1) To be protected by this Act, a disclosure by a public official to the principal officer of, or officer who constitutes, a public authority must be a disclosure of information that shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by the authority or any of its officers or by another public authority or any of its officers.
- (2) To be protected by this Act, a disclosure by a public official to:
 - (a) another officer of the public authority to which the public official belongs, or
 - (b) an officer of the public authority to which the disclosure relates,
 in accordance with any procedure established by the authority concerned for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money by that authority or any of its officers must be a disclosure of information that shows or tends to show such corrupt conduct, maladministration or serious and substantial waste

(whether by that authority or any of its officers or by another public authority or any of its officers).

18 Disclosures motivated by object of avoiding disciplinary action

A disclosure that is made solely or substantially with the motive of avoiding dismissal or other disciplinary action, not being disciplinary action taken in reprisal for the making of a protected disclosure, is not (despite any other provision of this Part) a protected disclosure.

If a disclosure by a public official comes within the protection of the PDA, it is an offence for any reprisal action to be taken against the public official. Section 20 of the PDA provides:

- (1) A person who takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure is guilty of an offence.
- (1A) In any proceedings for an offence against this section, it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected disclosure.
- (2) In this Act, **detrimental action** means action causing, comprising or involving any of the following:
 - (a) injury, damage or loss,
 - (b) intimidation or harassment,
 - (c) discrimination, disadvantage or adverse treatment in relation to employment,
 - (d) dismissal from, or prejudice in, employment,
 - (e) disciplinary proceeding.

Mr Blake asserted that the words “by a public official” in section 8 of the PDA precluded delegation and accordingly a disclosure through an agent or through a legal firm did not come within the section. He referred to the High Court decision of *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628. In that decision, the Court interpreted the words “by him” in relevant legislation as meaning “by him personally” rather than “by him or his agents”. Mr Blake argued that “by a public official” should be similarly interpreted. *Sola Optical* concerned the interpretation of a section that extended the time to institute an action based on when certain facts were ascertained by a plaintiff. The court concluded that the section intended that the time would run from the date that the information was known to the plaintiff himself, not just to his solicitors. It has no relevance to the interpretation of section 8 of the PDA.

and would make the section almost unworkable. It would preclude the use of mail because of the intervention of the postal carrier. It would preclude the use of email on account of the intervention of an internet provider. All complaints to a principal officer, this Commission, or any other authority that can receive protected disclosures would need to be made in person before the PDA would apply. The Commission rejects this argument. The Commission is satisfied that the disclosure by a public official through lawyers or through an agent is sufficient to bring the disclosure within the terms of the PDA.

Burwood Council's protected disclosure policy

Although evidence at the public inquiry showed that it was little known or understood, Burwood Council had a policy in relation to how protected disclosures should be made and handled, which was titled "Internal Reporting Policy – Protected Disclosures Act 1994" and adopted by the Council on 27 May 2008.

The policy commenced with a statement from Mr Romano, addressed to all councillors and staff of Burwood Council, that the Council did not tolerate corrupt conduct, was committed to the aims of the PDA and would take all reasonable steps to provide protection to staff who made protected disclosures.

The policy stated that disclosures would be protected if they were made in accordance with the Internal Reporting System, to the General Manager or to an appropriate external investigating authority.

The Internal Reporting System required that disclosures should be made to the:

- Disclosure Co-ordinator
- Director Governance Corporate & Governance Service and other Directors
- General Manager
- Mayor (if the disclosure concerned or involved the General Manager or a Councillor).

These requirements in the Internal Reporting System are relevant to section 8(1)(c)(ii) of the PDA, which requires that protected disclosures be made "in accordance with any procedure established by the authority concerned for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money by that authority or any of its officers".

The persons to whom protected disclosures can be made are "nominated disclosure officers". Section 7.2 of the

Internal Reporting Policy sets out the responsibilities of a nominated disclosure officer who is responsible for acting upon a protected disclosure, and provides that he or she should "put in writing and date any disclosures received orally (and have the person making the disclosure sign the document)".

Chapters 11–15 canvas whether managerial actions taken by the Council or any of its officers in respect of Mr Cummins, Mr Child, Mr Giangrasso, Mr Issa and Mr Saad could have amounted to breaches of relevant legislation or policies.

Chapter 11: Youssef (Joe) Saad

In early February 2009, Youssef (Joe) Saad, one of the depot workers who had performed work on the Befaro Units (see chapter 7), made complaints to John Dardano, the Depot Works Manager of Burwood Council, and Peter Macklin, the Human Resources Manager of Burwood Council. Mr Saad said that depot workers, himself included, had been engaged to work on units owned by Albert Becerra, the Council's in-house architect. Because Pat Romano had an interest in the Befaro Units, this complaint also potentially implicated him.

At a Council meeting on depot reform on 27 April 2009, a decision was made to terminate Mr Saad's casual employment. Mr Saad told the Commission that he considered the decision to terminate his employment was a reprisal action because he had made complaints about Mr Becerra and Mr Romano.

While there is no dispute that Mr Saad's employment was terminated by the Council in April 2009, the Council officers involved in that decision deny that Mr Saad's earlier complaints had any influence on the decision.

Did Mr Saad make a protected disclosure?

As Mr Saad was a public official, an appropriate disclosure of information by him could amount to a protected disclosure.

Under the *Protected Disclosures Act 1994* ("the PDA"), the disclosure would have to show or tend to show corrupt conduct or maladministration and would have to be made to an appropriate officer under Burwood Council's Internal Reporting Policy (IRP).

In relation to the first issue, it is difficult to determine exactly what information was provided by Mr Saad, as no written record was kept of it by the Council officers to whom he spoke.

The best account available is Mr Macklin's evidence about his meeting with Mr Saad on 9 February 2009. Mr Saad told Mr Macklin that he had been working on a unit for Mr Becerra, that the work was done out of hours and that the work was organised and paid for by Stephen Child. He also said that Giuseppe (Joe) Giangrasso and another council employee, John Vadala, were involved in working on the units, but did not say whether the work done by the other Council officers was done during Council time or not. According to Mr Macklin, Mr Saad said nothing about whether Mr Child, Mr Giangrasso or Mr Vadala performed work during Council hours. It is clear from evidence that emerged at the public inquiry that they all had. No enquiry was made about this at the time of the Saad disclosure by Mr Macklin or anyone else at the Council.

Even if all work had been performed outside Council hours (as discussed in chapter 6), there can be a significant conflict between public and personal interests when a council's general manager or another senior officer engages the services of junior staff in a private capacity.

On this basis, the disclosures by Mr Saad tended to show corrupt conduct for the purposes of being a protected disclosure under the PDA.

In relation to the issue of whether a disclosure was made to an appropriate officer, Mr Dardano, Mr Saad's direct supervisor, was not a nominated disclosure officer under the Council's IRP. The provision of information to him was therefore not a protected disclosure.

On 5 February 2009, Mr Dardano reported the Saad disclosure to his supervisor, Khaled Azer, Director, Technical Services and Operations of Burwood Council, in the presence of Mr Macklin.

While Mr Azer was a director, and therefore a nominated disclosure officer under the IRP, there is no evidence that Mr Saad asked Mr Dardano to take the disclosure to Mr Azer. While the Commission accepts, for the reasons

outlined in chapter 10, that a protected disclosure can be made through an agent or intermediary, Mr Saad did not request that his complaint be provided to Mr Azer and Mr Dardano was not acting as his agent or intermediary.

In these circumstances, the provision of the information to Mr Azer was also not a protected disclosure.

Mr Azer indicated he was reluctant to be involved, on the basis of an erroneous contention that he had a conflict of interest in pursuing the disclosure, as Mr Saad came under his authority.

Mr Macklin then discussed the matter with Robert Cummins, then Director, Governance and Corporate Services of Burwood Council. While Mr Cummins was a nominated disclosure officer, for the reasons outlined above in relation to Mr Azer, the provision of the information to him was also not a protected disclosure, as Mr Macklin was not acting as an agent or intermediary for Mr Saad.

In these circumstances, the Commission is satisfied that the information provided by Mr Saad to Mr Dardano was information that tended to show corrupt conduct for the purposes of the PDA, but that the provision of the information to Mr Dardano and the subsequent provision of that information to other Council officers did not constitute protected disclosures as the information was not provided to a nominated disclosure officer as required by the IRP.

The reasons advanced by Mr Macklin and Ian Dencker, who was appointed to investigate this matter, for not conducting further investigations was not that Mr Saad had not made a protected disclosure to an appropriate officer. The investigation was closed because Mr Saad did not say that he wanted to make a “protected disclosure” and, according to Mr Dencker, because he would not put his information in writing.

There is no statutory requirement that a protected disclosure be provided in writing, and no requirement that

a complainant nominate that they are making a “protected disclosure” as such. The IRP in fact recognises that an oral disclosure may be made, and then requires the nominated disclosure officer to reduce the disclosure to writing and ask the discloser to sign it.

Whether or not the Saad disclosure amounted to a protected disclosure under the PDA, serious allegations had been made that related to the Council’s General Manager and Principal Architect and the overall impression from the evidence is that all of the senior staff who became aware of it, with the exception of Mr Cummins, did all that they could to avoid having to investigate the complaint.

The effect of Mr Saad’s disclosure not falling within the provisions of the PDA is that it would not amount to an offence of reprisal under section 20 of the PDA if adverse action were taken against him for making that disclosure.

Such action could, however, still amount to corrupt conduct on the basis that it came within section 8(1)(b) of the ICAC Act as a dishonest or partial exercise of official functions or section 8(1)(c) as a breach of public trust, and could constitute reasonable grounds for dismissing those involved in taking such adverse action under section 9(1)(c) of the ICAC Act.

The Commission must therefore consider whether Mr Saad was subject to adverse managerial action because he had made a disclosure about suspected corrupt conduct.

Was Mr Saad victimised for reporting suspected corrupt conduct?

Mr Romano was told about the Saad disclosure on 10 February 2009 by Pina Viney, Governance Co-ordinator of Burwood Council (who also performed the role of Protected Disclosures Co-ordinator). She told Mr Romano that a protected disclosure had been made and that she,

Mr Cummins and Mr Macklin wanted to meet with him to discuss the issue.

Mr Romano then approached Mr Macklin who, according to Mr Romano, told him that the disclosure related to “a staff member at the depot working at a property in Ashfield that Albert [Becerra] owns”. Mr Romano then disclosed that he also had an interest in that property and Mr Macklin responded, “I cannot disclose anything more to you. The matter is being looked into by Robert Cummins”.

Mr Romano told Mr Macklin that he would step aside and appoint Ian Dencker as General Manager for the purpose of dealing with the allegation.

Mr Romano admits that he then went and spoke to Mr Cummins, who, in his role as Director, Governance and Corporate Service and as the manager of the Council’s Protected Disclosure Co-ordinator, Ms Viney, had begun to make some preliminary enquiries in relation to the Saad disclosure. Mr Romano told him that he was appointing Mr Dencker “as my alternative” and also told Mr Cummins, “I am removing you from the investigation”.

In his statement, Mr Romano detailed the reasons why he removed Mr Cummins from the investigation:

- He understood that Ms Viney, as the Protected Disclosure Co-ordinator, was responsible for the conduct of such an investigation and that she should report to the General Manager, in these circumstances Mr Dencker, rather than Mr Cummins, who was normally her supervisor.
- When he initially met Mr Cummins after finding out about the disclosure, Mr Cummins said to him, “Don’t talk to me. There is an investigation underway and it is inappropriate for you to talk to me. Don’t try to influence me. I’m not going to listen to you and I am advising you, no I’m instructing you, not to talk”. Mr Romano said that Mr Cummins’ erratic behaviour at this meeting and his involvement in the previous “Raneri investigation” convinced him that Mr Cummins should not be permitted to continue with any role in the investigation, before Mr Dencker made his assessment.

The Raneri investigation related to an allegation that a staff member, under the supervision of Mr Dencker, had inappropriately taken office stationery and had claimed a large amount of time in lieu for hours at work that he did not perform.

The Commission is satisfied that the effect of Mr Romano’s evidence on this issue is that he considered Mr Cummins had been overzealous in his conduct of

the Raneri investigation, and for this reason did not want Mr Cummins involved in the investigation of the Saad disclosure about the Befaro Units.

After removing Mr Cummins from the investigation, Mr Romano directed him to have no further involvement in the investigation.

At 4.47 pm on 10 February 2009, Mr Romano sent an email to Mr Dencker, which was copied to Ms Viney and Mr Macklin, confirming that Mr Dencker was to act in the position of General Manager to review the Saad allegations. He continued, “I note further that I have instructed Robert Cummins not to participate in this matter nor is he to be briefed in this matter”. Two minutes later, at 4.49 pm, Mr Romano sent an email to Mr Cummins, which was copied to Ms Viney and Mr Macklin, confirming Mr Dencker’s appointment in relation to the matter and specifying that Ms Viney would report directly to Mr Dencker on the matter.

Having removed Mr Cummins from the investigation, Mr Romano began to work behind the scenes to protect his position. According to Mr Child, Mr Romano rang him after he found out about the Saad disclosure and said, “That cunt Saad has made a protected disclosure with HR about the unit, our involvement and Albert’s involvement. Those assholes Macklin and Khaled [Azer] have withheld the disclosure from me for the past four days. We need to get rid of that cunt and we need to get together and talk about the situation”. Although Mr Child put this conversation as occurring on 9 February, it is clear from the evidence that Mr Romano did not find out about the Saad disclosure until 10 February, and the Commission is satisfied that this was the date of the conversation.

Although Mr Romano initially denied making this call, he admitted on the second last day of the public inquiry that he had telephoned Mr Child after he found out about the Saad disclosure, but said that he could not recall the details of the conversation. The Commission accepts Mr Child’s account of this conversation.

Mr Macklin told the Commission that he had discussions with Mr Romano in relation to Mr Saad and that Mr Romano indicated to him that Mr Saad “shouldn’t be working at Burwood” or words to that effect.

Mr Azer told the Commission that Mr Romano called him at his home at about 8.40 pm on 10 February 2009, “He was upset with me for not telling him that I had found out about Joe Saad working on the units. He said that I needed to look after his back about things like this. He said, ‘Just ask Ian Dencker he had trouble with toner and I looked after him’”.

This reference to Ian Dencker and the toner related to the Raneri investigation.

Mr Romano agreed that he had a conversation with Mr Azer on the evening of 10 February 2009 and that he spoke to Mr Azer about Mr Cummins' role in the Raneri investigation and concluded, "It's important in matters like this that the management team stick together and look after our interests ... decisions made in isolation can also be out of context".

Mr Child told the Commission that he met Mr Romano at the Council Chambers the day after the telephone call concerning the Saad disclosure. According to Mr Child, Mr Romano said, "Saad has made a protected disclosure about the units he has been working on with you and that they are owned by Albert and me". According to Mr Child, he replied, "Joe has not worked on the units during Council time". Mr Romano then said, "That's fine it is mainly about Albert [Becerra]. Ian Dencker is looking after the investigation and everything will be okay". Mr Becerra then joined them. Mr Child claimed that at this point he reemphasised that Mr Saad had only worked on the units in his own time. He said Mr Romano then said, "Text me tomorrow so that we can get together. Can you let John Vadala, Ammer and Joe (Giangrasso) [other council workers who had worked at the units] know what's going on and to keep quiet".

Mr Becerra told the Commission that he had a rough recollection of coming across Mr Romano and Mr Child "in the Chamber or the stairs to the Chamber. There was discussion about the units and, yes, Steve [Child] was mentioning a few names about persons who worked on the units, but I can't remember exactly the people he did mention". He said that he joined them for a brief moment and then he walked away. He said that he was not part of any conversation about letting people know what was going on or keeping quiet.

Mr Romano said that there was a very brief meeting with Mr Child. He made no reference to Mr Becerra being present. He claimed that he said to Mr Child, "All I know is there are allegations concerning work that staff had done at the property. Did you engage any other Council staff to work at the property after I asked you not to?".

Mr Romano's version is inconsistent with the evidence of Mr Child and Mr Becerra. Further, in chapter 7 of this report, the Commission finds that Mr Romano was privy to Council staff working on the Befaro Units and did not prohibit this. In all the circumstances, the Commission accepts Mr Child's version of this conversation.

It is clear from the conversations outlined above that Mr Romano was upset about the Saad disclosure, that he was

taking steps to try to protect his position and that he had a clear desire to remove Mr Saad from the Burwood Council workplace.

The core issue for the Commission is whether Mr Romano's desire to remove Mr Saad led him to take steps to influence the decision that was taken by other Council officers on 27 April 2009 to terminate Mr Saad's employment, thereby engaging in a dishonest or partial exercise of official functions or a breach of public trust.

The termination of Mr Saad's employment

Mr Saad commenced at Burwood Council as a labourer in April 2008. He was employed on a casual basis.

As discussed in chapter 7, in 2008, Mr Saad was involved in the renovation of the Befaro Units.

As discussed in chapter 8, on 13 September 2008, Mr Saad attended the Comer Street polling booth and handed out ALP pamphlets at the direction of Mr Child, who in turn had been directed by Mr Romano.

Mr Romano told the Commission that in December 2008, in the context of budgetary problems within the Council, he gave an instruction to phase out or terminate non-essential staff. The Commission did not receive any documentary evidence that this direction had been given. Mr Dencker confirmed that there had been discussions in late 2008 about making cost savings through phasing out or terminating the employment of all non-essential staff.

The minutes of a meeting between Mr Romano, Mr Dardano and Mr Child, which took place on 17 February 2009, record:

PR [Pat Romano] advised that all casual staff are to be terminated...

This meeting occurred after the telephone conversation on 10 February 2009 between Mr Romano and Mr Child, where Mr Romano suggested that Mr Saad should be removed from the Council. The direction by Mr Romano recorded in the minutes makes no reference to any earlier executive decision or direction.

In a briefing note dated 22 April 2009 in relation to "restructure of Works and Operations Group, Stephen Ellul, the manager responsible for the depot" proposed that "all casuals are released (short term – within four weeks)".

At a Council meeting on 27 April 2009, at which Mr Romano was not present, consideration was given to the issue of whether Mr Saad's employment should be

terminated immediately or whether his contract should be extended for a few more weeks. At the meeting Mr Azer, Mr Macklin and Mr Ellul all argued for Mr Saad's retention, but Mr Hullick and Mr Dencker insisted that his employment be terminated immediately. Mr Dencker was the acting General Manager in relation to the reform of the depot, so his decision was implemented, and Mr Saad was terminated immediately.

In his statement to the Commission, Mr Ellul said:

When I questioned the decision [to terminate Mr Saad's employment] I was not given any further explanation, however I thought there was some reason that they were not telling me. I said to the other members in the meeting, "there appears to be more to this than what I am being told". I was met with a stony faced silence.

Mr Azer told the Commission:

It may even be the fact that Mr Romano used to talk to, talk about Mr Saad unfavourably, but I took it maybe, that maybe he's had some other private discussions with Ian [Dencker] and Les [Hullick], that I haven't, I haven't sort of, haven't been part of.

Mr Macklin told the Commission that he suspected that the reason for the termination was because Mr Saad had made allegations that related to Mr Romano.

Mr Dencker specified four reasons for his decision to terminate Mr Saad's employment immediately:

1. "He'd been caught stealing in the workplace."
2. "Mr Dardano had said that he was not a person that Council should employ."
3. Mr Saad was "not a team player" and tended to polarise staff.
4. He had a criminal record.

In later evidence, Mr Dencker said:

Myself and Les were not prepared to overturn that previous decision of the executive [to terminate all casual staff] because we had made cuts across the organisation and in my area, I'd made cuts to the records area.

Conclusion

In all the circumstances, although the Commission is satisfied that after 10 February 2009 Mr Romano was actively seeking Mr Saad's removal from Council, there is insufficient evidence to conclude that Mr Romano's wishes were responsible for or influenced the decision made on 27 April 2009 to terminate Mr Saad's employment.

The Commission therefore does not find that any Council officer engaged in corrupt conduct in relation to the termination of Mr Saad's casual employment.

Chapter 12: Robert Cummins

On 16 March 2009, Harmers Workplace Lawyers (“Harmers”), who were acting for Robert Cummins in relation to the circumstances of his departure on sick leave from Burwood Council in February 2009, prepared a 10-page letter on Mr Cummins’ behalf (“the Harmers letter”). The letter was addressed to “Mr Pat Romano, Burwood Council” and was delivered to Mr Romano at the Council Chambers on 16 March 2009.

The letter detailed a series of allegations of “unethical and/or corrupt” behaviour by Mr Romano. These included allegations in relation to:

- conflicts of interest associated with the employment and management of Mr Romano’s friend and associate, Albert Becerra, at the Council
- the purchase of home security equipment for Mr Romano’s house
- the management of the Saad disclosure (see chapter 11).

On 24 April 2009, a letter from Burwood Council, signed by Les Hullick, was delivered directly to Mr Cummins at his home (“the Hullick letter”).

The Hullick letter said that the Council was conducting an investigation and a review with respect to the operation of an area formerly under Mr Cummins’ control at the Council and, for the purposes of this investigation and review, required Mr Cummins to provide responses to 10 specified issues.

The letter required responses from Mr Cummins by 5.00 pm on 4 May 2009 and concluded:

Should you fail to respond it will be taken into account as to whether Council can reasonably continue your employment.

On 23 April 2009, Mr Cummins had lodged a claim for workers compensation. The basis of his claim was that he had suffered psychological injury through his work at the Burwood Council. The Council defended Mr Cummins’ claim and Mr Romano provided a statement in respect of the claim that was highly critical of Mr Cummins’ performance at the Council.

Mr Cummins claimed that Mr Romano’s statement contained lies, which were included with a view to dishonestly defeating Mr Cummins’ claim for workers compensation.

Mr Romano, on the other hand, told the Commission that the facts included in his statement were true and that the opinions expressed were opinions he held at the time.

Mr Cummins claimed that both the Hullick letter and Mr Romano’s false statements in relation to his workers compensation claim were actions taken as a response to the allegations he had made against Mr Romano in the Harmers letter.

Such adverse managerial action could amount to corrupt conduct as it could involve a partial exercise of official functions under section 8(1)(b) of the ICAC Act or a breach of public trust under section 8(1)(c) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could also involve the criminal offence of taking reprisal action under section 20 of the *Protected Disclosures Act 1994* (“the PDA”).

It could also, for the purposes of section 9 of the ICAC Act, involve a disciplinary offence or reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of the public official or public officials responsible for such action.

Did Mr Cummins make a protected disclosure?

As Mr Cummins was a public official, an appropriate disclosure of information by him could amount to a protected disclosure.

Under the PDA, the disclosure would relevantly have to show or tend to show corrupt conduct or maladministration and would have to be made to the principal officer of a public authority or to an appropriate officer under the Burwood Council's Internal Reporting Policy (IRP).

The Harmers letter, written on behalf of Mr Cummins on 16 March 2009, contained a number of allegations of corrupt conduct against Mr Romano and was a disclosure that showed or tended to show corrupt conduct.

The disclosure was provided to Mr Romano who was the principal officer of a public authority under section 8 of the PDA.

In these circumstances, the Harmers letter could constitute a protected disclosure by Mr Cummins under the PDA.

Was adverse action taken against Mr Cummins as a result of his allegations?

In order to provide a context for the evidence about the alleged reprisal action against Mr Cummins, it is necessary to consider his employment history at Burwood Council prior to his making allegations against Mr Romano in the Harmers letter.

Mr Cummins' employment at Burwood Council

Mr Cummins commenced at Burwood Council in May 2005 as an Executive Officer. In this position, he assisted the Council executive on various projects and reported directly to the General Manager. From October or November 2005, Mr Cummins commenced acting in the position of Director, Technical Services and Operations, before being appointed to that position permanently. In May 2007, he applied for and obtained the position of Director, Governance and Corporate Services. In this position, he was responsible for managing the Council's governance processes, community services, library services, information services and compliance teams.

Over the period of his time in the executive, Mr Cummins provided Mr Romano with advice, particularly in relation

to governance issues. He told the Commission, "on most occasions I, I suppose you'd say I had the courage to give him fearless advice. And I think most of the time, in general, in the early days especially, he respected that I did that, and, you know, and, and was, I mean in my opinion happy to have a debate on the issue".

Mr Romano told the Commission, "Mr Cummins and I had disagreements during the course of his employment at Council in relation to a variety of policy matters. We usually managed to overcome our differences in a cordial manner".

