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INDEPENDENT
COMMISSION
AGAINST
CORRUPTION

Attempts to improperly influence a Ku-ring-gai Council officer

ICAC REPORT

FEBRUARY 2009

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Independent Commission Against Corruption

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



INDEPENDENT COMMISSION AGAINST CORRUPTION

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

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

Mr President
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on attempts to improperly influence a Ku-ring-gai Council officer.

I presided at the public inquiry held in 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

A handwritten signature in black ink, appearing to read 'Jerrold Cripps', written in a cursive style.

The Hon Jerrold Cripps QC
Commissioner

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Executive summary

This report concerns an investigation conducted by the Independent Commission Against Corruption (“the Commission”) into the provision of a pearl pendant, purchased for \$807, and \$1,000 cash to Ku-ring-gai Council (“council”) officer Ms Katharine Hawken between December 2007 and June 2008. At the time Ms Hawken was working on a subdivision and development of the property at 4 Munderah Street, Wahroonga (“the Wahroonga development”) owned by a company of which Mr Wing Mak was a director and shareholder. The pearl pendant and cash were given to Ms Hawken by Ms Diana Huang, who worked for Mr Mak.

The public inquiry

As part of its investigation the Commission held a public inquiry on 11 December 2008. Ms Huang, Mr Mak and Ms Hawken gave evidence. The Hon Jerrold Cripps QC, Commissioner, presided. Mr Murugan Thangaraj acted as Counsel Assisting the Commission.

The Commission’s findings

The Commission’s findings are set out in chapter 4.

The Commission found that Ms Huang provided the pearl pendant and \$1,000 cash to Ms Hawken with the intention of inducing Ms Hawken to exercise her official functions favourably in respect of applications relating to the Wahroonga development and thereby engaged in corrupt conduct.

No corrupt conduct findings were made in relation to Mr Mak or Ms Hawken.

A statement is made pursuant to section 74A(2) of the *Independent Commission Against Corruption Act 1988 (NSW)* (“the ICAC Act”) that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (“DPP”) with respect to the prosecution of Ms Huang for two offences of corruptly offering an inducement contrary to section 249B(2) of the *Crimes Act 1900 (NSW)*.

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 Mak or Ms Hawken for any offence.

The Commission is not of the opinion that consideration should be given to the taking of any disciplinary or dismissal action against Ms Hawken.

Corruption prevention issues and recommendations

Chapter 5 of this report details the Commission’s examination of the council’s policy and procedure relating to gifts and benefits. The chapter also sets out the Commission’s corruption prevention response to the conduct disclosed during the course of the investigation.

As part of this investigation the Commission identified the need for the Department of Local Government’s Model Code of Conduct, applicable to all councils, to clearly prohibit acceptance of gifts and benefits by council officials involved in the exercise of discretionary decision-making powers.

The Commission also identified deficiencies in the council’s Code of Conduct and Gifts and Benefits Policy.

The Commission makes the following three corruption prevention recommendations to address these deficiencies.

RECOMMENDATION 1

That the Department of Local Government amends the Model Code of Conduct to include a clear prohibition on council officials accepting gifts and benefits of any kind, regardless of their value, from persons seeking the exercise of a council’s decision-making discretion or who have sought the exercise of the council’s decision-making discretion within the previous 12 months.

RECOMMENDATION 2

That Ku-ring-gai Council removes the reference to monetary thresholds from the definition of gifts and benefits in its Gifts and Benefits Policy.

RECOMMENDATION 3

That Ku-ring-gai Council ensures that its Gifts and Benefits Policy is consistent with its Code of Conduct.

Chapter 1: Introduction

This report concerns an investigation by the Commission into the conduct of Mr Wing Mak, a property developer, Ms Diana Huang, who worked for him, and Ms Katharine Hawken, the Team Leader of the Engineering Assessment Team at Ku-ring-gai Council. In particular, the investigation examined the circumstances surrounding Ms Huang's provision of a pearl pendant purchased for \$807 and \$1,000 cash to Ms Hawken. At the time Ms Hawken was working on a subdivision and development of the property at 4 Munderah Street, Wahroonga, owned by a company of which Mr Mak was a shareholder and director.

The Commission's investigation arose as a result of a complaint received from the council's internal ombudsman. The complaint identified Ms Huang as an applicant for a development at 4 Munderah Street, Wahroonga. It was alleged she had offered Ms Hawken gifts of a pearl pendant and \$1,000 cash to obtain favourable treatment of the development application.