HR Manager Peter Macklin told the Commission:

Robert [Cummins] was a very direct person, well, probably still is, very direct, and he was, and it was good in executive meetings because he would, would present alternative points of view. On the whole that was good and Pat, the General Manager, accepted that and, and from what I observed enjoyed that, you know, the role that Robert played in those meetings. You can't have everyone saying yes, yes, you know. ... Robert had a lot of well not experience, he had a lot, he was very smart and he, he would often put forward alternative points of view. I guess sometimes Pat took things personally.

Generally, Mr Cummins' work at the Council was the subject of approbation by Mr Romano, at least in any written appraisals. Mr Romano admitted that he had not put any concerns he may have had about Mr Cummins' performance in writing.

As a Council executive, Mr Cummins was eligible for bonus payments under the Council's Bonus Payment Scheme, as determined by the General Manager.

Mr Cummins was granted every bonus payment for which he was eligible.

In a letter dated 27 January 2006, two months after Mr Cummins was appointed to the Council executive as Director, Technical Services and Operations, Mr Romano wrote to him "to express my appreciation for your efforts during the period you were Executive Officer".

In a letter dated 14 July 2006, Mr Romano advised Mr Cummins that he was receiving his first bonus payment in his capacity as Director, Technical Services and Operations.

I am writing to express my appreciation for your efforts over the past six months. You have played a major role in achieving some key outcomes for Burwood in the Technical Services and Operations area.

In a letter dated 14 February 2007, Mr Romano advised Mr Cummins that he was receiving his next bonus payment in his capacity as Director, Technical Services and Operations.

As you would agree, the challenges that you have faced since your appointment on 8 November 2005 have been considerable and I am satisfied that you have met those challenges in a most satisfactory manner.

In 2007, Mr Romano approved the appointment of Mr Cummins to the position of Director, Governance and Corporate Services.

In a letter dated 12 September 2008, Mr Romano advised Mr Cummins that he was receiving his bonus payment for his first year as Director, Governance and Corporate Services.

I want to personally thank you for your hard work and commitment to Burwood Council over the last 12 months. I understand the increased workloads you have had to contend with and I want to acknowledge the professional and flexible approach you have taken.

Despite these generally positive comments, there were eventually several incidents relating to issues that have been canvassed in this report that strained the relationship between Mr Cummins and Mr Romano.

One occasion when Mr Romano did not appreciate Mr Cummins' advice was in relation to the instalment of security equipment in Mr Romano's home (see chapter 3). In an email dated 8 November 2007, Mr Cummins advised Mr Romano as follows:

I strongly recommend that this matter be taken to Council, or an alternative independent body, for determination in order to protect both yourself and the Mayor from potential negative perceptions from the community. There is a potential conflict of interest for both yourself and the Mayor regarding the position of security equipment at your homes, and therefore from a probity perspective, someone else should be signing off.

In the Commission's view, this was an appropriate issue to be raised by a director with responsibility for governance issues. It was not appreciated by Mr Romano. He responded as follows:

My email to you was simply to advise you of budget impacts not to seek your approval or advice for the matter ... with all due respect, my email was a directive and did not seek your opinion. I do appreciate from time to time

we have a differing of opinion, but I would prefer that you come and see me personally in these instances rather than placing your views on email.

Mr Cummins told the Commission that he believed this incident was a trigger for the deterioration in his relationship with Mr Romano.

This deterioration came to a climax in February 2009 when Youssef (Joe) Saad made a disclosure about work that he and other depot staff had performed at the Befaro Units (see chapter 7). As detailed in chapter 11, Mr Romano removed Mr Cummins from the investigation of the Saad disclosure. Ian Dencker sent an email to Mr Romano on 12 February 2009, advising that no investigation of the Saad disclosure was necessary because no disclosure under the protected disclosure policy had been made. One and a half hours later, Mr Romano sent an email to Mr Macklin directing how future allegations were to be dealt with:

As discussed, effective immediately, any complaints, allegations, personal matters that affect Council operations and/or grievances (made by staff or others in writing or verbally) that are presented to you, or made known to you are to be reported to me immediately. You are not to proceed with investigating or acting on these disclosures without my approval. Where a disclosure involves/implicates myself and potential [sic] places me in a position of conflict, you are to call a meeting of the exec team (with myself present) to communicate the matter and seek guidance as to a path forward. You are not to make decisions on your own or in isolation. Where the disclosure involves one or more directors you are to advise me immediately and you may wish to request that the remaining unaffected directors be present. Again this is with a view of seeking direction prior to acting on the disclosure(s).

Importantly, this email was copied to all members of the Council executive, except Mr Cummins.

The following day, 13 February 2009, Mr Dencker, who had been appointed by Mr Romano to investigate the Saad disclosure, approached Mr Cummins. According to Mr Cummins, Mr Dencker said, "I'm the cleaner. I've been brought in to clean up your mess".

At 3.14 pm on the same day, Mr Dencker sent an email to Mr Cummins attaching a You Tube link, which depicted a scene from the movie *Point of No Return (The Assassin)*. The scene depicts two female assassins who attend a premises in order to kill a target, but end up killing multiple people. The assassins contact their employer who sends around "the Cleaner". The Cleaner disposes of bodies and shoots one of the assassins who begins to lose her nerve.

In Mr Dencker's evidence at the public inquiry on 26 May 2010, he denied that he nominated himself as "the Cleaner". In a previous account, in his statement dated 13 May 2009 to the Council's workers compensation insurers, he claimed that he told Mr Cummins, "I am like the cleaner here". In his evidence on 26 May 2010, he told the Commission that he was not trying to suggest to Mr Cummins that he was cleaning up the mess that Mr Cummins had made. Rather, he claimed, "I was trying to engage his sympathy by saying, well, great, I always get the greatest job around here to sort out or clean up, whatever you, you know...".

Mr Cummins told the Commission that Mr Dencker's comments and being sent the link to this film clip had a "major impact" on him from a psychological perspective.

Ernie White, the head of Information Services, left the Council on 13 February 2009. Information Services fell within Mr Cummins' area of executive responsibility. Accordingly, Mr Cummins appointed a person from Information Services to temporarily act in the vacated position until it could be filled. On 13 February 2009, Mr Romano overruled Mr Cummins' appointment on the basis that the person was not qualified for the position. Mr Romano also directed that Mr Cummins take on the responsibility for the management of Information Services, in addition to his other responsibilities, even though Mr Cummins also lacked appropriate qualifications. On 16 February 2009, Mr Romano and Mr Cummins clashed heatedly over the development of a Council community strategic plan. Mr Romano set a deadline for Mr Cummins to produce a project plan that Mr Cummins considered to be "just impossible".

Mr Cummins said that his health deteriorated under this pressure, he suffered a nervous breakdown and went on sick leave on 16 February 2009.

The Harmers letter

On 16 March 2009, in a letter to the Council from his solicitors, Mr Cummins made a number of allegations of corrupt conduct against Mr Romano.

The letter claimed that Mr Romano's conduct prevented Mr Cummins from fulfilling his duties as Director, Governance and Corporate Services, and amounted to a breach of Mr Cummins' employment contract, and a repudiation of that contract. The letter foreshadowed the conduct of legal proceedings by Mr Cummins for the recovery of damages, but invited the Council to negotiate a settlement.

A separate letter from Harmers was delivered to the Council at the same time as the Harmers letter. In this letter, Harmers detailed the terms on which Mr Cummins was prepared to settle the matter.

The Hullick letter

Mr Romano told the Commission that he met with the Council's solicitor, Mr Baird, and members of the Council executive at Maddocks, on 18 March 2009, two days after he received the Harmers letter. There were discussions about the Harmers letter and also discussion about developments within the Council's Information Services Cross Functional Team (ISCFT). This had been set up in February or March 2009 to oversee developments within Information Services and in projects taking place within that section.

Information Services had been led by Mr White, who had reported to Mr Cummins, as Director, Governance and Corporate Services. Mr Cummins had difficulties in his dealings with Mr White and these circumstances had, according to Mr Cummins, been a source of contention between Mr Cummins and Mr Romano. Mr White left the Council on 13 February 2009, three days before Mr Cummins went on sick leave.

According to Mr Romano, at the meeting on 18 March 2009, Jon Phegan, who had been appointed Acting Manager, Information Services, described concerns that had emerged from ISCFT enquiries in relation to the operation of Information Services under the leadership of Mr White and Mr Cummins. Mr Romano claimed that Mr Baird suggested that Mr Cummins "should be held to account for some of the issues that have been uncovered by the ISCFT", and suggested that the Council write to Mr Cummins and ask him to explain "irregularities that have been uncovered".

In his evidence, Mr Baird emphatically denied that he was the person who suggested that a letter be written to Mr Cummins on a pretext of the ISCFT's enquiries, and the Commission accepts his denial.

According to Mr Romano, at the same meeting, Mr Dencker said, "I'd like Jon [Phegan] as Acting Manager, Information Services, to compile a report that we can use to back up any correspondence to Robert [Cummins]". In his evidence to the Commission, Mr Dencker denied saying this, and the Commission accepts his denial.

In any event, according to Mr Romano, it was he who decided to adopt these approaches, "Okay, so you [Mr Dencker] work with Maddocks to prepare the correspondence and organise Jon [Phegan] to produce a

report. Given that Robert has made allegations through Harmers about me, I think Les [Hullick] should be signing any correspondence to him". This quote, from Mr Romano's statement dated 30 April 2010, indicates that Mr Romano initiated this process and Mr Hullick's involvement in signing correspondence was designed to give the process an appearance of impartiality.

On 23 April 2009, Mr Cummins provided the Council with his claim for workers compensation, together with a WorkCover NSW medical certificate. This recorded that Mr Cummins was suffering from "acute anxiety/ depression, secondary to workplace harassment".

The following day, 24 April 2009, a letter from Burwood Council, signed by Mr Hullick and dated 24 April 2009 (the Hullick letter) seeking responses in relation to Information Services issues, was forwarded to Mr Cummins. The Council arranged for the Hullick letter to be delivered directly to Mr Cummins at his home, despite the fact that there had been substantial communication between the Council and Mr Cummins' lawyers and that the Council had been put on notice only the day before that Mr Cummins was suffering from acute, work-related anxiety and depression.

The Hullick letter commenced as follows:

Following major concerns about the implementation of Council's Trim Electronic Document Management System (EDMS) Council has set up an IS [Information Services] Cross Functional Team to investigate the EDMS installation as well as undertake a review of all Information Services functions.

For the purposes of this "investigation" and "review", the letter sought Mr Cummins' responses to 10 specified "issues". Each issue generally related to matters that had been under the direct control of the former head of Information Services, Mr White. The letter required responses from Mr Cummins by 5.00 pm on 4 May 2009.

The letter concluded:

As the Director responsible for Information Services to the Council your written response to these issues is vital to the IS cross functional teams [sic] investigations and will assist Council in its final deliberations.

Should you fail to respond it will be taken into account as to whether Council can reasonably continue your employment.

Conducting a review into dysfunction associated with the introduction of the EDMS system and the operation of

Information Services generally may have been a legitimate management approach. The Commission, however, is satisfied that the asserted "investigation" and "review" was a ruse. There was no intention to pursue a proper investigation and review process. The real focus of the letter was to act against Mr Cummins and his position at the Council. This is supported by the following:

- While Mr Romano claimed that the preparation of a report on the review of Information Services and the letter to Mr Cummins were suggested by Mr Baird and Mr Dencker, this is denied by them, and Mr Romano admitted that he directed that the report and the letter to Mr Cummins be prepared.
- The person primarily responsible for the matters under review was Mr White. He was never approached for the purposes of the review. Mr Hullick said that this was because he no longer worked for the Council. This did not preclude the Council from seeking responses from the person who was the focus of the matters under enquiry.
- Mr Cummins provided a lengthy response to the Hullick letter. This appears never to have been considered for the purpose of any ISCFT review. The Chair of the ISCFT, Mr Dencker, told the Commission he had never even seen the response.
- Instead of being considered by the ISCFT for review purposes, the letter was used for HR purposes. In an "internal draft briefing" prepared at the end of May 2009, Mr Macklin reviewed and analysed Mr Cummins' response to the Hullick letter, with a view to whether it could be used to support a termination of Mr Cummins' employment.
- There never were any "final deliberations", as foreshadowed by the letter. The ISCFT investigation and review went no further after Mr Cummins' reply. Mr Hullick told the Commission the "thing" was "put on hold" because of this Commission's investigation. On 5 May 2009, the day after Mr Cummins' response was received by the Council, lawyers acting for the Council met with officers of this Commission. In a letter dated 7 May 2009, Mr Baird and Todd Neal of Maddocks reported on this meeting to Mr Hullick. The letter advised that the Commission had asked the Council to "suspend processes in relation to the cessation of Mr Cummins employment until the allegations are fully investigated". This should not have prevented the Council from continuing its investigation of the EDMS installation and review of all Information Services functions, except in circumstances where this investigation and review

were initiated for the purpose of bringing about “the cessation of Mr Cummins’ employment”.

- In an email to Mr Baird and Darren Gardner of Maddocks on 24 March 2009, Mr Romano conveyed questions that Mr Phegan and Mr Dencker wanted answered by Mr Cummins “as previously advised this would assist in the investigation currently afoot in the IT area”. This appears to be the first time that the proposal to formulate questions for Mr Cummins to answer about IT issues, which eventually formed the basis of the Hullick letter, was referred to in any written document.
- In an email to Mr Hullick on 26 March 2009, Mr Romano said, “...I confirm that you are appointed Acting General Manager for the purpose of dealing with the [Cummins] allegations and possible separation of Mr Cummins from Burwood Council’s employment”. The reference to the “possible separation” of Mr Cummins from Council employment is an indication that this was the outcome that Mr Romano was focused on achieving after the receipt of the Harmers letter.

The Commission is satisfied that, from its inception, the initiative involved a partial attempt by Mr Romano to act against Mr Cummins in his employment and to damage his credibility. It was focused on laying a foundation for discrediting Mr Cummins and removing him from the Council. The action was driven by Mr Romano and, as far as he was concerned, was substantially a response to the allegations made against Mr Romano in the Harmers letter.

Mr Romano’s role

At all relevant times, Mr Romano had a conflict of interest in relation to any action taken by the Council against Mr Cummins. He had a personal interest in undermining the credibility of a person who was making serious allegations against him. This personal interest was in direct conflict with his public duty to ensure that the Council conducted its processes in a fair and proper manner. Mr Romano should have stood aside and not had anything to do with employment issues relating to Mr Cummins. He did not do this.

Mr Romano went through a formal process of passing responsibility to Mr Hullick. As discussed above, however, even on his account, this was only a formality.

The evidence indicates that Mr Romano continued to be involved, to attend relevant meetings and to forward and receive correspondence in relation to these matters.

In an email on 25 April 2009 addressed to Mr Dencker and Mr Hullick, Mr Romano raised the following issues:

2. *Has RC’s [Robert Cummins’] letter been referred to Chris Ronalds for assessing as to whether it should be referred to the Police for investigation?*

This was reference to the separate letter that was sent with the Harmers letter, which sought a settlement for Mr Cummins, and which Mr Romano considered to be “extortion”.

5. *If RC lodges a Workers Comp claim then Council should forward to [the] Insurance Company a copy of extortion letter with RC’s application.*

This is a reference to the same letter, referred to in item 2 above.

Mr Romano suggested a number of other actions that should be taken in relation to others whom he believed were involved in allegations against him, including Mr Child, Mr Giangrasso and Mr Issa, and concluded:

Gentlemen, given the nature of the malicious allegations that are currently afoot, I strongly recommend that you give immediate attention to the items above. The Management team, which includes me, need to be seen to be responding to deficiencies in our processes and systems. The above may not solve all our issues but they will go a long way to protecting the organisation from real and perceived corruption and maladministration. In this regard I seek a weekly progress report on the above issues.

Mr Hullick accepted that, while he had been made Acting General Manager for the purposes of the Cummins matter, Mr Romano had a habit of “coming in later” to try to reassert his authority. According to Mr Hullick, someone in his position never really thought that he would be “a hundred per cent in charge of a particular matter...”. Mr Hullick also said:

Well, the thing is that he, and this is always a bit difficult because the thing is, he’s the General Manager. He’s in charge. Now until he’s not in charge, he’s in charge, so, you know, you can’t sort of abrogate his leadership or, or responsibility, if you like. You can’t. You can’t become equal.

Mr Hullick’s inability to fulfil his role appropriately as Acting General Manager in respect of allegations made against Mr Romano is best illustrated by a letter he wrote to the Commission on 2 April 2009. The letter stated:

Mr Romano is most eager to protect his reputation and has vehemently denied any wrong doing in any matter.

I am most concerned that the ICAC be placed on notice that allegations may be made in relation to Mr Romano and/or Senior Staff members and that they be given the fullest opportunity to respond in detail in order to clear their names. I request your assistance and advice in relation to any information that you may have received in relation to Mr Romano and whether the ICAC is on notice in relation to any protected disclosure or other relevant complaint. Mr Romano should be entitled to know the substance of any allegations being made against him.

This letter shows no balanced interest in assisting an investigation or in the rights of any person who has made complaints, but seems almost entirely concerned with obtaining information for Mr Romano in order to “clear” his name.

The Hullick letter required Mr Cummins to respond by 4 May 2009. Mr Cummins did in fact provide a response that met this deadline. Mr Macklin was not initially aware of this, and at 8.51 am on 5 May 2009, he sent an email to Mr Gardner seeking advice as to how the Council should react to Mr Cummins’ failure to comply. He told Mr Gardner, “you would also appreciate that Les [Hullick] and I are under pressure to terminate his employment in accordance with what we said in our letter”. Mr Macklin told the Commission that this “pressure to terminate” Mr Cummins’ employment was coming from Mr Romano.

Mr Macklin also told the Commission that he considered that the letter to Mr Cummins was “a reprisal” for the allegations Mr Cummins had made against Mr Romano. He was unhappy about what was being done but did not speak up because “the environment at the time was one where you didn’t really want to challenge Pat [Romano] on this”.

Mr Hullick agreed that, as at 5 May 2009, Mr Romano was looking for a way to terminate Mr Cummins’ employment and that Mr Macklin was under some pressure from Mr Romano over this issue. Mr Hullick also agreed that Mr Romano had made it clear to him that, sometime after Mr Cummins went on sick leave, he wanted Mr Cummins out of the workplace.

The Commission is satisfied on the basis of the evidence summarised above that, despite Mr Hullick being appointed to act as General Manager for this issue because of Mr Romano’s clear conflict of interest, Mr Romano continued to be involved in the Council’s response to the Harmers

letter and the proposed investigation and review of the Information Services area formerly under Mr Cummins’ control.

Corrupt conduct

The Commission is satisfied that Mr Romano initiated a review process that was directed at obtaining a report that could be used as a basis upon which to discredit Mr Cummins and remove him from the Council, and this was done substantially in response to allegations about Mr Romano made by Mr Cummins in the Harmers letter.

This involved corrupt conduct as defined in the ICAC Act. It involved a partial exercise of Mr Romano’s official functions as General Manager of the Council for the purposes of section 8(1)(b) of the ICAC Act. It also constituted a breach of public trust for the purposes of section 8(1)(c) of the ICAC Act as it involved him using his position as General Manager for an improper purpose.

Mr Blake submitted that Mr Cummins’ allegations in the Harmers letter could not constitute protected disclosures as they were made to avoid disciplinary action, and therefore were not protected disclosures by reason of section 18 of the PDA. The Commission accepts that section 18 of the PDA provides that disclosures made “solely or substantially with the motive of avoiding dismissal or other disciplinary action” are not protected disclosures.

Mr Blake submitted that Mr Cummins was “facing disciplinary action” because he had failed to comply with Mr Romano’s direction to act as Project Manager of the Community Strategic Plan and had failed to manage properly the Information Services section of the Council. There was, however, no evidence before the Commission that Mr Cummins had been notified that he was “facing disciplinary action” on either of these bases, and this suggestion was not put to Mr Cummins in cross-examination at the public inquiry. The Commission rejects this submission.

The Commission is satisfied that, through the Harmers letter, Mr Cummins made a protected disclosure as defined in the PDA. It was a disclosure by a public official to the principal officer of a public authority, as required by section 8 of the PDA. It was a disclosure that “shows or tends to show corrupt conduct” as required by section 14(1) of the PDA.

Mr Romano

The Commission is satisfied that Mr Romano’s actions, detailed above, that led to a report on the ISCTF review and the sending of the Hullick letter to Mr Cummins,

could constitute detrimental action for the purposes of section 20(1) of the PDA. The Commission is satisfied that Mr Romano's primary motive in initiating the review process and the sending of the Hullick letter was to direct Mr Cummins to answer questions with a view to finding grounds to terminate his employment at the Council. This could constitute "adverse treatment in relation to employment" in accordance with section 20(2) of the PDA, and accordingly could amount to "detrimental action" for the purposes of section 20(1) of the PDA.

While Mr Romano did not sign the letter or deliver it, he was complicit in the process of acting against Mr Cummins as he initiated the process and participated in it.

In all the circumstances, the Commission is satisfied that Mr Romano's initiation of the ISCTF review process and his involvement in the formulation of the Hullick letter was conduct that could involve a criminal offence of taking detrimental action substantially in reprisal for the making of a protected disclosure in contravention of section 20 of the PDA, for the purposes of section 9(1)(a) of the ICAC Act.

Mr Hullick and Mr Macklin

Mr Hullick and Mr Macklin were both clearly involved in the preparation and submission of the Hullick letter to Mr Cummins.

In an email dated 23 April 2009, Mr Macklin confirmed that he prepared the first draft of the letter.

Mr Hullick ultimately signed the letter in his capacity as Acting General Manager in relation to matters concerning Mr Cummins.

The Commission is satisfied that both Mr Hullick and Mr Macklin contributed to the action taken against Mr Cummins. The Commission is also satisfied that they understood the partial nature of this action and accordingly their own conduct involved a partial exercise of their official functions for the purposes of section 8(1)(b) of the ICAC Act. Their complicity in acting against a person on account of that person making a protected disclosure also constituted a breach of public trust for the purposes of section 8(1)(c) of the ICAC Act. Their participation in the process could have also involved a criminal offence of aiding and abetting the taking of detrimental action, substantially in reprisal for making a protected disclosure in contravention of section 20 of the PDA, for the purposes of section 9(1)(a) of the ICAC Act.

The Commission has a discretion pursuant to section 13(3)(a) of the ICAC Act in relation to whether it proceeds to a finding in relation to corrupt conduct.

The Commission is satisfied that both Mr Macklin and Mr Hullick would have suffered significantly if they had challenged Mr Romano on issues such as this, where his personal interests were so directly involved.

The Commission accepts the evidence of Mr Macklin that neither he nor Mr Hullick wanted to be privy to this process and that they were under "pressure" from Mr Romano, as Mr Macklin alluded to at the time in his email to Mr Gardner on 5 May 2009.

In all the circumstances, the Commission does not find that Mr Hullick and Mr Macklin engaged in corrupt conduct when they were involved in forwarding the Hullick letter to Mr Cummins on 24 April 2009.

Mr Cummins' workers compensation proceedings

On 23 April 2009, Mr Cummins lodged a claim for workers compensation. The basis of his claim was that he had suffered psychological injury through his work at Burwood Council. This claim was made after Mr Cummins had exhausted his sick leave and other forms of leave.

The Council defended Mr Cummins' claim.

By a letter dated 26 May 2009, StateCover, Burwood Council's workers compensation insurer, notified Mr Cummins that StateCover was disputing liability. These proceedings are continuing.

Documents taken into account by StateCover when deciding to dispute Mr Cummins claim included:

- Mr Cummins' claim form
- medical reports
- the insurance company's investigation report, based on statements received
- the Hullick letter of 24 April 2009
- the Harmers letter of 16 March 2009.

The last two documents were submitted by the Council.

The Commission reviewed the statements obtained by the insurance company during its investigation. The central statement against Mr Cummins' claim is the statement prepared and submitted by Mr Romano, dated 19 May 2009, which contains strong criticism of Mr Cummins' performance at the Council.

Mr Cummins told the Commission that Mr Romano's statement contained outright lies, included with a view to dishonestly defeating Mr Cummins' claim for workers compensation. He pointed to this as part of the reprisal

action he claimed to have suffered as a result of his allegations against Mr Romano.

Mr Romano, on the other hand, told the Commission that the facts included in his statement were true, and the opinions expressed were opinions he held at the time.

A central theme of the statement Mr Romano provided to StateCover was that Mr Cummins was consistently deficient in his performance as an executive at the Council. He stated, "I did not issue any written warnings to Mr Cummins because I always hoped my verbal discussions with him would help him meet Council's expectations". As summarised in the preceding sections, documentation that was generated by Mr Romano in relation to Mr Cummins performance during the currency of his work at the Council is not consistent with the assertions in Mr Romano's workers compensation statement.