Why the Commission investigated

One of the Commission's principal functions, as specified in section 13(1)(a) of the ICAC Act, is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

- i. *corrupt conduct, or*
 - ii. *conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or*
 - iii. *conduct connected with corrupt conduct,*
- may have occurred, may be occurring or may be about to occur.*

The role of the Commission is explained in more detail in Appendix 1, while Appendix 2 sets out the definition of corrupt conduct under the ICAC Act.

The matter reported to the Commission was serious and would, if established, constitute corrupt conduct within the meaning of the ICAC Act. The Commission determined that it was in the public interest to conduct an investigation for the purpose of establishing whether corrupt conduct had in fact occurred and whether there were any corruption prevention issues which needed to be addressed.

Conduct of the investigation

The Commission's investigation involved an examination of numerous documents obtained from the council and other sources, as well as interviewing and obtaining statements from several witnesses.

In order to obtain evidence of the motivating reasons for the provision of the pearl pendant and money, the Commission also conducted two controlled operations. These were authorised pursuant to the requirements of the *Law Enforcement (Controlled Operations) Act 1997 (NSW)*. A controlled operation permits those authorised under the operation to engage in specified activity which would otherwise be unlawful.

The controlled operations were conducted with the assistance of Ms Hawken and involved two meetings between her, Ms Huang and Mr Mak at the council premises on 5 June 2008 and 24 June 2008 respectively. These meetings were lawfully recorded by listening devices.

In addition, the Commission conducted compulsory examinations of Ms Huang and Ms Hawken on 14 October 2008 to obtain further relevant evidence. During these examinations, both Ms Huang and Ms Hawken denied having engaged in any corrupt conduct.

The public inquiry

The ICAC Act provides that for the purposes of an investigation the Commission may conduct a public inquiry if it considers it is in the public interest to do so.

Section 31(2) of the ICAC Act provides that:

Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:

- (a) *the benefit of exposing to the public, and making it aware, of corrupt conduct,*
- (b) *the seriousness of the allegation or complaint being investigated,*
- (c) *any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),*

- (d) *whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

The Commission assessed the material gathered during the investigation and the evidence given at the compulsory examinations. Taking into account these factors and each of the matters set out in section 31(2) of the ICAC Act, the Commission determined that it was in the public interest to hold a public inquiry having regard to the following considerations:

- The serious nature of the matters being investigated which involved allegations of bribery of a public official.
- There appeared to be compelling evidence of corrupt conduct.
- The suspected corrupt conduct was of a type that could potentially occur on a wide scale throughout the community. It was therefore considered desirable to expose it for the purpose of educating and deterring a wide audience.
- The risk of prejudice to the reputation of persons who would be called to give evidence at the inquiry was not, in the circumstances, undue.
- There was a 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 public inquiry took place on 11 December 2008. The Hon Jerrold Cripps QC, Commissioner, presided at the inquiry and Mr Murugan Thangaraj acted as Counsel Assisting the Commission. Ms Huang, Mr Mak and Ms Hawken each gave evidence.

Following the conclusion of the public inquiry, the Commission served detailed written submissions from Counsel Assisting on Ms Huang, Mr Mak and Ms Hawken. These submissions set out possible findings and recommendations. Submissions received in response to Counsel Assisting's submissions were considered in preparing this report.

Investigation findings and section 74A(2) statements

Findings of fact and corrupt conduct are set out in chapter 4 of this report.

The Commission found that Ms Huang provided the pearl pendant and \$1,000 cash to Ms Hawken with the intention of inducing Ms Hawken to exercise her

official functions favourably in respect of applications relating to the Wahroonga development and thereby engaged in corrupt conduct.

The Commission did not make any finding of corrupt conduct against Mr Mak or Ms Hawken.

Chapter 4 contains a statement pursuant to section 74A(2) of the ICAC Act. The Commission is of the opinion that the advice of the Director of Public Prosecutions (DPP) should be obtained with respect to the prosecution of Ms Huang for two offences of corruptly offering an inducement under section 249B(2) of the *Crimes Act 1900 (NSW)*.

The Commission is not of the opinion that the advice of the DPP should be sought with respect to the prosecution of Mr Mak or Ms Hawken for any criminal offence.

The Commission is not of the opinion that consideration should be given to the taking of any disciplinary or dismissal action against Ms Hawken.

Corruption prevention issues

Chapter 5 sets out the Commission's corruption prevention response to the conduct disclosed during the investigation.

As part of the performance of its statutory functions the Commission will monitor the implementation of the three recommendations made as a result of this investigation.