This documentation included praise for Mr Cummins' performance in various roles and the awarding of a payment under the Bonus Payment scheme on every occasion that Mr Cummins was eligible for such a payment.

At paragraph 37 of the statement he provided to the workers compensation insurers, Mr Romano records:

Various problems in Council's IT area were detailed in a report commissioned by the Executive Team in around February 2009. The report sets out Mr Cummins' numerous failures in managing Council's IT area...

The reference to this report being commissioned "in around February 2009" misleadingly suggests that it was commissioned before, and independently from, the Council receiving notice of Mr Cummins' allegations against Mr Romano in March 2009.

The report was in fact commissioned at the meeting at Maddocks on 18 March 2009, two days after the Council received the letter from Harmers dated 16 March 2009 that contained Mr Cummins' allegations against Mr Romano. This report was part of the review process of the Information Services section that was initiated by Mr Romano for the purpose of taking adverse action against Mr Cummins in respect of his employment.

Mr Blake submitted that Mr Romano's workers compensation statement contained the views that Mr Romano held at the time he prepared the statement. The views of Mr Cummins' performance conveyed by Mr Romano in his statement to StateCover were so distinct from the evidence contained in contemporaneous Council documents, the Commission is satisfied, in all the circumstances, that Mr Romano provided a false account

to damage Mr Cummins' prospects of securing workers compensation support.

The Commission is satisfied that Mr Romano's statement to StateCover contained false information in relation to when a report on the Council's Information Services section was commissioned and misleading information in relation to Mr Cummins' performance at the Council.

Corrupt conduct

Mr Romano's statement to the workers compensation insurers was prepared in his capacity as the General Manager of Burwood Council. In all the circumstances, the Commission is satisfied that Mr Romano, through the preparation and submission of the statement that he knew contained false and misleading information, engaged in conduct that involved a dishonest or partial exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act.

Counsel for Mr Romano submitted that the Commission should not find that the preparation and submission of this statement could amount to detrimental action for the purposes of section 20(1) of the PDA as there was no evidence before the Commission that indicates that the statement had any impact on the decision made by StateCover to refuse Mr Cummins' application.

Detrimental action for the purposes of section 20(1) of the PDA includes "discrimination, disadvantage or adverse treatment in relation to employment" under section 20(2). The workers compensation insurer notified Mr Cummins, "We have disputed your claim because the evidence we have gathered strongly indicates that any psychological injury you suffer is the direct result of the reasonable actions of your employer relating to various issues of performance over the term of your employment with Burwood Council".

Mr Romano's statement was the primary evidence provided to the insurer in relation to "performance over the term of [Mr Cummins'] employment". In these circumstances, the Commission is satisfied that Mr Romano's unfair and dishonest portrayal of Mr Cummins' performance had an adverse impact on Mr Cummins' claim for compensation that could constitute "disadvantage or adverse treatment in relation to employment" for the purposes of section 20(2) of the PDA.

The Commission is satisfied that Mr Romano's actions in preparing and submitting a statement that he knew contained misleading statements about Mr Cummins' performance and false statements about when a report on the Council's Information Services section was

commissioned, were taken substantially in response to Mr Cummins' actions in making allegations about Mr Romano's conduct as General Manager. This could amount to a breach of section 20(1) of the PDA for the purposes of section 9(1)(a) of the ICAC Act. In reaching this conclusion, the Commission has had regard to the fact that, under section 20(1A) of the PDA, in any proceedings for an offence against the section it would lie on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected disclosure.

Accordingly, the Commission is satisfied that, through the preparation and submission of this statement, Mr Romano engaged in corrupt conduct as defined in the ICAC Act.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano, Mr Hullick and Mr Macklin. Accordingly, they are people who come within the definition of "affected" person for the purposes of section 74A(2) of the ICAC Act.

Mr Romano

Any admissions or relevant statements by Mr Romano in relation to the matters canvassed in this chapter were made subject to a declaration issued pursuant to section 38 of the ICAC Act, and cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. Despite this, there is some documentary evidence and the evidence of available witnesses in relation to Mr Romano's relevant activities that would be available for use in a prosecution by the DPP, in particular the records of the Council and the evidence of other Council officers involved in the decisions made in relation to Mr Cummins.

In all the circumstances, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano in relation to the following criminal offences:

- a. taking detrimental action against another person substantially in reprisal for that person making a protected disclosure, contrary to section 20(1) of the PDA, through his involvement in the process that led to the sending of the Hullick letter to Mr Cummins
- b. taking detrimental action against another person substantially in reprisal for that person making a protected disclosure, contrary to section 20(1) of the PDA, through his provision of false and misleading information in relation to Mr Cummins' workers compensation claim.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

Mr Macklin and Mr Hullick

For the reasons canvassed above in relation to possible corrupt conduct by Mr Macklin and Mr Hullick, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Macklin or Mr Hullick in relation to any criminal offence with respect to the conduct canvassed in this chapter.

Mr Macklin and Mr Hullick no longer work for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

Chapter 13: Stephen Child

On 29 March 2009, Burwood Council's Civil Maintenance Supervisor, Stephen Child, made a telephone call to the Mayor of Burwood and provided information about the General Manager, Pat Romano. The information related to Council staff having worked on units in which Mr Romano and Albert Becerra had a personal interest (the Befaro Units, dealt with in chapter 7). Mr Child said that the work had been done in Council time and using Council resources.

The Mayor, Lesley Furneaux-Cook, arranged for Mr Child to speak to the Commission and, on about 30 March 2009, Mr Child confirmed to Ms Furneaux-Cook that he had provided information to the Commission about the Befaro Units allegations, and about another matter.

Mr Child also provided information about his allegations to Kate McClymont, a journalist from the *Sydney Morning Herald*. Mr Child had spoken to Ms McClymont before he went to the Mayor, and Ms McClymont had played a role in putting him in touch with the Mayor. The *Sydney Morning Herald* published articles in relation to the allegations from 4 April 2009.

The Commission examined adverse managerial action that was taken by the Council against Mr Child after he made his complaints to the Mayor, the Commission and the *Sydney Morning Herald*. This action included:

- the surveillance conducted on Council depot workers, including Mr Child, after 7 April 2009
- the depot reform process that led to Mr Child's position being substantially changed, in a way that adversely affected his interests, on and after 7 April 2009
- an email sent by Mr Romano to senior Council officers on 25 April 2009, urging that consideration be given to immediate disciplinary and other action in relation to Mr Child and others
- Mr Child's suspension from his position at Council from 17 August 2009.

If taken in response to the allegations made by Mr Child, such adverse managerial action could amount to corrupt conduct as it could involve a partial exercise of official functions under section 8(1)(b) or a breach of public trust under section 8(1)(c) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could also involve the criminal offence of taking reprisal action under section 20 of the *Protected Disclosures Act 1994* ("the PDA") and, in respect of disclosures to the Commission, the criminal offence of causing or procuring disadvantage to a person assisting the Commission under section 93 of the ICAC Act or the criminal offence of prejudice to an employee in his or her employment for or on account of the employee assisting the Commission under section 94 of the ICAC Act.

It could also, for the purposes of section 9 of the ICAC Act, involve reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

Did Mr Child make a protected disclosure?

As Mr Child was a public official, an appropriate disclosure of information by him could amount to a protected disclosure.

Under the PDA, the disclosure would relevantly have to show or tend to show corrupt conduct or maladministration, and would have to be made to the principal officer of a public authority or to an appropriate officer under Burwood Council's Internal Reporting Policy (IRP).

The information provided by Mr Child to the Mayor of Burwood related to allegations of misuse of Council staff and resources by the General Manager for private purposes and was a disclosure that showed or tended to show corrupt conduct.

The disclosure was provided to the Mayor, who was a nominated disclosure officer under the IRP for complaints in relation to the General Manager, and therefore came within the terms of section 8 of the PDA as a protected disclosure.

The information provided to the Commission by Mr Child also related to the Befaro Units and was a disclosure that showed or tended to show corrupt conduct.

Under section 8(1)(a) of the PDA, a disclosure of appropriate information to “an investigating authority” is a protected disclosure, and the Commission is an investigating authority under the PDA. The provision of the information to the Commission by Mr Child therefore came within the terms of section 8(1)(a) of the PDA as a protected disclosure.

The provision to the Commission of information about his allegations also constituted “assistance” to the Commission by Mr Child within the terms of sections 93 and 94 of the ICAC Act, for the reasons outlined in chapter 10 about the proper construction of those sections.

Mr Child also provided information about his allegations to Ms McClymont, a journalist, prior to 4 April 2009. Under the PDA, the provision of information to a journalist is not a protected disclosure unless the public official making the disclosure has already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority, and that authority has declined to investigate or has not investigated in a timely manner. As this was not the case, the provision of information by Mr Child to Ms McClymont was not a protected disclosure.

Was adverse action taken against Mr Child as a result of his allegations?

Mr Child’s employment history at the Council

In order to provide a context for the evidence about the alleged reprisal action against Mr Child, it is necessary to consider his employment history at Burwood Council prior to his making allegations against Mr Romano and Mr Becerra.

Mr Child commenced at Burwood Council in 2003 as a Team Leader, Concreter. He was promoted to the position of Civil Maintenance Supervisor, his current position, in April 2007. Mr Child developed a close working relationship with Mr Romano. There was no dispute that Mr Romano often bypassed the Council hierarchy to provide instructions directly to Mr Child about Council work.

Their relationship strengthened when Mr Child began working long hours to manage substantial civil works undertaken in response to community concerns in the lead up to the September 2008 Council elections. Mr Romano frequently gave Mr Child directions in relation to these works. At this time, Mr Child was also involved in the Befaro Unit renovations.

In his evidence, Mr Romano acknowledged the long hours that Mr Child worked for the Council and the close working relationship that he formed with Mr Child until the latter part of 2008.

Mr Child pointed to an incident where he and other Council officers had coffee with council candidates from the Liberal Party of Australia in September 2008 as a turning point in his relationship with Mr Romano. He described ongoing arguments between him and Mr Romano over this incident, with Mr Romano accusing Mr Child of being disloyal and refusing to accept Mr Child’s explanations of the incident. Mr Romano does not dispute that he spoke to Mr Child about how inappropriate he thought Mr Child’s actions were.

Around the same time, a separate issue emerged that caused division between Mr Romano and Mr Child. Robert Risteski was employed by the Council as a labourer. Mr Child was his supervisor. Mr Risteski’s wife worked with Mr Romano’s wife, Carmela Romano. This was well known in the depot and there was speculation about Mr Romano’s closeness to Mr Risteski, and the possibility that he was favouring Mr Risteski.

In September 2008, Mr Risteski made allegations of mistreatment by Mr Child. This was investigated by Peter Macklin and resulted in no adverse findings against Mr Child. Mr Child, however, told the Commission that he formed the view that Mr Romano favoured Mr Risteski in this dispute, and he resented it.

According to Mr Child, in November 2008 Mr Romano asked if Mr Child and Giuseppe (Joe) Giangrosso would assist with the renovation of another Befaro unit. Both Mr Child and Mr Giangrosso refused to assist with further renovations on the units. Mr Child said that Mr Romano “was very upset and unhappy” with this response and that their relationship deteriorated further from this point.

Mr Romano said that he never asked for any assistance from Mr Child or Mr Giangrosso in relation to another unit. Mr Romano had another explanation for the deterioration in their relationship. Mr Romano commissioned a report from a consulting firm, Morrison Low, in relation to the operations of the Council depot where Mr Child worked. This culminated in a report, completed on 28 November 2008, containing reform recommendations that were adopted by Mr Romano on behalf of the Council. Mr Romano claimed that Mr Child resisted these reforms,

putting him at odds with Mr Romano, who was determined to see the reforms through. According to Mr Romano, this resistance was the basis for the falling out between the two men.

Under the existing structure, depot operations were led by the Works Manager. The Maintenance Service Coordinator operated as a second-in-charge, with oversight responsibilities across the depot operation. The Morrison Low report found this second supervisory position was not warranted and should be removed. The report also moved existing responsibilities around between different management positions so as to “group like functions together” and “balance out the supervisory responsibility”.

On 21 January 2009, following the adoption of the report, Mr Child met with Khaled Azer and Mr Macklin in relation to the reconfiguration of his position within the new structure. He was advised that his position name would change from Civil Maintenance Supervisor to Civil Maintenance Coordinator. He would lose responsibility for supervising street sweeping functions, which would be placed with the Waste Services Supervisor, consistent with the policy of grouping like functions together. It is not disputed that Mr Child was told at this meeting that his position would not otherwise change and would not need to be advertised.

This situation was to change in the months that followed and, in these circumstances, it is necessary to consider whether subsequent changes that were made to Mr Child’s position were a result of the complaints he had made about Mr Romano to the Mayor and the Commission. The following sections consider the complaints made by Mr Child, and the actions taken by the Council following the making of those complaints.

Mr Child makes a complaint

Mr Romano’s volatile response in February 2009 to the Saad disclosure about the Befaro Units (see chapter 11) highlighted to Mr Child that his involvement with the Befaro Units might be perceived as improper, and might have adverse implications for him.

Mr Child told the Commission that he became concerned about his own welfare and the welfare of the other depot workers who had worked on the units.

Mr Child sought advice about how to deal with the situation, and was eventually put in contact with Ms McClymont and Ms Furneaux-Cook.

After receiving a message to call Ms McClymont, Ms Furneaux-Cook discussed the situation with the Council’s media officer who then advised Mr Romano about the contact. According to Ms Furneaux-Cook, Mr Romano

spoke to her and suggested that the complainant would be Robert Cummins, “it’s about pay, a pay dispute”.

Ms Furneaux-Cook spoke to Ms McClymont by telephone on 27 March 2009. Ms McClymont told her that there were people who wanted to complain about a senior Council staff member, but they would not come into the Council Chambers as they “were worried about reprisals”. Ms Furneaux-Cook provided her personal mobile number so that the complainants could call her directly.

After Ms Furneaux-Cook spoke to Ms McClymont, she spoke to the Council’s solicitor, David Baird, “I said this is a conversation in confidence. I said I have just received a, a call from a journalist from the *Sydney Morning Herald* who is saying she is acting as a middle person, and the allegation is about a senior officer”. She explained how Ms McClymont had said, “they fear reprisals” and would not feel comfortable coming into the Council office to see her. Mr Baird suggested that they could make arrangements to see the complainants at his firm’s offices.

On 29 March 2009, Mr Child called Ms Furneaux-Cook on her personal mobile number. He outlined the general nature of his complaint, which related to the Befaro Units. Ms Furneaux-Cook suggested they could meet at the offices of the Council’s solicitors, Maddocks, but Mr Child was not comfortable dealing with Maddocks.

As mentioned above, Mr Romano was put on notice by the Council’s media officer that a journalist was trying to contact Ms Furneaux-Cook in relation to a complaint. It is not clear what other information he obtained about this, but it is apparent that by 1 April 2009 he had concluded that the complaint must relate to him, and he was concerned about his situation.

In his statement dated 20 May 2010, Mr Romano claimed that he told Mr Baird on 1 April 2009:

These allegations are unfounded. I have been denied natural justice.

This was an extraordinary statement in the circumstances. Only Ms Furneaux-Cook at the Council knew that the complaint related to Mr Romano. She had spoken to others only of a complaint about a senior officer. Accordingly, Mr Romano would have had no reason to believe the allegations specifically related to him apart from his own assumptions. In addition, he had no idea what the allegations were, so he was not in a position to proffer an opinion that they were unfounded.

According to Ms Furneaux-Cook, on 1 April 2009, she was approached by Mr Baird, and a conversation that she described as “robust” took place. Mr Baird said that Mr Romano was very concerned and was of the view that, as a matter of natural justice, he was entitled to be told about

the allegation that had been made. Mr Baird told her that he was also of this view.

Mr Baird did not agree entirely with Ms Furneaux-Cook's account, but agreed that their conversation had become heated. Mr Baird said that he had told Ms Furneaux-Cook that, while she was not obliged to reveal the identity of the complainant, he believed that the person who is the subject of the allegations had a right to know the general nature of the allegations. Mr Baird denied that he was suggesting that Mr Romano had a right to be told immediately, and said that he was discussing only general principles. He also confirmed that he had contacted the Mayor at Mr Romano's request because Mr Romano was asserting that he had been denied natural justice.

Ms Furneaux-Cook refused to tell Mr Baird the nature of the complaint or who the complaint was about.

It is one of the principles of procedural fairness, which is routinely included in complaint-handling procedures, including Burwood Council's Internal Reporting Policy, that at some stage, a person who is the subject of a complaint has the right to be informed that a complaint has been made and the substance of that complaint. When this happens depends on the circumstances of the complaint and the investigation process. Often there is considerable delay in this taking place as a premature disclosure could compromise the enquiry process. It would not have been appropriate for Ms Furneaux-Cook to disclose the information she had received to Mr Romano at that time. Nor was it appropriate for Mr Romano to instruct Mr Baird to approach Ms Furneaux-Cook for this information at that time.

In the afternoon, after Ms Furneaux-Cook had spoken to Mr Baird, she received the following email from her personal assistant:

Madam Mayor,

Pat has advised me that he wishes to cancel your regular fortnightly meetings. Accordingly I will remove them from your calendar and send out a cancellation notice.

On receiving this, Ms Furneaux-Cook telephoned Mr Romano and asked why he was doing this. According to Ms Furneaux-Cook, Mr Romano said that he felt she was denying him natural justice and that he had received advice from Mr Baird to this effect. He said that "he was very upset" and "he believes that he should take this to the Council and either resign or leave it up to the Councillors".

Ms Furneaux-Cook took this last comment as a veiled threat, insinuating that the Councillors may take adverse action against her.

Mr Romano's conduct in cancelling all his meetings with the Mayor because she, quite rightly, refused to divulge information to him about the complaint concerning him demonstrates how concerned he was about these allegations, and how desperate he was to try to obtain information about the details of the allegations.

The publication of a series of articles in the *Sydney Morning Herald* from 4 April 2009 was to provide detailed information about the allegations and the likely sources of that information.

The Sydney Morning Herald articles and their aftermath

The *Sydney Morning Herald* article published on 4 April 2009 made the following allegations with respect to Mr Romano:

1. junior members of Burwood Council staff assisted with renovations at a block of units owned by a company controlled by Mr Romano's wife, and the wives of Mr Becerra and Tony Fasanella
2. Mr Romano approached one of the Council employees and sought his assistance with respect to the units
3. some of the work done by Council employees was done in Council time
4. Council resources and equipment, including vehicles, were sometimes used during the renovations
5. Council staff also worked on the driveway at Mr Romano's home
6. Council top soil was used to fill in areas at either side of Mr Romano's driveway
7. Mr Romano did not pay those involved for the work on his driveway
8. Mr Romano took those involved in the driveway renovation to Il Buco Restaurant as a "thank you".

These allegations (with the exception of items 4 and 6, where it was considered there was insufficient evidence to make a finding) have been found by the Commission to be true.

An article on 6 April 2009 essentially repeated the previous allegations, but provided more detail. An article on 7 April 2009 stated that the Council staff involved in the issues that were raised in the articles had lodged a complaint with the Commission.

The articles had a profound effect on the Council. Mr Macklin told the Commission "it was like a bombshell".

Mr Romano responded by making blanket denials of the allegations in the newspaper articles.

On 5 April 2009, Mr Romano sent an email to all staff saying the allegations raised in the *Sydney Morning Herald* were “totally false and unsubstantiated”.

Council executives told the Commission that in an executive meeting on 6 April 2009 Mr Romano “denied the allegations”.

This is despite the fact that, even on Mr Romano’s own account, at least some of the allegations were true:

- Council staff had worked on renovations of the Befaro Units
- Council staff had worked on the driveway at his house
- Mr Romano had taken those involved in the driveway renovation to Il Buco Restaurant, at least in part as a “thank you” for that work.

The Council held an extraordinary meeting on 7 April 2009 to deal with the allegations made in the *Sydney Morning Herald*. In a report tabled by Mr Romano at this meeting, he stated, “I wish to advise the Council that I am challenging these outrageous allegations and will show them to be false so that my name is cleared as soon as possible”.

On 11 May 2009, Mr Romano attended a meeting between the Mayor and the Acting Director-General of the Department of Local Government, Ross Woodward. He handed a statement to Mr Woodward, in which he stated, “for the record, the allegations that have been made against me in the SMH are false and without foundation”.

No one at the Council challenged his blanket denials. No one sought any details with respect to any particular allegation.

At its extraordinary meeting, the Council passed a motion to establish a Code of Conduct Review Panel to investigate and address the allegations made in the newspaper articles. This review ultimately did not proceed because of this Commission’s intervention.

At the same meeting, Ms Furneaux-Cook told the Council:

The General Manager has indicated to me that he will voluntarily step aside from any involvement in the management of issues relating to the allegations in the Sydney Morning Herald articles.

On 17 April 2009, Mr Macklin sent an email to all Council about the proposed Code of Conduct review and the Commission’s investigation, and advised:

The General Manager has voluntarily stepped aside in relation to these processes.

His only involvement will be in providing information to the ICAC.

As detailed in the next section, the General Manager in fact remained very much involved in “these processes”, and other matters relating to the *Sydney Morning Herald* articles, despite his clear and significant conflict of interest. The continued involvement of Mr Romano in the decisions and actions of the Council in respect of Mr Child’s employment is highly relevant to the issue of whether such decisions and actions were taken substantially in response to the allegations Mr Child had made against Mr Romano.

Mr Romano’s conflicts of interest

The current Burwood Council Code of Conduct was adopted by the Council on 24 February 2009. It is based on the Division of Local Government’s Model Code of Conduct. Chapter 7 of this code deals with conflicts of interest.

Clause 7.1 defines a conflict of interest as:

A conflict of interests exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty.

Clause 7.2 sets out the rule that Councillors and Council staff must comply with:

You must avoid or appropriately manage any conflict of interest. The onus is on you to identify a conflict of interest and take appropriate action to manage the conflict in favour of your public duty.

In relation to the allegations against Mr Romano made to the Mayor and in the *Sydney Morning Herald*, the Council had an interest in ensuring all relevant facts were brought forward so that it could ensure a proper investigation to establish whether the allegations were correct and in the proper ongoing administration of the Council.

Mr Romano had a personal interest in avoiding any adverse findings in relation to his actions.

Mr Romano denied all of the allegations. If his denials were true, then his interests and the Council’s interests may have aligned to a significant extent. No such assumption, however, could reasonably be made by anyone at the Council at the commencement of its enquiry process.

Mr Romano should not have had any involvement in the management of issues relating to these allegations. His only

involvement should have been to provide statements, as required, to support the various related processes.

Mr Romano was not formally notified by Mr Child, Ms Furneaux-Cook or the Commission that Mr Child had made allegations against him. The Commission, however, is satisfied that Mr Romano was well aware of Mr Child's status as a complainant. The article published by the *Sydney Morning Herald* made reference to junior members of Council staff who had been involved in work on the Befaro Units and specifically mentions one "council worker" who had been receiving emails and text messages from Mr Romano. This was clearly Mr Child. Mr Romano's response to the article demonstrated his belief that Mr Child was involved in this disclosure. The following day, 5 April 2009, Mr Romano sent an email asking Mr Macklin to recover any "warnings, grievances by other staff and file notes" relating to Mr Child. On 9 April 2009, Mr Romano directed Mr Mailey in relation to the conduct of surveillance on Mr Child (dealt with in the following section). On 25 April 2009, Mr Romano sent an email to Ian Dencker and Les Hullick asking for an update on the depot restructure that was eventually to render Mr Child's position redundant.

In the same email, Mr Romano wrote:

Has PM [Peter Macklin] issued letters to individuals who are known to us as doing private work after hours and asked them to explain in writing why they have not sort [sic] approval for secondary employment. If they do not respond I believe we have a responsibility to report them to the taxation office. This should be pursued immediately. The people I am aware of from IPP reports are:

- a. Joe Giangrosso
- b. Steve Child
- c. Barry Web [sic]
- d. John Vadala
- e. Ommar [sic] Issa
- f. Mowing crews

There may be others. Have PM and Richard [Mailey of IPP Consulting] compile a list.

All the named persons in this list had been involved in the Befaro Unit renovations.

Any pretence that Mr Romano was managing his conflict of interest appropriately, in relation to the consideration of the employment of Mr Child and others who had been involved in the Befaro Units, fell away in the second half of 2009. By this time, Mr Romano was convening a

series of meetings involving himself, his lawyers, Council's lawyers and select Council staff to discuss these very matters and to formulate strategies for their management. These meetings were referred to as "strategy meetings" or "lawyers meetings".

The stark nature of Mr Romano's conflict of interest with respect to matters being dealt with in these meetings is highlighted by the agenda for the meeting held on 19 August 2009. The listed item headings were:

- "ADB matter re Y Saad complaint"
- "Robert Cummins"
- "Steve Child"
- "G Giangrosso"
- "Depot structural changes"
- "Workers Compensation Issues", which included references to Mr Cummins, Mr Child and Mr Giangrosso.

There was no matter on the agenda where Mr Romano did not have a conflict of interest, as canvassed in this and other chapters of this report. There was no part of the meeting that he could properly attend. Yet, Mr Romano did attend and participate in this meeting.

Mr Romano's continued involvement in Council decisions and actions will be considered in each of the three areas where adverse management action was taken by the Council in respect of Mr Child's employment. One aspect of his involvement is dealt with below in relation to the consideration of corrupt conduct.

Corrupt conduct

Mr Romano's email of 25 April 2009, relevant parts of which are set out above, was sent to Mr Hullick and Mr Dencker, two members of the Council's executive group. In respect of Mr Child, it listed him as one of the people who had been identified through IPP surveillance reports as undertaking private work after hours without secondary employment approval. It said:

Has PM [Peter Macklin] issued letters to individuals who are known to us as doing private work after hours and asked them to explain in writing why they have not sort [sic] approval for secondary employment. If they do not respond I believe we have a responsibility to report them to the taxation office. This should be pursued immediately.

Mr Romano ended his email by urging that, in light of the "malicious allegations" that had been made, immediate action be taken on the items in his email.

Mr Romano, who had supposedly stood aside from issues in relation to the depot because of a conflict of interest, should have taken no part in giving instructions or issuing suggested courses of action to Mr Hullick and Mr Dencker, particularly instructions or suggestions that targeted a Council officer who had made allegations against Mr Romano. The Commission is satisfied that Mr Romano included Mr Child in this email as an officer to target substantially because of the allegations Mr Child had made against Mr Romano.

Mr Romano said that he listed the officers named in his email because they had been named in IPP reports as doing private work after hours. The IPP reports and investigator notes do not list these five people as doing private work after hours. The only persons who are referred to by name are Mr Giangrasso and Mr Child, and Mr Child is not linked in the notes with any private work after hours. Mr Romano tried to explain this by saying that Mr Mailey of IPP Consulting had provided him with verbal reports that justified his claims. Mr Mailey was not personally conducting surveillance and relied on information provided by his operatives. As the operatives' notes and reports did not contain the information contained in Mr Romano's email, the Commission is satisfied that this is not the basis upon which the names, including Mr Child's, were included in the email. Mr Mailey confirmed in his evidence that the surveillance conducted by IPP Consulting did not uncover any evidence of wrongdoing by Mr Child.

For the reasons outlined in detail in the following section relating to the surveillance of the depot workers, the Commission is satisfied that Mr Romano believed or suspected at the time he wrote this email that Mr Child was one of the people who had complained about him to the Mayor and the Commission.

Mr Romano's actions in urging senior Council officers to take action in relation to Mr Child by seeking an explanation in writing for an alleged disciplinary breach of failing to obtain approval for secondary employment and by reporting him to the Australian Taxation Office could constitute "detrimental action" under the PDA, on the basis that his actions could comprise or involve "discrimination, disadvantage or adverse treatment in relation to employment" in respect of Mr Child under section 20(2) of the PDA.

The definition of "detrimental action" in the PDA is broad in its scope and is intended to cover a wide variety of circumstances in which reprisal action might be taken against officers who make protected disclosures. The reference to "discrimination, disadvantage or adverse treatment in relation to employment" would, if construed in accordance with the normal meaning of those terms, extend to circumstances where a senior officer has, as a reprisal action, urged his subordinates in writing to take

adverse action against an officer. In the Commission's view, this is so even where, as in the present case, there is no evidence that the subordinate officers took action in accordance with Mr Romano's wishes. The fact that Mr Romano's email put Mr Child in real peril of such action would still amount to disadvantage or adverse treatment in relation to Mr Child's employment.

Mr Romano's actions, which were taken substantially because he believed or suspected that Mr Child had made a complaint about him to the Mayor and the Commission, also involved a dishonest or partial exercise of Mr Romano's official functions for the purposes of section 8(1)(b) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could amount to a criminal offence under section 20(1) of the PDA.

In reaching this conclusion, the Commission has had regard to the fact that, under section 20(1A) of the PDA, in any proceedings for an offence against the section it would lie on a defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected disclosure.

For the purposes of section 9 of the ICAC Act, Mr Romano's actions outlined above could also involve the criminal offence of causing or procuring disadvantage to a person for or on account of that person assisting the Commission, within the meaning of section 93(2)(c) of the ICAC Act, in breach of section 93(1) of the ICAC Act.

The re-profiling of Mr Child's position

After the Morrison Low review and report were completed in November 2008, the Council established a Cross Function Team (CFT) to consider issues relevant to depot reform. At relevant times, the CFT included all of the Council executives (except Mr Romano, who stood aside from the reform process on 16 February 2009) and the HR Manager, Mr Macklin. The minutes of a meeting of the CFT on 7 April 2009, three days after the first article appeared in the *Sydney Morning Herald*, record that the civil maintenance position held by Mr Child had been re-profiled and note that a draft position description for that re-profiled position of Civil Maintenance Co-ordinator had been prepared. This would lead to the position being upgraded and then advertised in circumstances where Mr Child had no prospect of regaining the position. In an email on 12 June 2009 to the Council executives (including Mr Romano), Mr Macklin confirmed that the restructure of the position would make Mr Child "redundant".

Mr Child worked extremely hard and was able to extract a significant effort from those under his authority. It is clear on the evidence that at times he was working such

long hours that concerns were expressed by Council management about occupational health and safety issues.

The final draft of the Morrison Low report was completed on 28 November 2008. There is no evidence that the review was requested for any inappropriate purpose, as lack of planning and structure seemed to be an issue at the depot where Mr Child worked.

The outcomes of the review were never going to be easy for Mr Child. He came from a labouring background. He would need to extend himself and develop as a manager in order to operate under the reforms that were being promoted by Morrison Low. The Council gave him some support in this respect by arranging for him to be “coached” by management consultant Norman Turkington.

There were other problems that emerged for Mr Child as a result of the report.

Morrison Low recommended steps to rein in the overtime that had blown out in the period leading up to the Council elections. This presented personal difficulties for Mr Child, as it meant a substantial reduction in his income. It also involved difficulties for his staff, who had grown used to these additional payments. In addition, work practices had developed around the availability of overtime. Pre-planning was less important when overtime could accommodate emerging contingencies.

At the beginning of 2009, John Dardano commenced as Depot Works Manager, a position that supervised Mr Child’s position. Mr Child found himself suddenly being closely supervised in a manner that he was not used to. He complained about Mr Dardano “always looking over my shoulder”. Mr Dardano set about implementing some of the requirements of the Morrison Low report, including the measures directed at reducing overtime.

This culminated in an incident in the second half of February 2009, when rain delayed the completion of concrete work that Mr Child was overseeing. Mr Child was now required to obtain Mr Dardano’s authority for his staff to work overtime. The two men argued over the telephone about whether overtime should be incurred, and Mr Child responded by directing his staff to work the extra time and then paying them for their additional work out of his own pocket. This resulted in a complaint against Mr Child that was investigated by Mr Macklin. Mr Macklin found that Mr Child’s actions were inappropriate and undermined Mr Dardano’s authority. On 19 March 2009, he was issued with a letter of warning, a copy of which was placed on his personnel file.

Mr Child acknowledged to the Commission that his actions were inappropriate. He said they were born out of frustration with the approach taken by Mr Dardano.

Mr Child thought the disciplinary action taken by the Council was an overreaction.

There were other signs of Mr Child struggling with reform measures. On 17 February 2009, Mr Child met with Mr Romano and Mr Dardano. Minutes were taken at this meeting, which was clearly tense. Mr Child complained about a number of reform developments.

Mr Child wrote to Mr Romano two days later, on 19 February 2009, again raising concerns about reform issues and complaining about being “attacked and harassed by your senior staff on a daily basis”. He told Mr Romano:

Even though it seems to me that I am being heavily criticised I will come to work every day and give 150%. I would further like to assure you that I support you personally, your leadership and your vision for Burwood completely, even though it seems you sometimes seem to doubt this. All I ask for is a little bit of respect for me and my teams.

There is no doubt there was a personal clash between Mr Dardano and Mr Child. Mr Dardano told the Commission, “at first I found Steve Child impressive as a site supervisor and worker”, but according to Mr Dardano, Mr Child later became obstructive as changes were brought in. It is clear that Mr Dardano formed an adverse view of Mr Child and told people that he was not an appropriate person for the Civil Maintenance Co-ordinator position.

It is also clear that, at some stage prior to 4 April 2009, Mr Romano also decided that he wanted Mr Child to be removed.

On 21 January 2009, Mr Child met with Mr Azer and Mr Macklin, and was told his position would be only slightly changed under the reforms arising from the Morrison Low Report and that the position would not need to be advertised.

As discussed in chapter 11, Mr Romano contacted Mr Child after he found out about the Saad disclosure on 10 February 2009. The Commission is satisfied that Mr Romano told Mr Child that he wanted to remove Youssef (Joe) Saad from the Council workforce. Although Mr Child himself was now a person who threatened Mr Romano’s position, as he too could provide information to authorities in the way that Mr Saad had done, it appears that at this stage Mr Romano still considered Mr Child someone he could trust.

Mr Romano met with his executive as well as Mr Dardano and Mr Macklin on 16 February 2009. Extensive discussion took place in relation to the depot reform. Mr Child’s position was canvassed at length. The minutes of this meeting are sparse and make no reference to the discussion that took place in relation to Mr Child. A series

of witnesses gave accounts of this meeting and there are a number of conflicting versions of the discussion that took place. It is clear that Mr Dardano expressed a view that Mr Child should not be retained. According to Mr Cummins, Mr Romano insisted that Mr Child's position not be altered. Mr Macklin told the Commission that a position was taken by the executive, rather than by Mr Romano, that Mr Child "would remain essentially in his position". He said this was a consensus decision and Mr Romano was part of the decision-making process. However, in his statement responding to Mr Child's workers compensation claim, Mr Romano said that at this meeting he formed the view that Mr Child was no longer suitable for the position however "my view was not supported by the executive team".

The Commission prefers the accounts of Mr Cummins and Mr Macklin over that of Mr Romano, and is satisfied that Mr Romano supported Mr Child's retention at this time, even though he knew that Mr Child had information that could threaten his position.

In Mr Child's letter to Mr Romano on 19 February 2009, following their meeting on 17 February 2009, he referred to a telephone conversation that the pair had after the meeting on the evening of 17 February 2009:

During our phone conversation on Tuesday night you asked me to fall in line and to trust you with the changes we are currently working through at the depot ... I want to assure you that I am taking you at your word and I am trusting your judgment, as I am finding it very hard to understand a lot of the changes you are making.

This suggests that Mr Romano was still trying to engage Mr Child in the reform process at that time. This was about to change.

In his statement to the workers compensation insurer, Mr Romano said that at their meeting on 16 February 2009 the Council executive agreed that the new Works Manager who was to replace Mr Dardano, who was only temporary, "should be given the opportunity to assess the requirements of the new role and the structure for the depot generally".

On 16 February 2009, Mr Romano formally stepped aside with respect to the depot reform process, appointing Mr Dencker as Acting General Manager with respect to that issue. This may have resulted from the Saad disclosure and a perceived conflict of interest between Mr Romano's public and private interests with respect to certain depot staff. Despite having formally stepped aside, however, Mr Romano continued to be involved in matters relating to the depot reform process, as outlined below.

Interviews for the new Works Manager, who would have a pivotal role in the reform process, took place in the latter

part of February 2009. Stephen Ellul, who was ultimately appointed to this position, told the Commission how his second interview involved an hour-and-a-half discussion with Mr Azer and Mr Romano at a cafe. Mr Romano confirmed this took place on 26 February 2009. Mr Ellul told the Commission that, during this meeting, Mr Romano specifically identified Mr Child as someone who was resisting change. According to Mr Romano, Mr Ellul told him, "I know exactly how to deal with these people".

On 27 February 2009, Mr Romano received a text message from an unknown mobile number that stated, "your corruption is about to be exposed". On 3 March 2009, he received a further text message, "your corruption is about to be exposed very soon". Mr Becerra also received a message from the same unknown mobile service, stating "your corruption is about to be exposed very soon, with your mate". At the Commission's public inquiry, Mr Giangrasso acknowledged that he sent these text messages.

Mr Child received a disciplinary letter on 19 March 2009 in relation to the payment of overtime to staff members with funds from his own pocket. On 23 March 2009, Mr Child sent an email to Mr Romano complaining about this. In this, he told Mr Romano:

At this point I am about to take legal action to find out if Council has a policy to cover the action that I took. I am sure you are aware that I have also paid staff members at your request on Election Day.

As outlined in chapter 8 of this report, the Commission is satisfied that Mr Romano had arranged, through Mr Child, for depot staff to hand out Australian Labor Party pamphlets on election day, and that he recognised this email as referring to that event. The inclusion of this reference by Mr Child in his email may have been intended as a veiled threat to Mr Romano, flagging Mr Child's knowledge of sensitive matters. In any event, it highlighted the threat that Mr Child presented to Mr Romano.

Mr Romano replied to this email with a letter dated 25 March 2009. His reply dismissed Mr Child's plea for him to intervene in the disciplinary process. The letter was seen by members of the executive and Mr Macklin as an indication that the previous good relationship between the two men had now broken down.

Mr Ellul commenced in the position previously known as the Depot Works Manager on 23 March 2009. Mr Child went on leave on 26 March 2009. According to Mr Ellul, he had little to do with Mr Child in their three days of shared work time. A meeting was held on 30 March 2009, six days into Mr Ellul's tenure at the Council, in circumstances where Mr Ellul had barely met Mr Child. This involved the Council executive as well as Mr Ellul,

Mr Dardano and Mr Macklin. At this meeting, there was discussion of Mr Child's position being revised and ultimately advertised.

On 31 March 2009, Mr Ellul sent an email to Mr Dardano enclosing revised position descriptions in relation to a number of senior depot positions. The revised position description for the Civil Maintenance Co-ordinator position now had as one of its essential criteria that the person must have tertiary qualifications. This additional requirement made the position significantly different from what it had been, thus requiring the position to be advertised. This additional requirement also precluded Mr Child from reapplying for his own position, as he had no tertiary qualifications.

On 7 April 2009, three days after the publication of the first article in the *Sydney Morning Herald*, at the CFT meeting in relation to the depot reform process, a decision was made to reprofile the Civil Maintenance Coordinator position. The requirement for tertiary qualifications was moved from "essential criteria" to "desirable criteria", "so as not to exclude the current Civil Maintenance Coordinator, Steve Child from reapplying for the position". Following this meeting, however, the position description was further revised, and now included as the first two essential criteria, "Demonstrated experience in project management of multi-faceted projects, including project definition and cost planning" and "Demonstrated experience in contract administration, with specific experience in preparation and use of contract documentation for multi-faceted civil infrastructure projects". These new requirements were now the basis on which the position would be upgraded and advertised.

The minutes of the CFT meeting on 7 April 2009 record that Mr Macklin and Mr Ellul were to meet with Mr Child to advise that his position had been "significantly re-profiled as a result of the Morrison & Low report ... the role will be re-advertised, and that SC [Mr Child] can reapply for the role". This is despite the fact that, on 21 January 2009, Mr Child had met with Mr Azer and Mr Macklin and had been told that his position would be only slightly changed under the reforms arising from the Morrison Low report and that the position would not need to be advertised. Further, the Morrison Low report had not recommended the significant changes to the position discussed above, which required it to be re-advertised.

The minutes of the CFT meeting on 18 May 2009 record "PM [Mr Macklin] is ensuring every opportunity is given for current Civil Maintenance Supervisor to apply for the role". This was disingenuous, as Mr Macklin, at the request of Mr Romano, and as evidenced by a letter on 19 May 2009 had sought written legal advice from Maddocks about whether Mr Child could claim constructive dismissal if he failed to win the position and the Council's duties if

Mr Child was to become redundant. There is evidence that suggests that Mr Macklin and the Council executive had no desire for Mr Child to have any chance of coming back to his position. On 12 June 2009, 25 days after this meeting, Mr Macklin sent an email to Mr Romano and the executive warning that Mr Child might try to come back to work, and advising them that, at that time, there was no sufficient basis to ward him off through suspension.

The decision on 7 April 2009 to move tertiary qualifications from "essential criteria" to "desired criteria", "so as not to exclude" the current Civil Maintenance Supervisor, was similarly disingenuous. There was no intention to give Mr Child an opportunity of reclaiming his position, only an intention to avoid the appearance of a reprofiling, which was instigated for the purpose of removing Mr Child from the position.

Conclusion

The Commission is satisfied that the primary intention behind the reprofiling of the Civil Maintenance Coordinator position was to remove Mr Child, for the following reasons:

- In his evidence, Mr Ellul discussed taking a hard line to the restructure process. Mr Azer quoted Mr Ellul as talking about the need to fit the person to the position, rather than the position to the person. This appears, however, to have been the only occasion that Mr Ellul applied this hard line approach. No other staff member had to apply to win their position back.
- The initial change suggested by Mr Ellul in the revised position description sent to Mr Dardano on 31 March 2009 was palpably intended to facilitate Mr Child's removal, as it made tertiary qualifications an essential criterion. Once this requirement was made desirable rather than essential, subsequent amendments were made to make project management and contract management skills and experience essential. The manner in which the position description developed supports the view that the primary concern was to remove Mr Child, with a secondary consideration being to settle a viable position description.
- The reform process was based around the Morrison Low report. The minutes of the CFT meeting on 7 April 2009 commenced by stating "all agree that the Morrison Low report is sound as approved by the General Manager". Some of the proposed changes, however, were inconsistent with the Morrison Low report. In particular, the Morrison Low report had not recommended incorporating planning and contract management

functions into Mr Child's position, and had in fact recommended that contract management should be kept separate from the Civil Maintenance Co-ordinator position, so it would not distract the civil maintenance teams from their core work. The report had also not recommended making tertiary qualifications mandatory or desirable for the position. The CFT's willingness to accept departures from the report when Mr Ellul had been in the position for such a short time are indicative of an eagerness to achieve a desired outcome, that is the removal of Mr Child.

- The position was adopted without any real opposition, despite a number of adverse organisational implications:
 - it involved removing a long-term employee with a proven record for achieving results
 - it involved a substantial departure from the Morrison Low report, which was the Council's blueprint for reform
 - it involved additional costs through increasing the position's wage. It gave the Council no increased capacity. The contract management functions that were being taken on by the position were already being performed by Council Engineer John Inglese.

Despite these concerns, there is insufficient evidence to find that Mr Child's position was changed as a result of his having made disclosures to the Mayor and the Commission about Mr Romano. The process that would have led to his removal was commenced prior to these disclosures being made, although Mr Child's conduct in making allegations against Mr Romano may have operated as a catalyst to fast track pre-existing plans.

In the circumstances, the Commission does not make findings of corrupt conduct in relation to any Council officer involved in the re-profiling of Mr Child's position.

Depot surveillance

In early March 2009, Mr Mailey of IPP Consulting was contacted by Mr Romano to commence surveillance on Council depot workers. According to Mr Mailey, Mr Romano said, "We need to carry out surveillance to verify the activities of alleged pilfering and thieving from the depot". Mr Romano said that he had received three anonymous letters during 2007 and 2008 in relation to alleged irregularities at the depot.

Surveillance commenced on 3 March 2009. Mr Romano told the Commission that when arrangements were being made to commence surveillance, "I actually stepped out.

I said to the executive, given the allegations that have occurred against me earlier this month, I felt that I was conflicted and didn't participate in any decision making from that point onwards". The reference to the earlier allegations is a reference to the Saad disclosure, which related to the Befaro Units, and the conflict obviously arose from the fact that Mr Saad and other Council staff who had worked on the Befaro Units were employed in the depot.

Despite his perceived conflict of interest, Mr Romano directed Mr Macklin to provide Mr Mailey with photographs of Mr Child and Mr Giangrasso. No similar direction was made in relation to any other depot worker.

The Commission obtained the IPP Consulting file in relation to the depot surveillance. This contained a hard copy of an email sent by Mr Macklin to Mr Mailey on 2 March 2009. This email made reference to the meeting that Mr Mailey had attended with Council staff on that day, and Mr Child's name and address were handwritten on the hard copy of the email. It is unclear when this was written or why, but it is likely it was written on or near 2 March 2009 to assist the surveillance process. The Council had some intelligence that Mr Giangrasso was engaged in secondary employment while on sick leave. There was no known intelligence of this sort in relation to Mr Child.

The focus on Mr Child in the instructions provided to IPP Consulting is consistent with other evidence which suggests that, by early March 2009, Mr Romano was seeking Mr Child's removal from the Council. On 26 February 2009, Mr Romano had met with Mr Ellul, who was to be Mr Child's new supervisor, and identified Mr Child as someone who was resisting reform in the depot.

The timing of the request for surveillance in March 2009 is also significant, in that the surveillance allegedly related to anonymous allegations about the depot that were received by Mr Romano in 2007 and 2008. Of course, Mr Romano would not have wanted to organise surveillance on the depot workers in 2008, as at that time several of them, including Mr Child and Mr Giangrasso, were working on the Befaro Units. While the delay in instituting the surveillance was attributed by some to a desire to await the Morrison Low review and report, this review and report were undertaken between September and November 2008, and do not explain the timing of the request for surveillance in March 2009.

After an initial period of surveillance, Mr Mailey went back to the Council executive on 16 March 2009, presented the findings of the initial surveillance and obtained authority to conduct further surveillance. This time, through Maddocks, a warrant was obtained under the *Workplace Surveillance Act 2005* to use camera and video equipment in the course of the surveillance. The initial warrant was obtained on 19 March 2009 and authorised covert surveillance from

19 March 2009 through to 18 April 2009. This warrant authorised surveillance of 13 specified depot staff. A variation was sought and obtained on 20 March 2009, extending the list of persons who could be the subject of covert surveillance to include everyone at the depot.

The initial affidavit by Darren Gardner, Employment Partner at Maddocks, identified that:

The employer has reasonable grounds of suspecting that the employees may be stealing from the employer and/or engaging in private work for payment during work hours, possibly using employer's equipment ... further, employee Jo Giangrasso is known to be engaging in private work for remuneration while he has been on sick leave.

According to the records of IPP Consulting, a direction was given to terminate the surveillance on 4 April 2009 but another direction to recommence the surveillance was given on 7 April 2009, and the surveillance then continued until 15 April 2009. The results of the surveillance were largely unproductive and are irrelevant in the context of this report, although there was video footage obtained of Mr Giangrasso performing private work while on sick leave.

Surveillance activities were specifically focused on Mr Child's house on 8, 9 and 14 April 2009. Mr Mailey admitted that this concentration on Mr Child's house was longer and more detailed than that on other staff. On 9 April 2009, IPP Consulting had operatives conduct surveillance on Mr Child at his home in Shellharbour, in circumstances that had little to do with the alleged purposes of the surveillance. Mr Romano, who had delegated responsibility for the surveillance operation to Mr Dencker, was in ongoing and regular contact with Mr Mailey of IPP Consulting. At Mr Romano's direction, Mr Mailey instructed his operative to photograph Mr Child's home so Mr Romano could assess whether any Council material had been used in its construction. There was no information available to the Council that suggested that this may have happened and none emerged as a result of the surveillance. This was a speculative investigation performed at Mr Romano's direction with a view to discrediting Mr Child for Mr Romano's benefit. Mr Romano's close involvement and interest in the investigation of Mr Child is demonstrated by an email sent to him from Mr Mailey on 9 April 2009 containing a photograph of Mr Child's house. In the email, Mr Mailey said, "Pat we are still trying to receive the data and I will call you when we have it this is a photograph of Childs house at Shell harbor".

Mr Mailey admitted in evidence that there was no proper basis for taking this photograph and no proper basis for sending it to Mr Romano.

Mr Dencker, who was officially liaising with IPP Consulting about the surveillance operation for the Council, admitted during the public inquiry that the surveillance operation was part of a "legal strategy" to clear Mr Romano's name:

Dencker: My understanding was that the General Manager had said that these allegations were made primarily to avoid the restructure process or disciplinary proceedings and, and that he in consultation with our lawyers wanted to demonstrate to the ICAC evidence which supported his claim.