The recommendations will be communicated to Ku-ring-gai Council and the Department of Local Government with a request that implementation plans for the recommendations are provided to the Commission within three months of the publication of this report.

The Commission will also request progress reports on the implementation of recommendations at intervals of 12 and 24 months after the publication of this report.

These reports will be posted on the Commission's website, 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 2: Gifts of the pearl pendant and cash

This chapter sets out the circumstances surrounding the giving of the pearl pendant and \$1,000 cash to Ms Hawken.

In 2007 and 2008, an application was before the council for a subdivision and development of land situated at 4 Munderah Street, Wahroonga, in NSW. This property was owned by Sun Cheung Development Pty Ltd, a company of which Mr Mak was a director and shareholder.

Mr Mak retained Ms Huang to assist him with the application before the council. The person at the council who dealt with Ms Huang most often was Ms Hawken, who was the Team Leader of the Engineering Assessment Team. As a development engineer it was her role to assess engineering aspects of the development plans.

In September 2007, Ms Huang submitted to the council a subdivision plan (“linen plan”) for the Wahroonga development. Construction on the land could not commence without the council’s approval of the linen plan. Ms Hawken’s role was to assess the linen plan and make recommendations as to whether it should be approved by the council.

Before the linen plan could be approved it was necessary for the council to also give approval under section 88B of the *Conveyancing Act 1919 (NSW)* to an easement affecting the Wahroonga development. As this also affected property owned by another company, it was necessary for that company to consent.

The pearl pendant

As at 23 December 2007 the application, including the checking and releasing of the subdivision linen plan, had not been finalised. On 24 December 2007 Ms Huang met with Ms Hawken at the council and gave Ms Hawken a small box containing a pearl pendant. Ms Hawken informed the Commission that she did not open the box until after Christmas. When she opened the box, she believed that the pearl pendant was an inexpensive piece of costume jewellery, assessing its value to be \$40. She further stated that she believed that under council policy gifts valued under \$50 could be kept.

Enquiries made by the Commission revealed that the pearl pendant, which was of 18 ct white gold, pearl and diamonds and came in a small jewellery box, was purchased on 23 December 2007 for \$807.

On 27 December 2007 Ms Hawken notified the council’s governance officer, Mr Geoff O’Rourke, of her receipt of the pearl pendant. She did not inform him that the gift was from someone whose application she was considering.

On 30 January 2008, upon her return from leave, she was given a Gifts and Benefits Disclosure Form by Mr O’Rourke to complete. She filled out this form on that date, however she did not proceed to get it signed by her Director (whose office was located close to hers) and pass it on to the General Manager as required by council policy, which provides that the form must be completed within seven days of the receipt of the gift and provided to the General Manager.

The pearl pendant remained on Ms Hawken’s desk for several months until the Commission’s investigation of this matter commenced in June 2008.

Release of the linen plan

It was council policy that if an applicant wished to collect a linen plan from the council, then the appropriate council officer should first check a document called the Subdivision Release Form. At the public inquiry, Ms Hawken gave evidence that she completed parts of this form, including ticking a box relating to the section 88B easement, in September 2007.

Ms Hawken admitted she ticked the section 88B box before the council had approved the easement. The transfer granting the easement was not registered on the council records until 9 January 2008. She claimed the ticking of the box merely indicated the instrument has been received by the council, not that it was endorsed by the council. She agreed, however, that the linen plan could not be released without registering the transfer granting easement and the endorsement of the section 88B instrument by the council. She also agreed that the point of the form was to indicate what criteria had to be satisfied before a linen plan could be released.

Ms Hawken was on leave from 29 December 2007 until 29 January 2008. On 28 December 2007, her last day at work prior to going on her leave, Ms Hawken sent an email to a colleague, Mr Ross Guerrero. In the email she advised Mr Guerrero that she was not aware if Ms Huang had paid the section 94 contribution fee. Under section 94 of the *Environmental Planning and Assessment Act 1979 (NSW)*, a contribution is payable to councils where a development will or is likely to require the provision of or increase the demand for public amenities and public services within the area. The contribution had been assessed at \$29,000.

In her email Ms Hawken told Mr Guerrero to “Process the linen anyway and we can exchange”. It is not clear what exactly Ms Hawken meant when she wrote this, as she did not proceed to specify what Mr Guerrero was to exchange the linen plan for. Ms Hawken gave evidence at the compulsory examination that she meant the linen plan was to be released in exchange for the section 94 contribution, and that she was not authorising Mr Guerrero to release the linen plan to Ms Huang in absence of payment.

Ms Hawken further claimed to have left a note on the linen plan to the effect that the section 94 contribution had to be paid and the transfer granting the easement was outstanding.

Mr Guerrero said that he recalled contacting Ms Huang sometime after 28 December 2007 to advise her that the linen plan was ready for collection. He also enquired whether she had paid the section 94 contribution. He left the linen plan with the council’s customer service area after advising Ms Huang that she had to pay the section 94 contribution before the linen plan could be released to her.

On or about 30 January 2008, after she returned to work from her leave, Ms Hawken was contacted by Ms Huang regarding the linen plan and became aware that it had not yet been collected by Ms Huang. She advised Ms Huang that the linen plan was ready for release and made arrangements for Ms Huang to collect it that day. Ms Hawken then gave the linen plan to Ms Huang. This was despite council policy requiring that linen plans be released only after payment of section 94 contributions.

Despite being informed by Mr Guerrero prior to 30 January 2008 that the linen plan was available for collection (subject to payment of the section 94 contribution), Ms Huang did not seek to collect the plan and waited until she spoke to Ms Hawken after her return to work before collecting the plan from the council. Ms Hawken conceded that she neglected to ensure the payment of the section 94 contribution prior to handing over the linen plan to Ms Huang. She claimed that she had mistakenly assumed that the

payment had already been made as the linen plan was placed in the collection tray in the council’s customer service area.

After becoming aware that the section 94 contribution had not been paid, Ms Hawken followed the matter up. It was eventually paid on 22 May 2008.

The \$1,000 payment

On 12 May 2008 Ms Huang submitted to the council a Traffic Management Plan (“TMP”) relating to the Wahroonga development for assessment and approval.

A TMP is a plan submitted to demonstrate how construction traffic will be managed during the construction stage, so that the safety of vehicles and pedestrians on the roads can be maintained. Approval of the TMP is required before construction can commence on the development. In late May 2008, Ms Huang asked Ms Hawken on about three occasions whether she had assessed the TMP. As at 2 June 2008 the TMP had not been assessed.

On the morning of 2 June 2008 Ms Huang arranged to meet with Ms Hawken at the council. They met briefly in the council’s reception area when Ms Huang whispered to Ms Hawken, “Here is a present for you”, and handed Ms Hawken an envelope. No other discussion took place which means Ms Huang had arranged and attended the meeting for the sole purpose of providing the envelope to Ms Hawken. The meeting and handing over of the envelope was captured on the council’s CCTV camera.

Later that day Ms Hawken opened the envelope and saw that it contained cash in the amount of \$1,000 wrapped up in a floor plan of the Wahroonga development. She advised Mr Corrie Swanepoel, Manager of Development Assessment Services, and the council’s Internal Ombudsman, Ms Katrina Annis-Brown, of the incident on the same day. Mr Swanepoel and Ms Annis-Brown confirmed that the envelope contained \$1,000 cash wrapped in a floor plan.

On 3 June 2008, the day after the cash was given to Ms Hawken, Ms Huang sent an email to Ms Hawken asking for the approval report for the TMP urgently.

On 5 June 2008 Ms Huang, Mr Mak and Ms Hawken had a meeting on council premises to discuss the Wahroonga development and the TMP. The Commission conducted a lawfully authorised controlled operation at this time. An audio and video recording of this meeting was made with the aid of two listening devices installed pursuant to a lawfully obtained warrant.

During this meeting, Ms Hawken produced the envelope and asked what the nature and purpose of the envelope was, and referred to the floor plan inside the envelope. Ms Huang confirmed that the cash was for Ms Hawken. Ms Hawken identified the deficiencies in the TMP and advised Ms Huang and Mr Mak of the required changes to be made.

On 24 June 2008 another meeting took place between Ms Huang, Mr Mak and Ms Hawken when the TMP was again discussed. This meeting was also lawfully recorded by the Commission but no relevant evidence was obtained.

After the amended TMP was subsequently re-submitted to the council several times, Ms Hawken eventually approved the TMP. She advised Ms Huang of this by a letter dated 30 July 2008.

Chapter 3: The explanations

This chapter examines the explanations given by Ms Huang, Mr Mak and Ms Hawken for their conduct as outlined in the preceding chapter.

Diana Huang's evidence

Ms Huang admitted that she gave the pearl pendant and \$1,000 cash to Ms Hawken. She denied she did so for any improper or corrupt reason. She claimed that it was a Chinese custom to express thanks to a person who had helped you by giving them money. She also claimed that the reason the \$1,000 was placed in an envelope was consistent with Chinese tradition.