...

Yeah, I think he was saying, I'm trying to clean up the depot and because I'm trying to do that these people are now retaliating against me with a vicious media smear campaign to try and get me to stop to clean up the depot.

Assistant Commissioner: And you thought that in those circumstances it was appropriate to use Council resources to get evidence that supports his view and clears his name?

Dencker: Yes, and I also noted at the time that it was a matter that had involved our lawyers and they had, from my limited knowledge, given some parameters about how he would conduct, that, that exercise.

According to IPP Consulting records, it was Mr Dencker who re-instituted the surveillance from 7 April 2009. Although Mr Dencker denies this, it is unlikely that IPP Consulting would make a mistake on this issue in both the email and the letter where Mr Dencker was named, and the Commission accepts that Mr Dencker instructed that the surveillance should re-commence on 7 April 2009. It is also clear from the reference in his evidence to the "vicious media smear campaign" against Mr Romano that the allegations against Mr Romano in the *Sydney Morning Herald* from 4 April 2009 were at least part of the justification for the surveillance.

Corrupt conduct

The instructions that Mr Romano gave to Mr Mailey of IPP Consulting after 7 April 2009 relating to surveillance activities targeting Mr Child, in particular, by photographing his house for evidence of possible theft of Council material, were actions that were adverse to Mr Child's employment. One of the purposes of these actions was to find evidence that Mr Child had been involved in wrongdoing, with a view to dismissing him, taking disciplinary action against him or damaging his credibility as a witness in respect of complaints he had made against Mr Romano. Mr Romano, who had supposedly stood aside from the depot surveillance issue because of a conflict of interest, should have taken no part in giving instructions to Mr Mailey, particularly instructions that targeted a Council officer who had made allegations against Mr Romano. The Commission is satisfied that Mr Romano directed these surveillance activities in respect of Mr Child substantially because of the allegations he had made against Mr Romano.

Mr Romano's action could constitute detrimental action for the purposes of section 20(1) of the PDA as it could comprise or involve "discrimination, disadvantage or adverse treatment in relation to employment" in respect of Mr Child under section 20(2) of the PDA.

The fact that Mr Mailey's actions were taken under the authority of a warrant does not mean that the instructions by Mr Romano could not constitute detrimental action. Actions that are otherwise legal, such as dismissing or disciplining an employee, may still amount to offences under section 20 of the PDA, if the actions are taken substantially in reprisal for a protected disclosure having been made. It is the motive of the person who takes the detrimental action that is the crucial factor, and the fact that legal advisers or others have authorised or supported the actions on the basis of information provided to them will not excuse a person whose actions are taken substantially in reprisal in breach of the PDA.

Mr Blake submitted that the Commission could not be satisfied that Mr Romano knew that Mr Child had made a protected disclosure against him, and therefore could not find that any of his actions in respect of Mr Child could amount to a breach of section 20 of the PDA. The basis of this submission was that a person could not take detrimental action "substantially in reprisal" for a protected disclosure, if the person taking the detrimental action did not know that the protected disclosure had been made.

The Commission is satisfied that, for a person to be found to have taken detrimental action substantially in reprisal, the person would have to know, believe or suspect that the person against whom detrimental action was taken had made a protected disclosure.

It would substantially weaken the effect of the reprisal provisions if knowledge of the disclosure, as opposed to belief or suspicion, was necessary. This construction would mean that a person who took detrimental action against a public official because the person suspected or believed that the public official had made a protected disclosure would not commit an offence. Such a construction is contrary to the broad purpose of the PDA.

In this case, the evidence supports a conclusion that Mr Romano believed or suspected that Mr Child had made a protected disclosure.

Mr Romano was aware that a complaint was made to the Mayor, Ms Furneaux-Cook, although he had not been told the identity of the complainant or the details of the complaint. Allegations against Mr Romano and Mr Becerra in relation to the Befaro Units, and about Mr Romano's driveway, appeared in the *Sydney Morning Herald* on 4 April 2009. The article published that day indicated that the complainants were Council employees who had performed work on the Befaro Units and Mr Romano's driveway. Only Mr Child, Mr Giangrosso and Mr Issa had been involved in both episodes and this was known to Mr Romano. The article made a reference to email messages that Mr Romano had sent to Mr Child's email address and text messages that Mr Romano had sent only to Mr Child's mobile telephone service. The day after this article appeared, Mr Romano directed Mr Macklin to obtain "copies of all warnings, grievances by other staff and file notes" against Mr Child.

The evidence known to Mr Romano about Mr Child's involvement in providing information to the *Sydney Morning Herald* strengthened when a further article was published on 6 April 2009. This specified, "Three council staff have told the *Herald* that they did work free on Mr Romano's driveway on Saturday September 15, 2007". Only three Council staff worked on Mr Romano's driveway: Mr Child, Mr Giangrosso and Mr Issa. This was known to Mr Romano. In all these circumstances, Mr Child's participation in making the allegations would have been apparent to Mr Romano.

It would also have been apparent to Mr Romano, from these circumstances, that Mr Child was likely to be responsible for, or at least involved in, the allegations made the previous Saturday to Ms Furneaux-Cook. Mr Romano was aware that the complaint by staff made to the Mayor had been made through contact by a journalist from the *Sydney Morning Herald* and he would therefore have had good reason to suspect or believe that the staff who had spoken to the *Herald*, which clearly included Mr Child, had also spoken to the Mayor.

On 7 April 2009, the *Sydney Morning Herald* reported, "Burwood Council staff who claim that they did work

on an apartment block owned by the Council's General Manager and its principal architect have lodged a complaint with the Independent Commission Against Corruption". In view of the information in this and previous articles, the Commission is satisfied that by 7 April 2009 Mr Romano also suspected or believed that Mr Child was assisting the Commission.

One of the purposes of the surveillance actions that Mr Romano directed in relation to Mr Child was to find evidence that Mr Child had been involved in wrongdoing, with a view to dismissing him, taking disciplinary action against him or damaging his credibility as a witness in respect of complaints he had made against Mr Romano.

As outlined in the section of this chapter relating to corrupt conduct by the sending of the email of 25 April 2009, the definition of "detrimental action" in the PDA is broad in its scope and intended to cover a wide variety of circumstances in which reprisal action might be taken against officers who make protected disclosures. The reference to "discrimination, disadvantage or adverse treatment in relation to employment" would, if construed in accordance with the normal meaning of those terms, extend to circumstances where a senior officer has, as a reprisal action, directed surveillance activities to find damaging evidence to base disciplinary proceedings against an officer. In the Commission's view, this is so even where, as in the present case, no damaging evidence was found to base disciplinary action.

The targeting of Mr Child for surveillance for this purpose would still amount to disadvantage or adverse treatment in relation to Mr Child's employment.

In all the circumstances, the Commission is satisfied that Mr Romano engaged in corrupt conduct under the ICAC Act on the basis that his actions in directing surveillance activity in relation to Mr Child after 7 April 2009 was conduct that involved a dishonest or partial exercise of his official functions for the purposes of section 8(1)(b) of the ICAC Act. It was also conduct that could, for the purposes of section 9 of the ICAC Act, amount to a criminal offence under section 20(1) of the PDA, on the basis that it was detrimental action that comprised or involved "discrimination, disadvantage or adverse treatment in relation to employment" for the purposes of section 20(2) of the PDA and was taken substantially in response to Mr Child having made a protected disclosure to the Mayor of Burwood and the Commission.

In reaching this conclusion, the Commission has had regard to the fact that, under section 20(1A) of the PDA, in any proceedings for an offence against the section it would lie on a defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected disclosure.

For the purposes of section 9 of the ICAC Act, Mr Romano's actions as outlined above could also involve the criminal offence of causing or procuring disadvantage to a person for or on account of that person assisting the Commission, within the meaning of section 93(2)(c) of the ICAC Act, in breach of section 93(1) of the ICAC Act.

The suspension of Mr Child

Mr Child went on sick leave from 30 March 2009 to around 20 or 21 April 2009, and then from around 24 April 2009 until he was suspended on 17 August 2009. Mr Child said that the basis of his sick leave was stress caused by Mr Romano's actions prior to 30 March 2009, as detailed in this and preceding chapters of this report.

Mr Child's suspension on 17 August 2009 was purportedly based on a complaint of discrimination against Mr Child and others that had been made by Mr Saad to the Anti-Discrimination Board (ADB). Mr Child gave evidence that he considered his suspension was a reprisal for the allegations he had made against Mr Romano.

Mr Saad's complaint was lodged at the ADB on 15 July 2009. It is clear, however, on the evidence that some officers at the Council had been looking for some time prior to that date for a reason to keep Mr Child from returning to the Council workplace.

In relation to Mr Romano:

- on 5 April 2009, he sent an email asking Mr Macklin to recover any "warnings, grievances by other staff and file notes" relating to Mr Child
- on 9 April 2009, he directed Mr Mailey in relation to the conduct of surveillance on Mr Child's house, with a view to finding evidence that Mr Child had been involved in theft or other wrongdoing.

On 12 June 2009, Mr Macklin sent an email to senior Council staff, including Mr Romano, raising the possibility that Mr Child and Mr Giangrosso, who were on sick leave, might present themselves as fit for work. He said he had consulted Maddocks and, in relation to Mr Child, "apart from the issue of him allegedly contacting the media, I do not believe we have the grounds to suspend him".

In an email dated 29 June 2009 to Mr Baird and Mr Gardner, Mr Macklin advised:

I have met with the Executive Team this morning (Les Hullick, Ian Dencker & Khaled Azer) and it is Councils preferred position that if either of these employees (Mr Cummins and Child) attempts to return to work that they are suspended from the workplace for the duration of the investigation.

In this email, Mr Macklin canvassed whether Mr Child might be suspended for making phone calls to a “SMH Journalist”. He asked Mr Baird and Mr Gardner to liaise with Mr Dencker and Mr Romano on the issue as a matter of urgency; an indication of how Mr Romano remained inappropriately involved in issues relating to the employment of Mr Child.

At the public inquiry, Mr Macklin told the Commission about the instructions he had given Maddocks.

- A. *To the best of my recollection it was the, the, it probably was words to the effect that, that the executive didn't want, didn't want Steve Child back in the workplace.*
- Q. *And how can we keep him out? That's what you were trying to find out wasn't it?*
- A. *Yes.*

Mr Macklin told the Commission that Mr Romano made it abundantly clear on a number of occasions after Mr Child went on sick leave that he did not want Mr Child back in the workplace. Mr Romano denied this.

Mr Macklin was the only senior Council officer who presented as a frank and credible witness on issues relating to the treatment by the Council of staff who had made allegations against Mr Romano. He made candid concessions about the influence that Mr Romano continued to have on these issues. The Commission accepts Mr Macklin's evidence on this point.

On 8 July 2009, Erin Wilson, a Maddocks lawyer advising the Council in relation to Mr Child's workers compensation claim, advised in writing:

We understand Council prefers Mr Childs [sic] to remain out of the workplace while the ICAC investigations are on foot.

...

If Mr Childs wishes to return to work, it will be difficult for Council to prevent him from doing so. There are currently no justifiable industrial or disciplinary reasons to suspend Mr Child.

It is noted that there were no factors in relation to the “ICAC investigations” being conducted that required Mr Child to be kept out of the workplace.

In view of the fact that there is clear evidence that Mr Romano and other Council officers wanted to keep Mr Child out of the workplace prior to the ADB complaint being made on 15 July 2009, it was necessary to

consider whether this complaint was improperly used as a justification for Mr Child's suspension.

The ADB complaint

The ADB notified Burwood Council about Mr Saad's complaint in a letter dated 20 July 2009. In his complaint, Mr Saad made the following assertions:

- He was the subject of racial discrimination
 - when he was called a “black cunt”
 - when he was singled out, picked on in front of other staff and called a “black bastard” and harassed about his religion (Mr Saad is a Muslim).
- He was generally bullied and treated unfairly by Mr Child “and his offsider Omar [Ammar] Issa”.
- He pointed to two specific incidents:
 - when Mr Child changed the levels on a concreting job that had been set by a Council engineer, Mr Saad insisted that they used the engineer's levels. Mr Child said, “It's my way or the highway. If you don't like it you can fuck off home”
 - when Mr Issa made Mr Saad sit in the back of a Council truck (it is noted, however, that Mr Child was not alleged to be involved in this incident).

Other than this, Mr Saad complained generally about being overlooked for full-time positions and ultimately dismissed.

The focus of Mr Saad's complaint to the ADB was that he had been the subject of racial discrimination while working for Burwood Council. The specific allegations of racial discrimination were, however, made in very vague terms and did not specify Mr Child as the perpetrator.

Mr Saad told the ADB, “I was called a ‘black cunt’ and when I told Steve Childs [sic] that I didn't like it, they continued to call me a ‘black cunt’”.

The reference to “they” seems distinct from Mr Saad's reference to “Steve Childs”, and may not necessarily incorporate Mr Child. The Council and Maddocks, who advised the Council on its management of the complaint, assumed that the offensive comment came from Mr Child.

Mr Saad's complaint continued, “I requested that the behaviour be stopped and that I be left alone. I stated that ‘I am just here to do my job’. This was witnessed by Mr Robert Rideski [sic]....”

Later in his complaint, Mr Saad said, “on another occasion around November 2008 in Minna Street, Burwood, I was

singled out and picked on in front of other staff and called a black bastard and was harassed about my religion". Again, this was not specific about who was responsible for the improper conduct. It suggested an ongoing course of conduct observed by other "staff". Initial Council enquiries could find no support for this from any staff beyond Mr Risteski, who was known to be antagonistic towards Mr Child. Mr Macklin admitted in evidence that he knew Mr Risteski hated Mr Child.

There are several reasons that the Council should have, in fairness, considered when assessing the ADB complaint as grounds for suspending Mr Child:

- Mr Saad's lack of credit

Evidence before the inquiry indicated that Mr Saad regularly made complaints to Council management and particularly complaints about Mr Child. Mr Dardano told the Commission that Mr Saad made a lot of complaints about Mr Child and "none of the allegations from Joe Saad could be substantiated or proved". When Mr Dardano had acted on one occasion to investigate one of Mr Saad's complaints, the allegation that Council concrete supplies were being put aside for private use, he was embarrassed when it turned out to be without any foundation.

Mr Ellul told the Commission that when he commenced at the Council he was warned that Mr Saad was unreliable in the information he reported to others.

Mr Azer also said that the word of Mr Saad could not be relied on. He also spoke about the concrete incident, but said that this was not the only time that Mr Saad made serious allegations against depot workers that, upon investigation, were found to be unjustified.

Mr Macklin told the Commission, "...Mr Saad had a habit of coming up and complaining about a lot of things and, and I think that some of the executive thought, that he probably wasn't very, a very credible person". He also told the Commission, "I can recall some discussions that Mr Romano had with me about Mr Saad's credibility and whether he is the sort of person who should be working at Burwood".

There were specific incidents canvassed in the Commission's public inquiry about complaints made by Mr Saad that had been shown to be untrue:

- His allegation that Mr Child's team had diverted concrete for private use was shown to be untrue. Concrete cores were drilled into the work done and these indicated that all the concrete obtained had been used on the Council job.
- Mr Saad told Mr Dardano that Mr Giangrosso "had hit" a Council officer named Ronita Tompsett during an argument (see chapter 14), while every

other witness, including Ms Tompsett, said that this was not true.

Mr Macklin acknowledged to the Commission that he was aware of both these incidents.

There were also indications of Mr Saad's unreliability in the complaint document forwarded to the ADB. Mr Saad told the ADB, "I have lost my job due to being discriminated against and bullied". All relevant senior Council officers knew this to be untrue. Mr Saad lost his job following a decision on 27 April 2009 by the Cross Functional Team that his casual position should be terminated. Mr Child, the person allegedly responsible for the discrimination and bullying, was on leave at the time.

- Mr Saad's delay in making a claim of racial discrimination

Mr Saad made his claim of racial discrimination in July 2009. Mr Child had not been in the Council workplace since early April 2009. Mr Saad's employment at the Council was terminated at the end of April 2009.

- Mr Saad's failure to raise these allegations previously

There is no record of Mr Saad making references to racial discrimination to work colleagues and various supervisors prior to July 2009, despite being a regular complainant during his time at the Council.

When Mr Macklin contacted Mr Dardano about Mr Saad's complaint to the ADB, in an email dated 3 August 2009, Mr Dardano replied:

Joe never advised me that Steven had called him a black #unt. If he had done so in my tenure he would have been in your office immediately.

On 8 April 2009, Mr Saad made an extensive complaint to Mr Ellul, which Mr Ellul recorded and submitted to the Council's Human Resources section and to this Commission. Some of these complaints were repeated in the complaint to the ADB. There was no mention in Mr Saad's complaint to Mr Ellul that he had been the subject of racial discrimination.

All of these issues were known to senior officers in the Council when Mr Saad made his ADB complaint, and should have been taken into account when deciding an appropriate response. There is no evidence that any of them were.

Mr Child's response to the ADB complaint

Mr Child responded to Mr Saad's complaint to the ADB in an email to the Council on 13 August 2009:

Joe Saad alleges he was called a "black cunt". I never heard him spoken of or heard him addressed in this manner by any person at Council. I personally have never used this kind of language with him or any other staff member. Joe Saad had never mentioned to me that he was addressed so by anybody.

In relation to his approach to Muslim members of staff, Mr Child said:

Another point I would like to raise is that I removed bacon from the depot bbqs, replacing it with sausages. This was done to allow Muslims at the depot to participate in our bbqs.

This was confirmed by other depot staff when enquiries were made.

Mr Child addressed the concreting incident described by Mr Saad, the only incident that related to Mr Child. He explained how he and Mr Saad had clashed, why he had taken the position he had and how the circumstances were resolved on the day.

Mr Child explained why Mr Saad was unsuccessful in job applications where Mr Child was involved in the selection process and pointed out that he was not involved in Mr Saad's termination.

Mr Child is suspended

On 17 August 2009, Mr Child advised the Council that he was available to return to work. On the same day, Mr Gardner, Council's solicitor, advised the Council by letter, "we would recommend that Council suspend Mr Child pending a full investigation of the matters raised in the complaint (by Mr Saad to the ADB)".

In a letter, also dated 17 August 2009, Mr Macklin advised Mr Child:

As you would appreciate the allegations made against you in the complaint are very serious and warrant a full investigation.

In circumstances where Council is conducting an investigation into the allegations made by Mr Saad, I advise that you are suspended from duty on pay pending the outcome of the investigation.

The conciliation conference

On 15 September 2009, Mr Macklin, on behalf of the Council, attended an ADB conciliation conference. Mr Macklin was accompanied by a solicitor from Maddocks. Mr Saad was accompanied by a union delegate. Mr Child

was not notified about the conference and was not given an opportunity to attend.

In the course of the mediation, the Council reached a settlement with Mr Saad involving a payment of \$5,574 to Mr Saad in return for his withdrawing the complaint.

Mr Macklin reported to the executive:

Mr Saad was allowed to discuss the circumstances of his complaint at length but apart from some comments alleged to have been made by Mr Child to him such as, calling him a 'Lebanese bastard', and a 'Muslim bastard' there were no additional allegations raised that were not already in his complaint.

Mr Macklin advised the executive that a settlement was reached whereby Mr Saad would withdraw the complaint in return for a payment of six weeks' wages. Mr Macklin told the executive that Mr Saad had agreed to assist the Council in its disciplinary investigation of Mr Child in relation to the matters raised in Mr Saad's complaint. It is unclear whether Mr Saad did so. This Commission has seen no additional material from Mr Saad. A few days later, Mr Saad left the country.

The disciplinary investigation

After the ADB proceedings were settled, the Council engaged independent investigator Salli Browning to conduct a disciplinary investigation into Mr Saad's allegations. Ms Browning sent an email to Ms Wilson on 8 December 2009. In this she provided a "preliminary view":

The use of the word 'black' in reference to Joe Saad and as verbal abuse has been corroborated by one witness [Mr Risteski] on one occasion only. All other employees interviewed stated that they have not heard Steve make any reference to Joe Saad's race.

Joe Saad alleged that he was discriminated because of his religion. None of the employees interviewed had witnessed Steve Child making any disparaging reference to Joe Saad's religion. There does not appear to be any evidence of any contemporaneous recollections of Joe Saad mentioning it to anyone at the time. It was not reported to the Works Manager or HR.

With respect to the allegation of discrimination, Ms Browning concluded, "I am leaning towards 'insufficient evidence'".

Ms Browning also looked into allegations that had been made by Mr Saad in relation to corrupt conduct that were not referred to in his complaint to the ADB, but in

prior complaints by Mr Saad. Her preliminary finding was “unsubstantiated”.

She looked generally at allegations of bullying and harassment by Mr Child. Her preliminary finding with respect to these allegations was “insufficient evidence”.

After Ms Browning provided her preliminary finding of “insufficient evidence” on the racial discrimination complaint, Ms Wilson forwarded the result to Mr Macklin on the same day. Ms Wilson made the following comments:

As discussed, below are Salli Browning’s preliminary findings. As expected but disappointing. I will discuss with Darren [Gardner] but there does not appear to be a sufficient basis for termination.

Mr Macklin, in turn, forwarded the email to Mr Romano at 6.09 pm on the same day. Mr Macklin commented:

Please find below an email from Maddocks in regard to the ADB investigation (I have already sent this to Les).

It does appear that we cannot meet the satisfactory threshold for termination based on the investigator’s preliminary views.

I will wait for the final report and then brief you and the executive team further.

It is significant that Mr Macklin reported this development to Mr Romano, the person who had told Mr Macklin on a number of occasions that he did not want Mr Child back in the Council workplace, and who had a substantial and obvious conflict in relation to Mr Child’s employment at the Council.

Ms Wilson’s comment that the lack of basis for termination was “disappointing” portrays an understanding that Mr Macklin and others in the Council were keen to use Mr Saad’s complaint of discrimination to remove Mr Child from the Council.

There is no evidence that Ms Wilson or Mr Gardner were ever informed of the credibility issues concerning the two main witnesses against Mr Child; that is, Mr Saad and Mr Risteski.

At the public inquiry, Mr Macklin agreed that, “the issue that Mr Saad was considered by [him] and others to be of low credibility” was significant. He could not, however, recall discussing it with Mr Gardner at the time that Mr Gardner’s advice recommending suspension was provided on 17 August 2009.

In all the circumstances, the Commission is satisfied that neither Ms Wilson nor Mr Gardner was apprised of

important information going to the credit of Mr Saad and Mr Risteski. Some of this information filtered through to Ms Browning when she spoke to witnesses during her investigation.

In a letter dated 19 May 2010, Mr Child was advised that the investigation had been completed and “there was insufficient objective evidence to determine that racially prejudicial comments or actions were instigated by you against Mr Saad”. Mr Child had been suspended from the Council workplace for nine months at the time of this advice, and remains suspended at the time of this report.

Conclusion

On the basis of the evidence outlined above, the Commission is satisfied that, after Mr Child’s departure on sick leave on 30 March 2009, the Burwood Council executive was considering bases upon which Mr Child could be kept out of the Council workplace if he reported that he was fit to return.

The Commission is also satisfied that Mr Romano had made it clear to Mr Macklin and others that he did not want Mr Child back in the workplace.

It is necessary to consider whether corrupt conduct occurred in these circumstances through officers performing their official functions in a partial manner under section 8(1)(b) of the ICAC Act or in a manner that constitutes a breach of public trust for the purposes of section 8(1)(c) of the ICAC Act.

In relation to the suspension of Mr Child, senior Council officers sought to rely upon the legal advice they received from Maddocks. In the Commission’s view, senior Council officers could not abrogate responsibility by accepting this advice. This was especially so when important issues about the credibility of the complainant and a witness were known to the Council executive and not to the lawyers.

The advice recommended, “that Council suspend Mr Child pending a full investigation of the matters raised in the complaint”. The advice did not contain detailed reasons to justify Mr Child’s suspension pending the investigation. Mr Macklin sought to justify the suspension on the following basis:

...there was a number of employees who were to be interviewed as part of our obligations under the agreement reached with the ADB and it was my view, after discussing it with Maddocks, that Steve should not be in the workplace when those employees were being interviewed in regard to these.

The Commission rejects this contention. Mr Child was not suspended when Mr Risteski made the complaints

against him in 2008. Mr Child was not suspended when the Council investigated him for making overtime payments from his own resources. Mr Romano was not suspended when Mr Cummins and depot workers made the complaints that led to this Commission's investigation. In these particular circumstances, the Council applied a different standard with respect to Mr Child. In any event, there was insufficient evidence to indicate that Mr Child's presence in the workplace threatened a proper investigation of the Saad complaints.