She gave evidence that there was no formal remuneration agreement in place between Mr Mak and herself, other than that she would be paid commission on any sales of property made by her and the possibility of receiving a bonus payment at Mr Mak's discretion. The prospect of receipt of the bonus means that Ms Huang had a financial interest in the applications being finalised as quickly as possible.

At both her compulsory examination and the public inquiry, Ms Huang claimed that the gifts of the pearl pendant and money were given to Ms Hawken in gratitude for her work, including explaining matters relating to the application. She denied that there was any intention on her part to try to induce Ms Hawken to provide improper assistance in respect of the applications.

Ms Hawken described her involvement with the linen plan as at 24 December 2007, when Ms Huang gave her the pearl pendant, in the following terms:

In effect this is simply crossing off conditions and requirements on a check list to ensure compliance, there is no actual assessment involved as this would have been completed during the Development Application assessment period of that DA.

It was argued by counsel for Ms Huang that by 24 December 2007 Ms Hawken's role in respect of the linen plan was purely an administrative one. She was not involved in exercising a discretionary assessment determination, and therefore Ms Huang would have had no reason to try to influence Ms Hawken to exercise her discretion favourably. The Commission rejects this argument.

Ms Hawken was required to satisfy herself that the necessary compliance issues had been addressed before releasing the linen plan. Construction on the Wahroonga development could not commence without the endorsement of the linen plan, and accordingly Ms Huang and Mr Mak had good reasons to want the linen plan finalised as soon as possible.

At her compulsory examination, Ms Huang vehemently and indignantly denied the floor plan was in the envelope with the cash. It was clear that she was of the view that if the floor plan accompanied the \$1,000 the inference would be that a bribe had been offered. However, at the public inquiry (by which time Ms Huang had been provided with statements from Ms Hawken, Mr Swanepoel and Ms Annis-Brown of the council all confirming that the envelope contained \$1,000 wrapped up in a floor plan), her evidence about the floor plan was far more circumspect. She now claimed merely that she could not remember whether the envelope containing the \$1,000 cash also contained the floor plan.

At one point in the evidence, Ms Huang claimed she obtained the envelope from the stationery desk. Later she said she picked it up from her desk. She also suggested the possibility that the floor plan might already have been inside the envelope she happened to pick up to put the money in. She thereby attempted to persuade the Commission that the floor plan may have found its way into the envelope without her knowledge.

None of this evidence is convincing, as the evidence from Ms Hawken, Mr Swanepoel and Ms Annis-Brown was that the cash was wrapped in the plan, not that it was in the envelope alongside the cash.

During the meeting between Ms Huang, Mr Mak and Ms Hawken on 5 June 2008 at the council, Ms Hawken specifically referred to the floor plan inside the envelope and asked Ms Huang if the money had anything to do with the plan. Ms Huang did not deny or query this. When she gave evidence at the Commission she claimed this was because she thought Ms Hawken was talking about the plans on the table in the room where the meeting was taking place, and claimed not to have heard Ms Hawken clearly. Her evidence is not accepted.

The video and audio evidence presented before the Commission showed that Ms Hawken held up the envelope in her hand and was clearly asking about the

contents of the envelope. Ms Huang's claim that she was not aware that Ms Hawken was referring to a plan inside the envelope is therefore rejected.

The Commission does not consider Ms Huang to be a credible witness. She had clear motivation for speeding up finalisation of the linen plan and the TMP. In all the circumstances the Commission is satisfied that the purpose in providing the pearl pendant and \$1,000 cash to Ms Hawken was to improperly influence Ms Hawken to favourably complete her consideration of the linen plan and the TMP.

Wing Mak's evidence

Mr Mak agreed he had discussed with Ms Huang the purchase of a Christmas present for Ms Hawken. He said Ms Huang was authorised to spend up to \$1,000 to buy a gift.

He claimed that the purpose of the gift was to show appreciation for Ms Hawken's assistance. Mr Mak denied any improper purpose on his part in giving the pearl pendant. He claimed he never considered whether giving the pearl pendant would assist the progress of the application.

Mr Mak denied knowing about the \$1,000 cash payment prior to it being made. He claimed that he was informed about it by Ms Huang after it was offered, but before the meeting at the council on 5 June 2008.

During the meeting at the council on 5 June 2008, Mr Mak said "No, no, no" after Ms Hawken asked whether the cash had anything to do with the plan inside the envelope. At the public inquiry, he denied that he said this in response to Ms Hawken's question, claiming that he was rather denying being part of giving the money to her, and gave the following evidence:

Let me say again: when I walk into the room, there were a lot of things on the table, so I sat on one side and then the two of them started talking.

Then Hawken produced the money or the gift. Then she said - she said has this got to do with this matter. But then I did not know what the matter was.

You can – you should not use money to ask people to do something, otherwise there would not be this matter now, today.

Mr Mak went on to say that he did not urge Ms Huang to arrange the fast progress of matters but rather to follow normal procedure. He vigorously denied discussing with Ms Huang that offering gifts to the council might result in a faster response.

Mr Mak had a clear interest in obtaining fast approval of the linen plan and the TMP. Until these were approved the development could not proceed. In the meantime interest payments were costing his company between \$7,000 and \$8,000 per month. Delays also pushed out the time for receipt of income from the sale of the developed properties.

Mr Mak was not an impressive witness. He did not make a genuine attempt to answer the questions asked of him to the best of his ability. His responses were for the most part very brief, and were characterised by a claim not to remember relevant details.

The Commission is of the opinion that there is insufficient evidence to establish that Mr Mak authorised Ms Huang to give the pearl pendant and cash to Ms Hawken in an attempt to induce Ms Hawken's favourable treatment of the application.

Katharine Hawken's evidence

The Commission is satisfied that appropriate decisions were ultimately made in relation to the linen plan and the TMP. There is also no dispute that Ms Hawken promptly declared the receipt of the \$1,000 to council officers.

However, the question still arises as to whether or not Ms Hawken did anything to favour Ms Huang or Mr Mak in response to receiving the pearl pendant.

Ms Hawken denied that anything she did with respect to the assessment process was done as a result of receiving the pearl pendant.

Ms Hawken's completion of the Subdivision Release Form, in relation to the section 88B easement, was misleading. Anyone reading the completed form would be entitled to assume the section 88B instrument had been endorsed by the council and would not have withheld the linen plan from release on that basis. However, she completed this section of the form in September 2007, well before receiving the pearl pendant. There is no evidence that her completion of this form was motivated by anticipation of a gift or reward from Ms Huang.

At the compulsory examination and public inquiry, Ms Hawken conceded that she made a mistake in releasing the linen plan to Ms Huang without confirming that the section 94 contribution had been paid. However, she denied that she was in any way influenced to exercise her official duties improperly as a result of receiving the pearl pendant. The Commission accepts her evidence on this point.

At the public inquiry Ms Hawken gave evidence that she was not aware at the time of accepting the pearl pendant from Ms Huang that the council policy had a blanket prohibition on officers assessing an application accepting gifts from the applicant.

There appears to be some ambiguity as to whether the prohibition on accepting gifts from applicants is an absolute one, or whether it applies only to gifts which fall within the definition of “gifts and benefits” as defined by the council policy, which excludes items with a value of \$50 or less. This issue is explored in more detail in chapter 5.

Ms Hawken did not claim any possible ambiguity as the reason for having accepted the pearl pendant from Ms Huang. She thought she could accept and keep it if it was under \$50. She said that she was not aware of the prohibition on accepting any kind of gift from applicants. Although she should have been aware of the blanket prohibition, her subsequent conduct would suggest she was telling the truth.

She made no attempt to conceal receipt of the pearl pendant. She kept it on her desk at work where it was seen by her colleagues. She partially filled out the Gifts and Benefits Declaration Form and her explanation for her failure to have the form signed by her Director (inadvertence and being busy at work) is not incredible in all the circumstances.

Chapter 4: The Commission's findings and recommendations

This chapter sets out the Commission's findings of fact and contains a finding of corrupt conduct against Ms Huang. The chapter also sets out the statements required by section 74A(2) of the ICAC Act.

Findings of fact

Based on the evidence set out in chapters 2 and 3, the Commission is satisfied that the following facts have been established to the requisite standard of proof.

1. In 2007 and 2008 an application was before Ku-ring-gai Council for a subdivision and development of the property at 4 Munderah Street, Wahroonga. The property was owned by a company of which Mr Wing Mak was a director and shareholder. He engaged the services of Ms Diana Huang to assist with the application. Ms Katharine Hawken, a council officer, was involved in the assessment of the application.
2. On 24 December 2007 Ms Huang gave a pearl pendant, which she had purchased for \$807, to Ms Hawken with the intention of influencing Ms Hawken to show favour in relation to the assessment and approval of the linen plan for the Wahroonga development.
3. On 2 June 2008 Ms Huang gave Ms Hawken an envelope containing \$1,000 cash wrapped in a floor plan of the Wahroonga development with the intention of inducing Ms Hawken to fast track approval of the Traffic Management Plan for that development.