While the failure to provide instructions on matters going to the credit of Mr Saad and Mr Risteski was a serious oversight, the Commission is not satisfied that the failure constituted a partial exercise of official functions by relevant Council officers for the purposes of section 8(1)(b) of the ICAC Act or a breach of public trust under section 8(1)(c) of the ICAC Act.

In the Commission's view, Mr Child's suspension on the basis of the Saad complaint was unnecessary and inappropriate, for the reasons outlined in the preceding section. Although Mr Romano was keen to keep Mr Child out of the workplace, and was kept informed about certain steps in the process that led to his suspension, there is insufficient evidence to conclude that he directed those steps. In the circumstances, the Commission cannot conclude that the suspension amounted to corrupt conduct on the basis that it was partial exercise of official functions under section 8(1)(b) of the ICAC Act or a breach of public trust for the purposes of section 8(1)(c) of the Act. No finding of corrupt conduct is made in respect of this issue.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano. Accordingly, he comes within the definition of "affected" person for the purposes of section 74A(2) of the ICAC Act.

Any admissions or relevant statements by Mr Romano in relation to the matters canvassed in this chapter were made subject to a declaration issued pursuant to section 38 of the ICAC Act and cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. Despite this, there is some documentary evidence and the evidence of available witnesses in relation to Mr Romano's relevant activities that would be available for use in a prosecution by the DPP, in particular the records of the Council and IPP Consulting, and the evidence of other Council officers and IPP staff involved in the decisions made in relation to Mr Child.

In all the circumstances, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano in relation to the following criminal offences:

- a. causing or procuring disadvantage to a person for or on account of that person assisting the Commission, within the meaning of section 93(2)(c) of the ICAC Act, in breach of section 93(1) of the ICAC Act, through urging senior Council officers in an email dated 25 April 2009 to seek an explanation from Mr Child about his alleged failure to obtain approval for secondary employment and to consider reporting him to the Australian Taxation Office
- b. causing or procuring disadvantage to a person for or on account of that person assisting the Commission, within the meaning of section 93(2)(c) of the ICAC Act, in breach of section 93(1) of the ICAC Act, by directing surveillance activity in relation to Mr Child after 7 April 2009.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to the matters canvassed in this chapter.

Chapter 14: Giuseppe (Joe) Giangrasso

As discussed in the preceding chapter, on 29 March 2009, Burwood Council's Civil Maintenance Supervisor, Stephen Child, made a telephone call to the Mayor of Burwood and provided information about General Manager Pat Romano. The information related to Council staff having worked on units in which Mr Romano and another senior Council officer had a personal interest (the Befaro Units, dealt with in chapter 7). Mr Child and Giuseppe (Joe) Giangrasso, another Council officer who had worked on the units, had been looking for someone to whom they could take their concerns about the matter, and Mr Giangrasso had been provided with the name of Kate McClymont, a *Sydney Morning Herald* journalist, as someone who might be able to help. Mr Child contacted Ms McClymont, and she acted as an intermediary for Mr Child and Mr Giangrasso to contact the Mayor. Although Mr Giangrasso did not personally speak to the Mayor, Mr Child spoke on his behalf when he contacted the Mayor.

The Mayor, Lesley Furneaux-Cook, arranged for Mr Child to speak to the Commission and Mr Giangrasso was also interviewed at the Commission in April 2009.

Mr Giangrasso spoke to Ms McClymont on several occasions about his allegations against Mr Romano and the *Sydney Morning Herald* published an article in relation to the allegations on 4 April 2009.

The public inquiry examined adverse managerial action that was taken against Mr Giangrasso after he had provided information to the Mayor, the Commission and the *Sydney Morning Herald*:

- on 25 April 2009, Mr Romano sent an email to senior Council officers, urging that consideration be given to immediate disciplinary and other action in relation to Mr Giangrasso and others
- Mr Giangrasso was suspended by the Council on 4 September 2009, allegedly on the basis of disciplinary matters involving an altercation with a Council officer, unauthorised secondary

employment while on sick leave and an alleged threat to a Council officer.

If taken in response to the allegations made by Mr Giangrasso, such adverse managerial action could amount to corrupt conduct as it could involve a partial exercise of official functions under section 8(1)(b) or a breach of public trust under section 8(1)(c) of the ICAC Act. It could also, for the purposes of section 9 of the ICAC Act, involve the criminal offence of taking reprisal action under section 20 of the *Protected Disclosures Act 1994* ("the PDA") and, in respect of disclosures to the Commission, the criminal offence of causing or procuring disadvantage to a person assisting the Commission under section 93 of the ICAC Act or the criminal offence of prejudice to an employee in his or her employment for or on account of the employee assisting the Commission under section 94 of the ICAC Act.

It could also, for the purposes of section 9 of the ICAC, involve reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

Did Mr Giangrasso make a protected disclosure?

As Mr Giangrasso was a public official, an appropriate disclosure of information by him could amount to a protected disclosure.

Under the PDA, the disclosure would relevantly have to show or tend to show corrupt conduct or maladministration, and would have to be made to the principal officer of a public authority or to an appropriate officer under Burwood Council's Internal Reporting Policy (IRP).

The information provided by Mr Child to the Mayor of Burwood related to allegations of misuse of Council staff and resources by the General Manager for private purposes

and was a disclosure that showed or tended to show corrupt conduct.

Although Mr Giangrasso did not provide information directly to the Mayor, he gave evidence that Mr Child was acting on his behalf when he did so. Mr Giangrasso said that Ms McClymont had approached the Mayor “on our behalf [on behalf of him and Mr Child]” and that “we [he and Mr Child] did go to the Mayor first”. Mr Giangrasso also said that, “he wanted to tell the Mayor of what had happened over the last couple of years”.

Ms Furneaux-Cook confirmed that the person to whom she spoke on the telephone was speaking on behalf of himself and other Council staff. The caller said that “they had been working on a property” and that “they” feared reprisals if they took their allegations to the Council.

The Commission has concluded in the preceding chapter that the information provided by Mr Child to the Mayor could amount to a protected disclosure. For the reasons outlined in chapter 10 of this report, the Commission has also concluded that a protected disclosure may be made through an intermediary or agent.

In these circumstances, the Commission is satisfied that the disclosure to the Mayor by Mr Child could also amount to a protected disclosure on behalf of Mr Giangrasso.

Mr Giangrasso gave evidence that he was interviewed about his allegations by the Commission in April 2009. Under section 8 (1)(a) of the PDA, a disclosure of appropriate information to “an investigating authority” is a protected disclosure and the Commission is an investigating authority under the PDA. The provision of information to the Commission by Mr Giangrasso could therefore come within the terms of section 8(1)(a) of the PDA as a protected disclosure and could also amount to assistance to the Commission for the purposes of sections 93 and 94 of the ICAC Act.

Mr Giangrasso also provided information about his allegations to Ms McClymont, a journalist, prior to 4 April

2009. Under the PDA, the provision of information to a journalist is not a protected disclosure unless the public official making the disclosure has already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority, and that that authority has declined to investigate or has not investigated in a timely manner. As this was not the case, the provision of information by Mr Giangrasso to Ms McClymont was not a protected disclosure.

Was adverse action taken against Mr Giangrasso as a result of his allegations?

Mr Giangrasso’s employment history at the Council

In order to provide a context for the evidence about the alleged reprisal action against Mr Giangrasso, it is necessary to consider his employment history at the Council prior to his making allegations against Mr Romano and Albert Becerra.

Mr Giangrasso commenced work at Burwood Council as a labourer in 1990. By the time of Mr Romano’s arrival in 2003, he had risen to the position of construction team leader in the Council’s Civil Construction and Maintenance operation. His position was still, however, many levels below Mr Romano in the Council’s hierarchy.

Despite this, according to Mr Giangrasso, he developed a close working relationship with Mr Romano. Mr Giangrasso said that from about 2006 or 2007, Mr Romano would frequently visit him at work sites and personally give him instructions in relation to Council jobs.

Mr Giangrasso and his supervisor, Mr Child, both said that they often met Mr Romano for morning tea, with Mr Romano routinely paying. As canvassed in previous chapters, the Commission accepts that Mr Giangrasso was approached by Mr Romano for assistance with the

renovation of the driveway at his home and with the Befaro Unit renovations.

Mr Romano denied having any personal relationship with Mr Giangrosso. He described how on one occasion he and his wife dined with Mr Giangrosso and his wife, as well as Robert Cummins and his wife, as a “thank you” for hard work performed during the year. Apart from this, however, he said that he never met Mr Giangrosso by himself. He occasionally saw Mr Giangrosso in the company of Mr Child, with whom he acknowledged that he worked closely.

The Commission accepts the evidence of Mr Giangrosso and Mr Child on this issue and, in view of this evidence and the findings in previous chapters that Mr Romano approached Mr Giangrosso for assistance with private renovations, the Commission is satisfied that Mr Romano had a closer relationship with Mr Giangrosso than he was prepared to admit.

Mr Giangrosso told the Commission that his relationship with Mr Romano deteriorated shortly after the September 2008 Council elections, when Mr Giangrosso, Mr Child, Ammar Issa and Council Senior Engineer John Inglese had coffee with Liberal Party of Australia candidates John Sidoti and Henson Liang and former Councillor Joe Tannous, after a chance meeting at a shopping centre.

Although there are varying accounts of this incident and its aftermath, there is no dispute that Mr Romano found out about this meeting and was unhappy about it. The Code of Conduct in operation at that time specified that Council staff were not to approach “...Councillors and administrators to discuss individual staff matters and not broader industrial policy issues”. It is doubtful that the interaction described above was in breach of this provision, but Mr Romano clearly thought it was. Mr Romano does not dispute that he spoke to Mr Child and Mr Giangrosso on separate occasions about how inappropriate he thought their actions were.

Mr Giangrosso said that he was resentful of his treatment by Mr Romano and increasingly fearful for his position within the Council. Youssef (Joe) Saad made an allegation against Mr Giangrosso that concrete from one of the jobs by Mr Giangrosso’s team had been removed and applied for private purposes. This was shown to be untrue when concrete cores obtained by Works Manager John Dardano showed that all the concrete had been properly used. Mr Giangrosso also became concerned about the implications of the work he had done for Mr Romano on his driveway and at the Befaro Units. This concern was heightened following an internal disclosure about the Befaro Units that was made by Mr Saad to Council management in February 2009 (see chapter 11).

When Mr Giangrosso turned up to work on 4 March 2009, he was told that the store superintendent, Ronita Tompsett, had made allegations that he was involved in stealing Council pavers that had disappeared overnight. According to Mr Giangrosso, the pavers had simply been moved by his team the previous day and were still onsite. He asked to speak to Ms Tompsett. Ms Tompsett attended in the company of two union representatives and others. At this point, Mr Giangrosso raised his voice, “I was very upset and in a rage”. Ms Tompsett described him as yelling at her and “gesturing wildly”. Someone from Human Resources attended and mediated. Mr Giangrosso ultimately apologised to Ms Tompsett for his behaviour. He then went and spoke to his general practitioner who diagnosed him with depression and anxiety. He told the Commission, “I had a mental breakdown, basically”. He went on sick leave. He had not returned to work at the time of the Commission’s public inquiry.

In his evidence, Mr Giangrosso claimed that his breakdown was work related, and while his confrontation with Ms Tompsett was a “trigger”, his primary problems were “rooted” in his dealings with Mr Romano.

Mr Giangrosso went on stress leave on 4 March 2009 and received medical treatment. He told the Commission, “my treating doctor and my psychiatrist both thought I should report what I had been involved in because it would help me with my healing process, basically”.

Mr Giangrosso makes a complaint

The complaint that was made to the Mayor of Burwood by Mr Child, acting on behalf of himself and Mr Giangrosso, has been outlined in the preceding chapter. That chapter also outlines Mr Romano’s attempts to find out more information about the complaint and his cancellation of his meetings with the Mayor as a result of her refusal to provide him with further details.

The sections in the preceding chapter that deal with the *Sydney Morning Herald* articles and their aftermath, and Mr Romano’s conflicts of interest in relation to any issues dealing with the employment of the Council officers who had made allegations against him, are equally relevant to Mr Giangrosso’s situation. As detailed in chapter 13, although Mr Romano assured the Mayor and the Council that he would step aside in respect of these issues, he remained actively involved.

In respect of Mr Giangrosso, on 5 April 2009, the day after the initial *Sydney Morning Herald* article appeared, Mr Romano directed Peter Macklin to provide him with “copies of all warnings, grievances by other staff and file notes” related to Mr Giangrosso.

The surveillance of depot workers by IPP Consulting, which has been detailed in the preceding chapter and

which largely focused on Mr Giangrasso, was supposed to terminate on 4 April 2009 but a direction to recommence the surveillance was given on 7 April 2009, and the surveillance then continued until 15 April 2009. One result of the surveillance operation was that video footage was obtained of Mr Giangrasso performing private work while on sick leave.

On 25 April 2009, Mr Romano sent an email to Ian Dencker and Les Hullick that included this item:

Has PM [Peter Macklin] issued letters to individuals who are known to us as doing private work after hours and asked them to explain in writing why they have not sort [sic] approval for secondary employment. If they do not respond I believe we have a responsibility to report them to the taxation office. This should be pursued immediately. The people I am aware of from IPP reports are:

- a. Joe Giangrasso
- b. Steve Child
- c. Barry Web [sic]
- d. John Vadala
- e. Ommar [sic] Issa
- f. Mowing crews

There may be others. Have PM and Richard [Mailey of IPP Consulting] compile a list.

All the named persons in this list had been involved in the Befaro Unit renovations.

In relation to Mr Giangrasso, Mr Romano stated at paragraph 10 of the email:

My understanding is that Richard's people [IPP Consulting investigators] witnessed Joe Giangrasso and other staff loading and unloading materials from [sic] Council truck into and out of his private home. Do we have enough evidence to approach Police and ask them to seek a warrant to enter JG's property to search it for stolen Council material and property?

Mr Romano urged, in light of the "malicious allegations" that had been made, that immediate action be taken on the items in his email.

Mr Romano's continued involvement in Council decisions and actions where he had a clear conflict of interest is relevant to the issue of whether adverse management action taken in respect of Mr Giangrasso's employment was motivated by the allegations that he had made against Mr Romano.

Corrupt conduct

Mr Romano's email of 25 April 2009, relevant parts of which are set out above, was sent to Mr Hullick and Mr Dencker, two members of the Council's executive group. In respect of Mr Giangrasso, it listed him as one of the people who had been identified through IPP surveillance reports as undertaking private work after hours without secondary employment approval. It said:

Has PM [Peter Macklin] issued letters to individuals who are known to us as doing private work after hours and asked them to explain in writing why they have not sort [sic] approval for secondary employment. If they do not respond I believe we have a responsibility to report them to the taxation office. This should be pursued immediately.

Mr Romano, who had supposedly stood aside from issues in relation to the depot because of a conflict of interest, should have taken no part in giving instructions or issuing suggested courses of action to Mr Hullick and Mr Dencker, particularly instructions or suggestions that targeted a Council officer who had made allegations against Mr Romano. The Commission is satisfied that Mr Romano included Mr Giangrasso in this email as an officer to target substantially because of the allegations Mr Giangrasso had made against Mr Romano.

While the surveillance had identified Mr Giangrasso as an officer who was doing private work while on sick leave, the Commission is satisfied that Mr Romano did not send this email because he was concerned about undeclared secondary employment. This is clear from his willingness to use Council workers on his own private projects, including the Befaro Units and his driveway, in circumstances where no declarations of secondary employment were made. The reference to reporting workers to the Australian Taxation Office was also maliciously motivated. Even if officers had been doing private work, there was no information to suggest that there had been a failure to declare income from that work.

In relation to the suggestion that consideration should be given to reporting Mr Giangrasso to the police to see if they could obtain a search warrant for his home, it is not clear what part of the IPP Consulting surveillance bases this suggestion by Mr Romano. The draft report prepared by IPP Consulting in relation to its surveillance work (and there was never any final report) was described by Erin Wilson of Maddocks in an email on 30 April 2009 as "deficient in almost its entirety". Ms Wilson noted that it failed "to analyse or provide any opinion on what has been observed or investigated by IPP field officers" and expressed the view that it was not of "any evidentiary value". In any case, the Commission is satisfied that Mr

Romano was not motivated in making this suggestion by any genuine desire to have a possible theft of Council property investigated, but by a desire to take adverse action against Mr Giangrasso because he had made allegations against Mr Romano.

Mr Romano was aware that a complaint was made to the Mayor, Lesley Furneaux-Cook, although he had not been told the identity of the complainant or the details of the complaint. Allegations against Mr Romano and Mr Becerra in relation to the Befaro Units, and about Mr Romano's driveway, appeared in the *Sydney Morning Herald* on 4 April 2009. The article published that day indicated that the complainants were council employees who had performed work on the Befaro Units and Mr Romano's driveway. Only Mr Child, Mr Giangrasso and Mr Issa had been involved in both episodes, and this was known to Mr Romano. The day after this article appeared, Mr Romano directed Mr Macklin to obtain "copies of all warnings, grievances by other staff and file notes" against Mr Giangrasso.

The evidence of Mr Giangrasso's involvement in providing information to the *Sydney Morning Herald* strengthened when a further article was published on 6 April 2009. This specified, "Three council staff have told the *Herald* that they did work free on Mr Romano's driveway on Saturday September 15, 2007". Only three Council staff worked on Mr Romano's driveway, Mr Child, Mr Giangrasso and Mr Issa. This was known to Mr Romano. In all these circumstances, Mr Giangrasso's participation in making the allegations would have been apparent to Mr Romano.

From these circumstances, it would also have been apparent to Mr Romano that Mr Giangrasso was likely to be responsible for, or at least involved in, the allegations made the previous Saturday to Ms Furneaux-Cook. Mr Romano was aware that the complaint by staff made to the Mayor had been made through contact by a journalist from the *Sydney Morning Herald* and would have had good reason to suspect or believe that the staff who had spoken to the newspaper (including Mr Giangrasso) had also spoken to the Mayor.

On 7 April 2009, the *Sydney Morning Herald* reported "Burwood Council staff who claim that they did work on an apartment block owned by the Council's General Manager and its principal architect have lodged a complaint with the Independent Commission Against Corruption". In view of the information in this and previous articles, the Commission is satisfied that by 7 April 2009 Mr Romano suspected or believed that Mr Giangrasso was assisting the Commission.

The Commission is satisfied that Mr Giangrasso was included in Mr Romano's email of 25 April 2009

substantially because of the allegations he had made about Mr Romano to the Mayor and the Commission.

Mr Romano's actions in urging senior Council officers to take action in relation to Mr Giangrasso by seeking an explanation in writing for an alleged disciplinary breach of failing to obtain approval for secondary employment and by reporting him to the Australian Taxation Office and the police could constitute "detrimental action" under the PDA, on the basis that his actions could involve "discrimination, disadvantage or adverse treatment in relation to employment" in respect of Mr Giangrasso under section 20(2) of the PDA.

Mr Blake submitted that Mr Giangrasso's complaints against Mr Romano could not constitute protected disclosures as they were made to avoid disciplinary action and therefore were not protected disclosures by reason of section 18 of the PDA.

Mr Blake submitted that Mr Giangrasso was "facing disciplinary action" in respect of a complaint by Ms Tompsett, allegations of undeclared secondary employment and working while on sick leave and taking Council property. There was no evidence before the Commission that Mr Giangrasso had been notified at the relevant times that he was "facing disciplinary action" on any of these bases, and this suggestion was not put to Mr Giangrasso in cross-examination at the public inquiry. The Commission rejects this submission.

Mr Romano's conduct in this matter amounted to corrupt conduct as it was conduct that involved a dishonest or partial exercise of Mr Romano's official functions for the purposes of section 8(1)(b) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could amount to a criminal offence under section 20(1) of the PDA.

In reaching this conclusion, the Commission has had regard to the fact that, under section 20(1A) of the PDA, in any proceedings for an offence against the section it would lie on a defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected disclosure.

For the purposes of section 9 of the ICAC Act, Mr Romano's actions outlined above could also involve the criminal offence of causing or procuring disadvantage to a person for or on account of that person assisting the Commission, within the meaning of section 93(2)(c) of the ICAC Act, in breach of section 93(1) of the ICAC Act.

Mr Giangrasso's suspension

Mr Giangrasso was notified of the decision to suspend him on 4 September 2009. It is clear, however, that officers at the Council had been looking for some time prior to that date for a reason to keep Mr Giangrasso from returning to the Council workplace.

In his email to the Council executive on 12 June 2009, Mr Macklin raised the possibility that Mr Child and Mr Giangrasso may "present themselves fit for work". In relation to Mr Giangrasso, Mr Macklin said:

This is not as complicated as we are currently waiting to deal with him on several serious employment issues such as working while on sick leave etc. So my strategy would be if he reported fit for work we would suspend him from duty with pay...

The issue was addressed by Ms Wilson of Maddocks in her letter to Mr Macklin dated 8 July 2009, providing advice and recommendations in relation to Mr Cummins, Mr Child and Mr Giangrasso:

If Mr Giangrasso indicates he wishes to return to work, Council would have grounds to stand him down pending the outcome of investigations into his conduct.

No reasons were given in support of this advice.

In an email to Mr Romano on 31 August 2009, Mr Macklin advised that in the event that Mr Giangrasso presents himself as "fit for preinjury duties", "the Council will be required to suspend him from duty pending the outcome of employment issues currently outstanding":

From research and advice it is not recommended to suspend without pay based on the fact that firstly, the Award restricts periods of suspension without pay to two weeks and secondly, the outstanding employment issues do not warrant suspension without pay.

In view of the fact that there is clear evidence that Mr Romano and other Council officers wanted to keep Mr Giangrasso out of the workplace, it was necessary to consider whether his suspension was based substantially on his allegations against Mr Romano, rather than the complaints that were said to justify the suspension.

Mr Giangrasso advised the Council that he would be fit to resume preinjury duties from 7 September 2009. Mr Macklin advised the Council executive of this by email on 2 September 2009 and stated:

I have already discussed our strategy to deal with this matter and that is as set out below, that we suspend him from duty and require him to respond to the allegations put to him some months ago in regard to his employment.

We are preparing a letter for perusal by Maddocks to be sent to him before Monday.

He continued:

Are you happy to proceed with suspension from duty with pay pending the investigation into this matter?

I will need direction before this letter is sent to him.

Presumably the Council executive approved this course as Mr Macklin prepared correspondence to forward to Mr Giangrasso. In this letter, Mr Macklin made reference to three disciplinary investigations into Mr Giangrasso's conduct and advised:

In circumstances where Council is conducting an investigation into the allegations made, I advise that you are suspended from duty on pay pending the outcome of the investigation. This period of suspension will commence on Monday 7 September 2009.

The letter was shown to Mr Baird who commented, in an email dated 4 September 2009:

The letter is fine. However the action set out in the letter needs to be action that is soundly based on prior practices of Council or based on the written policies of Council. Otherwise the action could be characterised as punitive. If you are satisfied that we meet the above criteria then let's get the letter out.

Mr Macklin replied on the same day:

Council does have a policy in place that allows disciplinary matters to be dealt with in this manner and it is consistent with other disciplinary action taken by Council.

It is not clear what "policy" and what "other disciplinary action" Mr Macklin was referring to.

At the public inquiry, Mr Macklin gave the following evidence:

Q. *Did you make any inquiries to DLG [Department of Local Government] about what they considered was appropriate circumstances to suspend people on full pay?*

A. *No, because it's covered within our Award.*

Q. *And you thought that's all that mattered?*

A. *That's what applied to us.*

The Local Government (State) Award operating at the time provided "notwithstanding the procedures contained below, a Council shall be entitled to suspend an employee

with or without pay”. The “procedures contained below” related to the suspension without pay and were not relevant to these circumstances.

In the context of Mr Macklin’s evidence, it appears that the aforementioned Award was the “policy” Mr Macklin was referring to in his email to Mr Baird.

The suspension of Mr Giangrosso was certainly consistent with the suspension of Mr Child a few weeks earlier. It is not clear whether this was the “other disciplinary action” to which Mr Macklin was referring. The Commission’s investigation did not disclose any other matters where Council staff were suspended with pay during disciplinary investigations. Certainly, Mr Child was not suspended during investigations into the complaints by John Whitecunas or Mr Risteski or the investigation into him making overtime payments from his own pocket. If Mr Child’s suspension was the “other disciplinary action”, it was an inappropriate precedent, for the reasons outlined in the preceding chapter.

It appears that Mr Giangrosso was given the letter notifying him of his suspension on 4 September 2009.

The three disciplinary investigations that the Council referred to as a basis for the suspension were:

1. the investigation into Mr Giangrosso’s confrontation with Ms Tompsett on 4 March 2009
2. allegations that Mr Giangrosso was engaged in unauthorised secondary employment, and in particular private work while he was on sick leave from Council
3. an allegation that on 29 July 2009 Mr Giangrosso asked another depot employee to pass on a message to Mr Risteski, which the other employee duly did pass on. The alleged message was that:
 - Mr Giangrosso was aware of allegations being made by Mr Risteski
 - Mr Risteski better get his facts straight or he would be sued
 - Mr Risteski should “watch himself”.

The Tompsett matter was not a matter that warranted suspension. Mr Macklin told the Commission that he considered that the matter had been adequately dealt with on the day and it was only subsequently pursued as Ms Tompsett had reported the matter in an email to Human Resources.

Mr Giangrosso denied the allegation that he asked someone to pass on a message to Mr Risteski. There were inconsistent accounts of this incident from the “messenger”. In any event, the alleged message was not something that could properly sustain a suspension.

Mr Macklin acknowledged at the public inquiry that the primary basis for the suspension was “the evidence that he was working while on sick leave”.

The Council had surveillance footage of Mr Giangrosso working while he was on sick leave. According to Mr Macklin, this footage was the only useful thing that came out of the depot surveillance operation.

In his evidence at the public inquiry, Mr Giangrosso acknowledged that he performed some work for others while on sick leave. He said he was not involved in operating his rubbish removal business, “I was – could have been labouring just giving people a hand or doing anything”. He said he had suffered a work-related mental breakdown. In the wake of this, his treating doctor and psychologist said he should be trying to live a normal life, “what I’ve done all my life, and that, that is working”.

Whilst the allegation that Mr Giangrosso had done some private work while on sick leave warranted investigation by the Council, it is difficult to see how it warranted suspension. It was not something that would impact on the work Mr Giangrosso was performing at the Council. His presence at the workplace was not going to adversely affect the investigation of the matter. The cost to the Council in continuing to pay Mr Giangrosso’s salary whilst being one position down was substantial.

Conclusion

On 8 July 2009, Ms Wilson of Maddocks provided advice to Mr Macklin, which he circulated to the Council executive in relation to how the Council might deal with Mr Cummins, Mr Child and Mr Giangrosso. An underlying assumption of this advice was that Mr Giangrosso had made disclosures to this Commission.

The first occasion when the Council acted to exclude Mr Giangrosso from the workplace was when he made himself available to work from 7 September 2009.

The Award allowed the Council to exclude Mr Giangrosso through suspension. It did not mandate this.

This situation was different from that which applied to Mr Child, as there was no legal advice recommending that Mr Giangrosso be suspended. Ms Wilson’s advice on 8 July 2009 indicated that suspension was available. Mr Baird correctly cautioned that the action could be characterised as punitive.

Mr Macklin told the Commission that his actions were not in response to Mr Romano’s desire to have Mr Giangrosso out of the workplace. He agreed, however, that he knew that Mr Romano did not want Mr Giangrosso to return because he saw him as Mr Child’s sidekick:

I knew that. But this, I, you know, I, I am able to think independently. And I didn't, and this was a matter I felt I had to deal with as a genuine employment issue. I knew that Joe and Steve were out of favour with the GM. But this, as far as I was concerned, was a genuine employment issue that I had to deal with. It was a difficult situation to be in. But I had, I sat down and thought closely, and thought carefully about it, sought legal advice and it was, and I was in a difficult position because if you did nothing then I'd be, then the matter with Ronita would progress further and she would be, she'd probably put a further complaint in. I had to do, I had to do something and I, like I thought, I thought long and hard about it, got advice on it and that's what we did.

In the Commission's view, Mr Giangrasso's suspension on the basis of the complaints against him was unnecessary and inappropriate, for the reasons outlined in the preceding section. Although Mr Romano was keen to keep Mr Giangrasso out of the workplace and was kept informed about certain steps in the process that led to his suspension, there is insufficient evidence to conclude that he directed those steps. In the circumstances, the Commission cannot conclude that the suspension amounted to corrupt conduct on the basis that it was partial exercise of official functions under section 8(1) (b) of the ICAC Act or a breach of public trust for the purposes of section 8(1)(c) of the ICAC Act. No finding of corrupt conduct is made in respect of this issue.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano. Accordingly, he comes within the definition of "affected" person for the purposes of section 74A(2) of the ICAC Act.

Any admissions or relevant statements by Mr Romano in relation to the matters canvassed in this chapter were made subject to a declaration issued pursuant to section 38 of the ICAC Act and cannot be used against him in any subsequent criminal prosecution except for offences under the ICAC Act. Despite this, there is some documentary evidence and the evidence of available witnesses in relation to Mr Romano's relevant activities that would be available for use in a prosecution by the DPP, in particular the records of the Council and IPP Consulting and the evidence of other Council officers and IPP staff involved in the decisions made in relation to Mr Giangrasso.

In all the circumstances, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano in relation to the following criminal offence:

- causing or procuring disadvantage to a person for or on account of that person assisting the Commission, within the meaning of section 93(2) (c) of the ICAC Act, in breach of section 93(1) of the ICAC Act, through urging senior Council officers in an email dated 25 April 2009 to seek an explanation from Mr Giangrasso about his alleged failure to obtain approval for secondary employment, to consider reporting him to the Australian Taxation Office and to consider reporting him to the police.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

Chapter 15: Ammar Issa

An article published in the *Sydney Morning Herald* on 4 April 2009 indicated that it was based on information from Council employees who had performed work on the Befaro Units, in which Pat Romano had a personal interest, and on Mr Romano's driveway. Ammar Issa, a Council driver/labourer, had been involved in both episodes, and this was known to Mr Romano.

A further article in the *Sydney Morning Herald* on 6 April 2009 stated that, "Three council staff have told the *Herald* that they did work free on Mr Romano's driveway on Saturday September 15, 2007". Only three Council staff worked on Mr Romano's driveway: Mr Child, Mr Giangrasso and Mr Issa. This was known to Mr Romano.

On 7 April 2009, the *Sydney Morning Herald* reported, "Burwood Council staff who claim that they did work on an apartment block owned by the Council's General Manager and its principal architect have lodged a complaint with the Independent Commission Against Corruption".

The Commission examined adverse managerial action that was taken by the Council against Mr Issa after the publication of these articles. This action included:

- an email sent by Mr Romano to senior Council officers on 25 April 2009, urging that consideration be given to immediate disciplinary and other action in relation to Mr Issa and others
- on 24 July 2009, telling Mr Issa that he was stood down from work, as no suitable light duties could be found for him.

Mr Issa provided a statement to the Commission dated 18 November 2009 that dealt with, inter alia, his work on Mr Romano's driveway and the Befaro Units.

In his evidence and in his statement provided to the Commission, Mr Issa said that the failure of the Council to find light duties for him and Mr Romano's adverse comments about him to other senior Council officers were actions taken to harass him because he was seen to be part

of Mr Child and Mr Giangrasso's group; the group having made the allegations referred to above.

If taken in response to the allegations made against Mr Romano, such adverse managerial action could amount to corrupt conduct as it could involve a partial exercise of official functions under section 8(1)(b) or a breach of public trust under section 8(1)(c) of the ICAC Act and, for the purposes of section 9 of the ICAC Act, could also involve the criminal offence of taking reprisal action under section 20 of the *Protected Disclosures Act 1994* ("the PDA") and, in respect of disclosures to the Commission, the criminal offence of injury to a person assisting the Commission under section 93 of the ICAC Act or the criminal offence of prejudice to an employee in his or her employment for or on account of the employee assisting the Commission under section 94 of the ICAC Act.

It could also, for the purposes of section 9 of the ICAC Act, involve a disciplinary offence or reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

Did Mr Issa make a protected disclosure?

As Mr Issa was a public official, an appropriate disclosure of information by him could amount to a protected disclosure.

Under the PDA, the disclosure would relevantly have to show or tend to show corrupt conduct or maladministration, and would have to be made to the principal officer of a public authority or to an appropriate officer under Burwood Council's Internal Reporting Policy (IRP).

There is no evidence that Mr Issa made a disclosure to the principal officer or an appropriate Council officer under the IRP.

Mr Issa provided a statement to the Commission dated 18

November 2009 that dealt with, inter alia, his work on Mr Romano's driveway and the Befaro Units.

Under section 8 (1)(a) of the PDA, a disclosure of appropriate information to "an investigating authority" is a protected disclosure, and the Commission is an investigating authority under the PDA. The provision of information to the Commission by Mr Issa could therefore come within the terms of section 8(1)(a) of the PDA as a protected disclosure, and could also amount to assistance to the Commission for the purposes of sections 93 and 94 of the ICAC Act.

The *Sydney Morning Herald* articles suggest that Mr Issa also provided information about his allegations to journalist Kate McClymont. Under the PDA, the provision of information to a journalist is not a protected disclosure unless the public official making the disclosure has already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority, and that authority has declined to investigate or has not investigated in a timely manner. As this was not the case, any provision of information by Mr Issa to Ms McClymont was not a protected disclosure.

Was adverse managerial action taken against Mr Issa for an improper motive?

Mr Issa commenced at Burwood Council as a driver/labourer in the Concrete Gang at the Council depot in July 2006. His supervisor was Stephen Child. It is clear on the evidence that over his time at the Council he worked closely with Mr Child and Giuseppe (Joe) Giangrasso.

As discussed in chapter 6, in September 2007 Mr Issa participated in the replacement of Mr Romano's driveway.

As discussed in chapter 7, in 2008 he participated in the renovation of the Befaro Units.

As discussed in chapter 8, on 13 September 2008 he

attended the Comer Street polling booth and handed out Australian Labor Party pamphlets at the direction of Mr Child, who was in turn acting under a direction from Mr Romano.

On 20 March 2008, Mr Issa hurt his back at work, an injury that subsequently required two operations. After the initial injury, he was not able to work for a number of months. In mid-August 2008, he returned to work on restricted duties. In this respect, he initially worked for Mr Child supervising, but not performing, concrete works.

Ultimately, Mr Issa was moved to the Council Chambers to work with the Council's Design Manager, Frederick Thinesh, to work on asset management, amongst other things.

According to Mr Thinesh, Mr Issa worked well and Mr Thinesh was able to report this back to his supervisor, John Inglese, and to Human Resources. According to Mr Thinesh, "we were all okay with how things were going".

During this time, at the beginning of April 2009, the allegations against Mr Romano and Albert Becerra were canvassed in a series of articles in the *Sydney Morning Herald*. Mr Issa was identified as a close associate of Mr Child and Mr Giangrasso who, the Commission is satisfied, were suspected by Mr Romano and other senior Council staff of being responsible for these disclosures.

The email of 25 April 2009

On 25 April 2009, Mr Romano sent an email to Ian Dencker and Les Hullick, members of the Council's Executive that contained the following items in relation to Mr Issa:

6. *Ommar Issar [sic] is to remain in Khaled Azer's management. When OI is on exercise break he should be exercising not talking on the phone in one spot. I think we need to have a tighter structure to control him. I suggest Linda keeps a register on her desk*

which requires OI to sign out and sign in. Linda can control time out of office. If he abuses this privilege he should be disciplined. Linda should keep a strict time record of how long he is out of the office. While OI is out of office doing his stretching, if he is seen standing in one spot and not doing his stretching he should be disciplined. OI needs to be supervised more closely. I suggest he is not allowed to stand in the street. I think we need to provide him an area inside the building; say in front of KAs office where Linda can supervise him.

...

11. Has PM [Peter Macklin] issued letters to individuals who are known to us as doing private work after hours and asked them to explain in writing why they have not sort [sic] approval for secondary employment. If they do not respond I believe we have a responsibility to report them to the taxation office. This should be pursued immediately. The people I am aware of from IPP reports are:

- a. Joe Giangrasso*
- b. Steve Child*
- c. Barry Web [sic]*
- d. John Vadala*
- e. Ommar [sic] Issa*
- f. Mowing crews*

There may be others. Have PM and Richard [Mailey of IPP Consulting] compile a list.

All the named persons in this list had been involved in the Befaro Unit renovations.

The comments in item 6 in relation to Mr Issa showed an extraordinary level of interest by the general manager of a council in the moment-to-moment movements of a junior staff member. Item 6 suggests that unusual and onerous conditions should be placed upon Mr Issa, including that he should have to sign in and sign out whenever he took a break and that he should be disciplined if he “abused this privilege”. This item also suggested that Mr Issa should be disciplined if he stood in one place on his break and did not do his stretching exercises. This suggestion was onerous, inappropriate and evidenced a considerable degree of animosity towards Mr Issa on the part of Mr Romano.

In respect of item 11, Mr Romano said that he listed the officers named in his email because they had been named in IPP reports as doing private work after hours. As noted in the preceding chapters, the IPP reports and investigator notes do not list these five people as doing private work after hours. Mr Romano claimed that Richard Mailey of

IPP Consulting had provided him with verbal reports that justified his claims. Mr Mailey did not personally conduct surveillance and relied on information provided by his operatives. The IPP investigator’s notes do not contain any reference to Mr Issa doing private work after hours and the Commission is satisfied that this is not the basis upon which Mr Issa’s name was included in the email.

As well as sending the email, Mr Romano told the Commission that he complained to Mr Macklin and Mr Azer about the fact that he had seen Mr Issa out the front of the Council Chambers on the telephone. Mr Macklin and Mr Azer confirmed this in their evidence. Mr Macklin told the Commission that it was “pretty clear” that Mr Romano did not want Mr Issa around the Council Chambers.

Corrupt conduct

Mr Romano, who had supposedly stood aside from issues in relation to the depot because of a conflict of interest, should have taken no part in giving instructions or issuing suggested courses of action to Mr Hullick and Mr Dencker, particularly instructions or suggestions that targeted a Council officer who was suspected of being involved in the allegations against Mr Romano. While Mr Issa was no longer working in the depot at the time of this email, he had been working there during the period when work was undertaken on Mr Romano’s driveway and the units in which he had an interest. The Commission is satisfied that Mr Romano included Mr Issa in this email as an officer to target because he believed or suspected that Mr Issa was involved in the making of allegations against him.

Mr Romano’s actions in urging senior Council officers to take action in relation to Mr Issa by seeking an explanation in writing for an alleged disciplinary breach of failing to obtain approval for secondary employment and by reporting him to the Australian Taxation Office could constitute “detrimental action” under the PDA, on the basis that his actions could involve “discrimination, disadvantage or adverse treatment in relation to employment” in respect of Mr Issa under section 20(2) of the PDA. Mr Romano’s suggestion that onerous conditions should be placed upon Mr Issa in relation to his exercise breaks, and consideration of disciplinary action against him if he did not do his stretching exercises during his breaks, could also constitute “detrimental action” on the same basis.

It was also conduct that involved a dishonest or partial exercise of Mr Romano’s official functions for the purposes of section 8(1)(b) of the ICAC Act.

In order to amount to a possible criminal offence under section 20(1) of the PDA for the purposes of section 9 of the ICAC Act, it would be necessary that the detrimental action could be shown to have been taken substantially in

reprisal for a protected disclosure having been made.

As the only protected disclosure made by Mr Issa was his provision of information to the Commission in October/November 2009, some months after the email of 25 April 2009, this element could not be established.

Clause 6.1(f) of Burwood Council's Code of Conduct requires Council staff to refrain from carrying out their functions in a manner that is likely to bring the Council into disrepute, and specifically states they must not act in a way that "causes, comprises or involves discrimination, disadvantage or adverse treatment in relation to employment".

The detrimental action taken by Mr Romano against Mr Issa in sending the email of 25 April 2009 to Mr Dencker and Mr Hullick amounted to corrupt conduct on the basis that it involved a dishonest or partial exercise of Mr Romano's official functions for the purposes of section 8(1)(b) of the ICAC Act and could amount to a disciplinary breach of clause 6.1(f) of the Code of Conduct for the purposes of section 9 of the ICAC Act.

Mr Issa is stood down from work

Mr Thinesh, for whom Mr Issa had been working while performing restricted duties, told the Commission that he and Mr Issa commenced work on the Forward Works Program. This involved the preparation of a spreadsheet detailing planned future civil works and Mr Issa assisted with data entry and cost estimation.

In May or June 2009, Mr Inglese directed Mr Thinesh to cease work on the Forward Works Program and to work on a Capital Works Design project. This involved survey work in the field. Mr Thinesh needed assistance to perform this work, but Mr Issa's restrictions due to his back injury prevented him from providing adequate assistance.

Mr Azer told the Commission that Mr Thinesh spoke to him on 22 July 2009 about the difficulties he was having with Mr Issa's inability to assist in the field.

According to Mr Azer's notes, on 23 July 2009 he attended a meeting with the Council executive and Council lawyers. Mr Romano's personal lawyer was also in attendance. There was discussion about Mr Issa. Mr Macklin indicated that he was going to deal with the "Ammar issue" "without going back to the ICAC", as they were unsure whether he was "protected", and there were "time constraints". The meeting supported this position.

Around this time, Mr Macklin called Mr Issa at his home and told him there were no more suitable duties for him. He told him not to come in to work the following day as Mr Thinesh had told him he had nothing suitable for Mr

Issa to do.

Mr Issa rang Mr Thinesh and told him what Mr Macklin had said. Mr Thinesh denied that he had told Mr Macklin that there was no more work for Mr Issa. Mr Thinesh confirmed to the Commission that he had not said this to Mr Macklin.

In his evidence, Mr Macklin claimed that he had spoken to Mr Thinesh. Mr Azer's contemporaneous notes indicate that he had spoken to both Mr Thinesh and Mr Macklin about Mr Issa on 22 July 2009, but it is unclear whether he spoke to them together.

Mr Thinesh told the Commission that, at the time when Mr Issa was asked not to come in to work, there was still work to be done on the Forward Works Program that Mr Issa could have done while Mr Thinesh was involved in the Capital Works Program.

Mr Thinesh told the Commission that after his telephone call with Mr Issa "over the next few days" he did have a conversation with Mr Macklin about Mr Issa. They discussed how Mr Issa could not do the survey work on account of his physical restrictions:

We didn't discuss other options but I did not think it was my place to make these suggestions.

Mr Issa told the Commission that he considered the Council's failure to offer him alternative duties had been an act of reprisal against him.

Mr Issa was not provided with alternative restricted duties again prior to the commencement of the Commission's public inquiry in March 2010.

Conclusion

The removal of Mr Issa from the workforce came at the same time as plans were afoot for the removal of Mr Child and Mr Giangrosso. The Commission is satisfied that Mr Issa was identified by the Council executive and Mr Romano as being close to Mr Giangrosso and Mr Child. The Commission is also satisfied that Mr Romano had made it clear that he did not want Mr Issa working at the Council Chambers.

Mr Issa made a statement to the Commission on 18 November 2009, which amounted to a protected disclosure under the PDA. However, this was some months after the Council took action to stand Mr Issa down in July 2009, and this action therefore could not amount to reprisal action under the PDA.

Despite this, the action would amount to corrupt conduct if it involved a dishonest or partial exercise of official functions for the purposes of section 8(1)(b) of the ICAC

Act and could amount to a disciplinary breach of clause 6.1(f) of the Code of Conduct (as outlined in the preceding section) for the purposes of section 9 of the ICAC Act.

There is evidence that Mr Issa was stood down on the basis that there were no suitable duties available for him, when in fact, according to Mr Issa and Mr Thinesh, there were available suitable duties. There is no doubt, however, that there had been a change in the work circumstances of Mr Thinesh and Mr Issa, and that this had led to discussions involving Mr Thinesh, Mr Azer and Mr Macklin about difficulties associated with Mr Issa's employment situation. The evidence suggests that some confusion might have arisen in the course of these discussions about whether work was available or not.

The Commission is therefore not satisfied to the requisite standard that Mr Romano or any other officer of the Council engaged in corrupt conduct in relation to the decision to stand Mr Issa down from work at the Council in July 2009.

Section 74A(2) statement

In the course of the Commission's inquiry into the matters canvassed in this chapter, substantial allegations were made against Mr Romano. Accordingly, he is a person who comes within the definition of "affected person" for the purposes of section 74A(2) of the ICAC Act.

In all the circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Romano in relation to matters canvassed in this chapter.

Mr Romano no longer works for Burwood Council. It is therefore not necessary to make any statement in relation to the matters referred to in section 74A(2)(b) or section 74A(2)(c) of the ICAC Act in relation to matters canvassed in this chapter.

Chapter 16: Corruption prevention

Introduction

Pat Romano, the General Manager of Burwood Council, was able to undertake the corrupt conduct detailed in this report by taking advantage of weaknesses in the controls applied to his position.

Deficiencies in policies and other internal control systems, the absence of internal audit, gaps in complaint handling, the absence of protection from reprisals and a lack of councillor knowledge of their authority and responsibilities produced an environment conducive to corrupt conduct.

The governance framework that applied to Mr Romano is contained in the *Local Government Act 1993* (“the LGA”). The framework parallels a typical corporate governance model in many ways. The elected council’s role can be compared to that of the board of a public company. The elected council oversees the activities of the council and its general manager’s performance, but is not involved in the day-to-day running of the council.

Despite this, the local council model in NSW can differ from the corporate model in important details. These differences have the potential to weaken a council’s governance framework. In the case of Burwood Council, this included:

- Council management of the general manager. Councillors were not in a strong position to independently assess Mr Romano’s performance. For example, they had limited formal and informal channels by which complaints about Mr Romano could be detected. Similarly, they had little way of knowing whether reprisals or other inappropriate actions were being taken by Mr Romano. There was also no internal audit function that provided independent and objective advice to the elected body about the operation of Council’s control systems.
- Councillor knowledge of their rights and responsibilities. Councillors, unlike corporate

directors, do not necessarily have backgrounds relevant to their oversight roles. The councillors at Burwood Council appeared to be at a disadvantage relative to Mr Romano in knowing what they could or should do.

- Weak link between the elected body and staff. The role of the general manager is pivotal in providing a link between the elected body and its employees, particularly as individual councillors cannot direct staff in their day-to-day activities. Mr Romano’s failure to fulfill this role adequately undermined the mechanism through which key decisions of the elected body were meant to be implemented. It also meant that Councillors did not obtain the knowledge needed to provide effective oversight of the Council.

Local councils are public agencies. Yet, unlike their state government counterparts, they have a high degree of autonomy when it comes to the formulation of major policies. Burwood Council adopted a number of policies that gave Mr Romano extensive discretion, which he was able to exploit for corrupt purposes.

Mr Romano took advantage of the weak governance framework at Burwood Council to foster inappropriate expenditure practices, hide inappropriate expenses, refuse to supply information that may have alerted Councillors to his actions, alter policy to provide him with discretion and take adverse action against staff who complained.

Governance of council administration

Absence of policies

The LGA sets certain broad parameters that impact on council policies; for example, section 252 authorises payment or reimbursement only of actual expenses incurred by councillors in carrying out their civic duties. The Model

Code of Conduct for Local Councils in NSW (“Model Code of Conduct”) also includes general provisions about using council resources ethically, effectively and carefully, and generally not using them for private purposes.² Yet, unlike NSW public sector departments, local councils are not bound by state government pronouncements that govern specific levels, rates or standards for items such as equipment and expenses. Generally, the policy controls that are a central plank in corporate governance in local government are drafted by the bodies being governed by those policies.

Typically, under this system of self-regulation, councils set their own policies and limits on the amount of expenditure within the broader budget process.³ While the payment of expenses and provision of facilities to councillors is governed by a guideline issued under section 23A of the LGA, this guideline does not specify monetary limits. No equivalent guideline exists for the payment of expenses and provision of facilities to general managers and senior staff.

At Burwood Council there was no specific policy governing the frequency and quantum of expenses claims by Mr Romano and senior staff. Whilst the Model Code of Conduct states, “You must not act in order to gain financial or other benefits for yourself, your family, friends or business interests”,⁴ the adverse effects that decisions may have on the public purse is not set out as a consideration. Mr Romano was able to approve the expenditure of thousands of dollars on gifts, expensive lunches and dinners that he believed to be appropriate when a reasonable view could be formed that the expenditure was excessive and an unnecessary drain on limited public funds, with no discernable public benefit. Examples of expenditure that Mr Romano approved himself included:

- the annual sweeping of his home for electronic devices because of a suggested risk of commercial espionage
- a \$347 lunch with the Council’s lawyer at a five-star restaurant in the eastern suburbs of Sydney. This was justified, as were all restaurant meals, because “work” was discussed.