While Mr Mak had at least some knowledge of the pearl pendant and cash being provided to Ms Hawken by Ms Huang, there is insufficient evidence to establish that he was actually complicit in and authorised the giving of the pearl pendant and money for the purpose of obtaining improper assistance from Ms Hawken.

The Commission is not satisfied to the requisite degree that Ms Hawken provided any improper assistance to Ms Huang and Mr Mak.

Corrupt conduct

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

In the light of the above findings, the Commission finds that by providing the gifts of the pearl pendant and cash to Ms Hawken, Ms Huang engaged in corrupt conduct, as defined in sections 7, 8 and 9 of the ICAC Act, on the basis that:

- Her conduct could have adversely affected the honest or impartial exercise of official functions by Ms Hawken, a public official, within the meaning of section 8(1)(a) of the ICAC Act, and could have adversely affected the exercise of official functions by Ms Hawken or the council (a public authority) and also involve bribery, within the meaning of section 8(2)(b) of the ICAC Act; and
- Her conduct could constitute, within the meaning of section 9(1) of the ICAC Act, the criminal offence of corruptly offering an inducement contrary to section 249B(2) of the Crimes Act.

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 specified criminal offence,
- (b) the taking of action against the person for a specified disciplinary offence,
- (c) the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

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 the investigation concerned.

For the purposes of this report Ms Huang, Mr Mak and Ms Hawken are “affected” persons.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Huang for two offences of corruptly offering an inducement contrary to section 249B(2) of the *Crimes Act 1900 (NSW)*, namely the pearl pendant on 24 December 2007 and the cash on 2 June 2008.

Ms Huang gave her evidence before the Commission under objection and (pursuant to section 37(3) of the ICAC Act) her evidence is therefore not admissible against her in any criminal proceedings, except for offences under the ICAC Act.

The DPP, in determining whether to prosecute Ms Huang for the above offences, will have available the evidence of Ms Hawken, Mr Swanepoel and Ms Annis-Brown and the council’s CCTV footage. This footage recorded the brief meeting between Ms Huang and Ms Hawken on 2 June 2008, when the pearl pendant was given to Ms Hawken. The listening device recordings of the conversation between Ms Huang, Mr Mak and Ms Hawken from their meeting on 5 June 2008 at the council would also be available as evidence.

The Commission is not of the opinion that the advice of the DPP should be obtained with respect to the prosecution of Mr Mak.

As for Ms Hawken, the Commission is also not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of her for any offence, or to the taking of any disciplinary action against her.

Chapter 5: Corruption prevention issues

In the course of its investigation into this matter, the Commission identified some deficiencies in the council's Code of Conduct and policy and the Department of Local Government's Model Code of Conduct in relation to gifts and benefits.

The Commission makes three corruption prevention recommendations to address these deficiencies.

Council's Code of Conduct and policy on gifts and benefits

The acceptance of gifts by staff at Ku-ring-gai Council was governed by the following two documents:

1. *Ku-ring-gai Council Code of Conduct* ("the Code of Conduct"), and
2. *Ku-ring-gai Council Gifts and Benefits Policy* ("the policy")

The rules embodied in these documents purported to reduce the potential for gifts to unduly influence, or appear to unduly influence, the exercise of discretion of the council staff as public officials.

The Code of Conduct was largely based on the Department of Local Government's Model Code of Conduct which all local councils are required to apply and adopt. The council's Code of Conduct has one addition relating to a prohibition on accepting gifts during a tender evaluation phase. In general, the Code of Conduct prohibited council staff from accepting gifts and benefits that have more than a nominal or token value, or gifts or benefits regardless of their value which are intended or likely to influence, or may be perceived as influencing, the council staff to deviate from the proper exercise of their official duties.

The policy was intended to expand on the provisions of the Code of Conduct and establish procedures for disclosing gifts. However, the policy was different from the Code of Conduct in two important aspects.

First, the policy specifically excluded any product or service that had a retail value of \$50 or less from its definition of gifts and benefits. Secondly, it specifically provided that council staff must not accept anything from applicants when they are involved in assessing or deciding on their application as well as tenders from

suppliers. As the word used in the relevant provision of the policy is "anything" rather than "any gifts or benefits", it is open to interpretation whether this meant that in such cases council officers were not allowed to accept any gifts or benefits regardless of their value, or that they were only prohibited from accepting gifts or benefits with a value greater than \$50.