Unchecked by a code of conduct requirement, Mr Romano extended this philosophy to frequent petty cash claims for less than \$10 for coffee when he spoke to a subordinate. Almost daily claims by Mr Romano for coffee, breakfasts and meals with Council staff, Councillors, consultants and lawyers cost \$6,862.90 in 2007 and \$7,755.70 in

2008. After the commencement of the Commission’s investigation in 2009, Mr Romano appears to have adopted a fresh philosophy as his expense claims dropped to \$503.40.

The expenditure opportunities available to Mr Romano arguably included many items that were personal as opposed to public in nature. This expenditure was not disclosed to ratepayers. While clause 217(1)(b) of the Local Government (General) Regulation 2005 (“the Regulation”) requires the inclusion of a general manager’s remuneration and other benefits in a council’s annual report, the expenditure described above did not fit these criteria as it was categorised as the reimbursement of expenditure that was deemed to be work-related.

As the expectations of ratepayers can reasonably be assumed to be the same as state taxpayers, Burwood Council should develop a policy to bring staff expense claims in line with current state government practice. In particular, the NSW Government Expenses Policy prohibits the expenditure of state funds on any event that will provide a predominately personal benefit to NSW public sector employees. Out-of-pocket expenses must be directly related to the performance of an officer’s official duties and the costs must be reasonable. The Policy also provides that where an officer is paid a remuneration package (as is the case with general managers) “he or she is expected to cover expenditure of a minor nature associated with work and normal representative responsibilities, such as the occasional round of drinks, confectionary etc”.⁵

Recommendation 1

That Burwood Council develops a policy for the payment of appropriate out-of-pocket expenses incurred by the General Manager and Council employees. Such a policy should incorporate the provisions of the NSW Government Expenses Policy.

Recommendation 2

That Burwood Council’s out-of-pocket expenses policy for staff and the General Manager includes protocols for the approval of out-of-pocket expenditure. The protocols should explicitly prohibit the General Manager or any other Council employee from approving expenses where there is an actual or perceived personal benefit derived from the expenditure. The protocol should also provide that the Mayor must approve the expense claims of the General Manager.

2. Specific provisions include clauses 10.12, 10.14, 10.15 and 10.17 (June 2008).

3. A notable exception is the NSW Local Government Remuneration Tribunal, which is constituted under the LGA. The Tribunal is responsible for categorising councils, county councils and mayoral offices to determine the maximum amount of fees to be paid to councillors, members of county councils and mayors in each category.

4. Clause 4.3 of the Model Code of Conduct (June 2008).

5. See Department of Premier and Cabinet Circular C2010 – 42 NSW Government Expenses Policy.

Weak policies

Deficiencies in Burwood Council's policies were apparent in its Councillor Expenses and Facilities Policy. Such policies are made in accordance with sections 252 and 253 of the LGA as well as clause 403 of the Regulation.

Under section 252(5) of the LGA, councillor expenses and facilities policies must comply with the provisions of the LGA, the Regulation, and relevant guidelines issued under section 23A of the LGA. As mentioned in chapter 9, the NSW Division of Local Government has issued *Guidelines for the payment of expenses and the provision of facilities for Mayors and Councillors in NSW* ("the Guidelines") under the provisions of section 23A.⁶

The Guidelines include an attachment (that does not form part of the Guidelines), which provides examples of specific expenses and facilities that would be considered reasonable, although they do not include any suggested monetary limits. Rather, councils must agree and set monetary limits for all expense provisions in their policy, where practicable and where appropriate. Councils must also set standards for the provision of equipment and facilities to councillors.

The Guidelines that were in force during Mr Romano's time as General Manager stated that councillors generally should not obtain private benefit from the provision of equipment and facilities. A similar statement is contained in the updated Guidelines.

Burwood Council complied with the Guidelines with a crucial modification that greatly increased Mr Romano's discretion. Under the heading "Approval of expense claims" an option is provided for the individual approval of an expense by the General Manager of Burwood Council. This change was made despite the Guidelines stating that the Council's policy should avoid any one person being the sole decision-maker to avoid potential conflicts. The Guideline also states that approval for discretionary trips, attendance at conferences and/or for other significant expenses and facilities should occur, where possible, at a full council meeting.

Mr Romano used his discretion to approve the purchase of a second desktop PC for a Councillor weeks before the 2008 elections, despite concerns expressed by Robert Cummins. Mr Romano also approved ad hoc purchases of cameras valued at \$1,500 for some but not all of the Councillors.

The loose arrangements at Burwood Council for the payment of expenses and facilities to Councillors created a risk that Councillors would derive personal benefits under these arrangements in contravention of section 252 of the LGA and the Model Code of Conduct. There is a risk that

these arrangements could be exploited for corrupt purposes and the Commission considers this an area that warrants change.

Recommendation 3

That Burwood Council modifies its Councillor Expenses and Facilities Policy to require the payment of expenses and the provision of facilities to Councillors only where specifically provided for in the Policy.

Recommendation 4

That Burwood Council modifies the Councillor Expenses and Facilities Policy to require the approval of significant Councillor expenses and facilities, where possible, at a full Council meeting. Where approval at a full Council meeting is not possible or appropriate then approval should be given jointly by the Mayor and the General Manager. If the Mayor requires approval, it should be given jointly by the Deputy Mayor or another Councillor and the General Manager.

In 2007, Mr Romano purchased an Audi A6 car at the Council's expense. An examination of the Council's Motor Vehicle Management Policy reveals a number of weaknesses. For example, there is no requirement that cars not exceed the luxury car tax threshold nor is there any requirement for private payment of non-essential accessories. The absence of these key requirements is at odds with the NSW government practice and procedure, including established charges for Senior Executive Service (SES)/Senior Officer motor vehicles.⁷ It also creates a risk that unreasonable and excessive non-cash benefits will be provided to General Managers and senior staff.

Other key value-for-money provisions are also absent from the Council's Policy, including a preference for leasing and appropriate vehicle disposal methods.

Recommendation 5

That Burwood Council aligns its Motor Vehicle Management Policy to reflect key areas of NSW state government policy and practice, including preference for leasing, cars not exceeding the luxury car tax threshold, procedures for disposal and appropriate treatment of optional accessories.

6. The guidelines were originally issued in May 2007 and updated in October 2009.

7. See Department of Premier and Cabinet Circular 2010-17 SES/Senior Officer Motor Vehicle Charges 2010-11.

Recommendation 6

That contracts and remuneration packages for the General Manager and senior staff at Burwood Council comply with the Council's Motor Vehicle Management Policy.

The Commission's examination of Burwood Council's policies raises concerns about the ability of the NSW Division of Local Government to influence the standards expected from this sphere of government. When the Division considers a local government issue to be of significance, it may issue guidelines under section 23A of the LGA. Generally, under section 23A(3) councils are required to take any relevant guidelines issued under this section into consideration before exercising any of their functions. Only in specified cases are councils required to comply with such guidelines, as was the case with the guidelines governing councillor expenses and facilities.

The Commission considers that as a matter of good practice, councils should be compelled to adopt all guidelines issued under section 23A. Such a change would bring the governance of local government into line with the state model that requires state agencies to adopt circulars and pronouncements issued by the NSW Department of Premier and Cabinet.

Nevertheless, the Commission recognises that a "one size fits all" approach is not always appropriate given the local differences between councils. These include the complexity of existing governance structures, local economies, population size and what individual councils can afford to pay. For this reason, there should be a mechanism that allows individual councils to apply for a dispensation in relation to complying with a section 23A guideline.

Recommendation 7

That the NSW Division of Local Government be given the authority through legislative amendment to require councils in NSW to adopt policy and practice considered to be of state-wide significance by the Division's Chief Executive. This amendment should include an appeal mechanism to the Chief Executive for councils seeking specific dispensation.

Recommendation 8

That non-compliance with the requirement for adoption of policy (as described in recommendation 7) be dealt with as a discipline issue for relevant council administrative officers under the Model Code of Conduct for Local Councils in NSW.

Recommendation 9

That the NSW Division of Local Government reviews all circulars and pronouncements by the Department of Premier and Cabinet for issues of relevance to NSW local councils and issues guidelines to councils accordingly.

Absence of audit

Unlike corporate boards, the Councillors at Burwood Council did not have an audit committee to oversee and monitor the Council's audit processes, input into an audit plan or regular and routine access to the reports of internal audit. Councillors were able to obtain information only through Mr Romano, which allowed him to hide much of his behaviour.

The absence of an internal audit function was a significant factor that allowed Mr Romano to undertake inappropriate expenditure and to hide it from Council, and represents an obvious governance weakness. Without this independent source of information, Councillors were hostage to the General Manager's willingness to provide information.

The NSW Division of Local Government advocates that all councils should have an internal audit function for the following reasons:

- it supports good internal governance
- to ensure consistency with other levels of government
- to improve the effectiveness of risk management, control and governance processes
- to help instil public confidence in an organisation's ability to operate effectively.⁸

The Commission concurs with this view and consequently recommends that internal audit becomes a statutory function for local councils. In the case of small councils, the possibility of councils sharing an internal audit function should also be provided as an option.

The NSW Division of Local Government's *Internal Audit Guidelines*, issued as guidelines for the purpose of section 23A of the LGA, include appropriate structures, functions and charters for a council's internal audit function.

Typically, a direct reporting line between internal auditors and an audit committee (with a majority of members external to council) ensures there is a safeguard in the event of a serious breakdown in the internal control processes at senior levels within a council. Nevertheless, given the importance of an internal audit function to a

8. *Internal Audit Guidelines*, NSW Department of Premier and Cabinet, Division of Local Government, Sept 2010, p.8.

council's good governance framework, the Commission believes that additional safeguards should be put in place to strengthen the controls around internal audit functions. These include:

- a council's internal audit committee being able to meet without the general manager present. This would help preserve its capacity to meet as an independent body. The implementation of this measure would require amendment to section 376(2) of the LGA
- a statutory requirement that the general manager of a council report to the elected body any decision to remove an internal auditor and the reason for the decision. This will help protect internal auditors from dismissal as a result of conducting an audit involving the conduct of a general manager
- amending the LGA to confer powers on internal auditors similar to those conferred on external auditors. These powers should include full and free access to council records in order to carry out the internal audit function and the power to direct general managers, councillors and staff to produce documents and answer questions
- amending the Model Code of Conduct to permit councillors to provide information directly to internal auditors. This amendment is necessary to increase internal auditors' potential sources of information.

It is also important that the reporting structure for council's internal audit function includes provision for the elected body to receive information about the outcome of audits.

To deal with the specific problems present at Burwood Council, the Commission recommends that the Council establish an internal audit function as a matter of priority and that this function initially focuses on certain high-risk areas, including:

- compliance with the Council's policy for the payment of expenses and facilities to Councillors
- compliance with the Council's policy for the payment of out-of-pocket expenses to the General Manager and staff (when it is developed)
- the Council's system for allocating work to legal practitioners and compliance with this system
- expenditure that is unusual by its nature or frequency.

Recommendation 10

That the NSW Minister for Local Government seeks legislative amendment to the *Local Government Act*

1993 to establish internal audit for local authorities as a statutory function.

Recommendation 11

That Burwood Council establishes an internal audit function with an independent internal audit committee as a matter of priority. This committee should be chaired by a person independent of the Council.

Recommendation 12

That the elected body of Burwood Council receives regular updates on the outcome of internal audits.

Recommendation 13

That the NSW Minister for Local Government seeks legislative amendments to the *Local Government Act 1993* to require general managers to report to the elected council a decision to dismiss an internal auditor and the reasons for the decision.

Recommendation 14

That the NSW Minister for Local Government seeks legislative amendments to the *Local Government Act 1993* to provide internal auditors unfettered access to all documents and any council staff they deem necessary for the conduct of their role.

Recommendation 15

That the NSW Minister for Local Government amends Part 9.2(d) of the Model Code of Conduct for Local Councils in NSW to allow councillors to provide information to an internal auditor on any matter related to council business.

Recommendation 16

That the NSW Minister for Local Government seeks legislative amendment of section 376(2) of the *Local Government Act 1993* to remove the automatic entitlement of a general manager to attend an audit committee meeting.

Recommendation 17

That Burwood Council's internal audit function monitors compliance with the Councillor Expenses and Facilities Policy as part of its oversight role.

Recommendation 18

That Burwood Council's internal audit function monitors compliance with Council's (foreshadowed) policy for the payment of out-of-pocket expenses to the General Manager and staff.

Recommendation 19

That Burwood Council's internal audit function monitors compliance with Council's system for allocating work to legal practitioners.

Recommendation 20

That Burwood Council's internal audit function conducts audits of the authorisation, certification and approval processes for expenditure that is unusual by its nature or its infrequency.

Council management of the General Manager

Gaps in complaint handling

Complaints are the most common way to detect corrupt conduct. Effective channels for making complaints, competent investigation of complaints and protection against reprisal are central to the effective exposure and prevention of corrupt behaviour. None of these factors was present at Burwood Council when a complaint was made about Mr Romano's use of Council staff on a private project.

The Employee's Handbook at Burwood Council provides guidance for the management of complaints about staff under the heading "Disciplinary Procedures". The handbook remains silent on managing complaints against the General Manager. Accordingly, the only guidance for the management of complaints against the General Manager lies in the Burwood Council Code of Conduct, which is based on the Model Code of Conduct for Local Councils in NSW.

Senior Burwood Council officers became aware of the receipt of a complaint by Council worker Youssef (Joe) Saad in February 2009. Mr Saad provided information about Council workers being used on a private project involving the Council architect, Albert Becerra, and, as it subsequently became known, the General Manager.

There has been some dispute about whether this disclosure amounted to a "protected disclosure" under the *Protected Disclosures Act 1994* but, as canvassed earlier in this report, whether or not it was a protected disclosure, a serious allegation had been made against senior members of staff.

The inadequate and, in some regards, inappropriate way in which this disclosure was handled by the Council is outlined in chapter 11.

Recommendation 21

That Burwood Council amends its Code of Conduct and the Employee's Handbook to clearly prescribe that all complaints concerning the General Manager be referred to the Mayor in the first instance. If the Mayor is also implicated, the complaint should be referred to the NSW Division of Local Government.

Recommendation 22

That Burwood Council policies be amended to prohibit the General Manager from having any involvement or giving directions to staff in relation to any formal or informal complaints where he/she is the subject of the complaint. This recommendation does not prohibit the General Manager from providing information or a statement as part of the investigation process.

When Mr Saad made his initial complaint about Council staff working on Mr Becerra's unit to a supervisor, he was working from the Enfield Council Depot. At that time, there was no one available as a designated officer at the depot to make a complaint to under the protected disclosure policy at Burwood Council. As outlined in chapter 10, the only officers that a protected disclosure could be made to were the Mayor, the General Manager, the four directors and the disclosure-coordinator.

The physical and hierarchal distance between Mr Saad and those to whom he could make a disclosure at Burwood Council was not conducive to encouraging him or other employees to come forward. In general terms, the Commission considers that officers are more likely to make protected disclosures if they are permitted to complain to their immediate supervisors, rather than largely limiting the officers to whom they may complain to members of the executive team.

Recommendation 23

That Burwood Council amends its Internal Reporting System to include an officer's line manager/supervisor as a designated officer to whom a protected disclosure can be made. All officers to whom a protected disclosure can be made under the policy should receive training on how they should deal with a protected disclosure.

When a further complaint about various allegations concerning Mr Romano was made to the *Sydney Morning Herald* and the Mayor, action was taken by the Council to investigate the allegations. A decision was made by the Council to accept Mr Romano's offer to step aside in relation to the management of the issues surrounding the complaints. Consequently, two directors, Les Hullick and Ian Dencker, were appointed as acting general managers for the issues.

As the evidence canvassed in the preceding chapters shows, Mr Romano did not effectively step aside from relevant issues. He continued to have full access to information and documents relating to the complaints and continued to instruct his subordinate managers on matters that clearly related to the complaints.

Recommendation 24

That Burwood Council ensures that the handling and investigation of complaints about the General Manager are overseen by the Mayor and conducted by investigators who are independent of the Council.

Adverse action against staff who have made complaints

Fear of reprisal action reduces the likelihood of complaints about corrupt conduct and the detection of corrupt conduct. Where the complaint concerns senior management, reprisal is a real possibility and protection of the complainant is essential to the effective functioning of a complaints system.

Allowing Mr Romano to remain in his role and to have input into employment decisions concerning complainants, whilst serious corruption allegations against him were investigated, arguably provided him with the opportunity to take adverse action in relation to staff, as outlined in the preceding chapters. There was no provision for the General Manager to be suspended in either the standard divisional contract or that signed by Mr Romano

In contrast, the LGA provides for the suspension of councillors. The Burwood Council Employee's Handbook also provides for the suspension of staff below the level of director in relation to conduct and performance issues.

Similarly, the current iteration of the NSW Premier's memorandum 94/35 provides guidance to the public sector about when consideration should be given to placing an officer on alternative duties or suspension with or without pay.

Recommendation 25

That Burwood Council develops a suspension policy for all Council staff aligned to the intention and effect of Premier and Cabinet guidelines for the NSW public sector, as espoused in Premier's Memorandum 94/35.

Recommendation 26

That the Chief Executive of the NSW Division of Local Government amends the *Standard contract for the employment of general managers* to include specific provision for a council to suspend the general manager from duty on a reasonable

apprehension that he/she has engaged in corrupt conduct or serious misconduct.

Recommendation 27

That Part 3 of the Model Code of Conduct for Local Councils in NSW be amended to improve the guidance provided to mayors in managing complaints against a general manager. In particular, guidance should be provided about the consideration of the suspension of the general manager in appropriate cases. A duty should also be placed on the mayor to monitor decisions and actions of the general manager and other council officers for possible detrimental action against staff or contractors who have provided information about alleged misconduct.

Councillor capacity to oversee Council

Councillor knowledge of their rights and responsibilities

A lack of councillor knowledge of their rights and responsibilities contributed to the problems at Burwood Council, to the extent that Councillors were ineffective in dealing with issues about Mr Romano because they did not understand their rights, powers and obligations. Mr Romano controlled the Councillors rather than assisting the Councillors in fulfilling their duties.

Once elected, a councillor is expected to be sufficiently skilled to fulfil their responsibilities, despite being drawn from the general community and having a disparate range of professional and life experiences. Whilst the same might be said about state government ministers, they command resources such as ministries and benefit from dedicated policy professionals within departments. The majority of councils in NSW are small and the councillors rely on their general manager to assist them by providing timely and relevant information.

Mr Romano used the restricted channels of information to his advantage. Evidence was given both by former Mayor John Faker and then Mayor Lesley Furneaux-Cook that Councillors were directed by the General Manager as to what decisions they were entitled to take. Ms Furneaux-Cook stated that the General Manager would make a determination whether a matter was operational and thereby restrict any enquiry or involvement by the Councillors: "as Councillors, we weren't getting the information for us to make the best choices, to make a strategic, those strategic policy decisions of Council".

Section 335 of the LGA sets out the functions of the general manager and states that the general manager is responsible for the day-to-day management of the council. A common theme from evidence at the public inquiry was

that certain matters were deemed by Mr Romano to be “operational” and therefore not the business of the councillors. Mr Faker was asked by Counsel Assisting: “So during the course of 2000, when you were Mayor from 2006 to 2008, during those, that three-year period, if I could ask you to turn your mind to that, are you able to explain to the Commissioner what you understood the distinction to be between the sorts of decisions Council made and the sorts of decisions the General Manager made?”. Mr Faker replied: “Senior Counsel, that was primarily with regards to operations and in that instance all of the Councillors would take the advice or rely on the advice of the staff as in the General Manager and the executive to tell us what is operational and what is Council involvement”.

In providing their evidence, Ms Furneaux-Cook and Mr Faker stated they realised they needed to be given more information to make informed decisions and to carry out their civic duties. The Councillors were vulnerable to manipulation by the General Manager, in part, because of the absence of this information.

Accordingly, a number of recommendations are made to enhance the knowledge of new and incumbent councillors to more effectively discharge their roles. The Commission is of the opinion that councillors should be provided with a core package of information to promote better governance, and that this package should be endorsed by the NSW Division of Local Government .

Recommendation 28

That the NSW Division of Local Government endorses a core package of information for trainers to deliver to councillors. The package should be tailored to the needs of new and existing councillors.

Recommendation 29

That all NSW councillors undertake a foundation education and training program endorsed by the

NSW Division of Local Government, at a minimum of once per term.

Recommendation 30

That all current Burwood Council Councillors undertake a foundation education and training program endorsed by the NSW Division of Local Government as a matter of priority.

Recommendation 31

That the NSW Division of Local Government promotes its capacity to provide information and assistance to councillors in the discharge of their role.

These recommendations are made pursuant to section 13(3)(b) of the ICAC Act and, as required by section 111E of the ICAC Act, will be furnished to Burwood Council and the Minister for Local Government.

As required by section 111E(2) of the ICAC Act, Burwood Council must inform the Commission in writing within three months (or such longer period as the Commission may agree to in writing) after receiving the recommendations, whether it proposes to implement any plan of action in response to the recommendations and, if so, of the plan of action.

In the event a plan of action is prepared, Burwood Council is required to provide a written report to the Commission of its progress in implementing the plan 12 months after informing the Commission of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the first report.

The Commission will publish the response to its recommendations, any plan of action and progress reports on its implementation on the Commission’s website, www.icac.nsw.gov.au, for public viewing.

Appendix 1: The role of the Commission

The ICAC Act is concerned with the honest and impartial exercise of official powers and functions in, and in connection with, the public sector of New South Wales, and the protection of information or material acquired in the course of performing official functions. It provides mechanisms which are designed to expose and prevent the dishonest or partial exercise of such official powers and functions and the misuse of information or material. In furtherance of the objectives of the ICAC Act, the Commission may investigate allegations or complaints of corrupt conduct, or conduct liable to encourage or cause the occurrence of corrupt conduct. It may then report on the investigation and, when appropriate, make recommendations as to any action which the Commission believes should be taken or considered.

The Commission can also investigate the conduct of persons who are not public officials but whose conduct adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority. The Commission may make findings of fact and form opinions based on those facts as to whether any particular person, even though not a public official, has engaged in corrupt conduct.

The ICAC Act applies to public authorities and public officials as defined in section 3 of the ICAC Act.

The Commission was created in response to community and Parliamentary concerns about corruption which had been revealed in, inter alia, various parts of the public service, causing a consequent downturn in community confidence in the integrity of that service. It is recognised that corruption in the public service not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The principal functions of the Commission, as specified in section 13 of the ICAC Act, include investigating any circumstances which in the Commission's opinion imply that corrupt conduct, or conduct liable to allow or encourage corrupt conduct, or conduct connected with corrupt conduct, may have occurred, and cooperating with public authorities and public officials in reviewing practices and procedures to reduce the likelihood of the occurrence of corrupt conduct.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

Appendix 2: Sections 8 and 9 of the ICAC Act

Sections 8 and 9 of the ICAC Act provide as follows:

8 General nature of corrupt conduct

(1) 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.

(2) Corrupt conduct is also any 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 could involve any of the following matters:

- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
- (b) bribery,
- (c) blackmail,
- (d) obtaining or offering secret commissions,
- (e) fraud,

- (f) theft,
- (g) perverting the course of justice,
- (h) embezzlement,
- (i) election bribery,
- (j) election funding offences,
- (k) election fraud,
- (l) treating,
- (m) tax evasion,
- (n) revenue evasion,
- (o) currency violations,
- (p) illegal drug dealings,
- (q) illegal gambling,
- (r) obtaining financial benefit by vice engaged in by others,
- (s) bankruptcy and company violations,
- (t) harbouring criminals,
- (u) forgery,
- (v) treason or other offences against the Sovereign,
- (w) homicide or violence,
- (x) matters of the same or a similar nature to any listed above,
- (y) any conspiracy or attempt in relation to any of the above.

(3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

(4) Conduct committed by or in relation to a person who was not or is not a public official may amount to

corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.

- (5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:
- (a) matters arising in the State or matters arising under the law of the State, or
 - (b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.
- (6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

9 Limitation on nature of corrupt conduct

- (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
- (a) a criminal offence, or
 - (b) a disciplinary offence, or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
 - (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.
- (2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.
- (3) For the purposes of this section:

applicable code of conduct means, in relation to:

- (a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or
- (b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

- (4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.
- (5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.
- (6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the *Local Government Act 1993*, but does not include a reference to any other breach of such a requirement.



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