Both the council's Code of Conduct and the policy required the declaration of gifts in certain circumstances. The Code of Conduct required that staff must disclose gifts of more than token value. The policy required that the details of all gifts and benefits, as defined by the policy, that have been accepted must be entered into the Gifts and Benefits Register by completion of a Gifts and Benefits Disclosure Form. The form was required to be completed within seven days of receiving a gift. In addition, staff were "encouraged" to complete a disclosure form even when they received something that did not meet the policy's definition of a gift or benefit if it was "appropriate in the circumstances for openness and transparency".

Recommendations

The Commission makes the following recommendation to the Department of Local Government applicable to all councils in relation to the receipt of gifts and benefits by council officials involved in the exercise of discretionary decision-making powers.

The Commission also makes the following two recommendations to Ku-ring-gai Council in respect of its Code of Conduct and policy on gifts and benefits to make them more effective in achieving their objectives.

The council has begun the process of reviewing its gifts and benefits policy and has indicated that it intends to address the Commission's concerns.

RECOMMENDATION 1

That the Department of Local Government amends the Model Code of Conduct to include a clear prohibition on council officials accepting gifts and benefits of any kind, regardless of their value, from persons seeking the exercise of a council's decision-making discretion or who have sought the exercise of the council's decision-making discretion within the previous 12 months.

Council staff working in the planning area exercise considerable discretionary powers. The exercise of these powers, including the length of time taken to determine applications, has the potential to significantly impact on the financial situation of applicants prior to the development and sale of a property. In this investigation there is evidence to suggest that Mr Mak's company was paying between \$7,000 and \$8,000 in interest payments per month on the loan taken out in relation to the Wahroonga development.

The ability to directly impact on the financial status of proponents makes any council official exercising discretion vulnerable to attempts to unduly influence their decision-making powers. A key way that this can occur is through gift giving that is intended to create a sense of obligation on the part of the receiver. It is generally well understood by honest public officials that it is inappropriate to accept gifts of value from proponents who are seeking the favourable exercise of a council's discretion. However, the acceptance of gifts that are perceived as inexpensive is an ambiguous area for some councils that can be equally problematic.

Frequent interactions with a proponent that involve accepting inexpensive gifts can form part of a pattern of behaviour that has the effect of blurring the professional boundary between a council official and a member of the public. Once this boundary is blurred the ability of a council official to exercise their discretion impartially is undermined.

It is also possible that a council official may believe that a gift offered by a proponent has a lower monetary value than its actual value. This argument was put forward by Ms Hawken who claimed that she thought the pearl pendant she received from Ms Huang, which was purchased for \$807, was costume jewellery valued at \$40.

In some cases a lay person may in fact find accurately assessing the value of certain types of gifts difficult. For example, it can be difficult to assess the real value of items such as jewellery, wine and art works if the receiver is not knowledgeable about these things. The acceptance of gifts in these circumstances could encourage a proponent to offer gifts of even greater value, or a bribe, at a future time. In the current investigation, it is arguable that Ms Huang would not have offered Ms Hawken the \$1,000 cash if she had refused the pearl pendant.

Finally, it is possible that even small gifts can create a perception that they were given in exchange for favourable treatment, if a council official is about to exercise discretion that will impact on the giver. The central issue in these cases is the nature of the relationship between the council official and a proponent as opposed to the monetary value of a gift.

For these reasons, the Commission is of the view that the Department of Local Government should invoke a clear blanket prohibition in the Model Code of Conduct. This should prohibit council officials accepting gifts and benefits of any kind, regardless of their value, from persons seeking the exercise of a council's decision-making discretion or who have sought the exercise of the council's decision-making discretion within the previous two years.

RECOMMENDATION 2

That Ku-ring-gai Council removes the reference to monetary thresholds from the definition of gifts and benefits in its gifts and benefits policy.

The Commission takes the view that the practical consequence of having the monetary thresholds specified in the policy is the creation of the impression that the policy permits staff to accept and keep gifts below a certain value regardless of the circumstances. This would appear to include gifts offered by suppliers and development applicants that would otherwise be prohibited. It is undesirable to remove the acceptance of such gifts from the council's control.

RECOMMENDATION 3

That Ku-ring-gai Council ensures that its gifts and benefits policy is consistent with its Code of Conduct.

The exclusion of gifts and benefits below the stated monetary thresholds from the policy also creates an inconsistency with the council's Code of Conduct. The general prohibition in the council's Code of Conduct on accepting gifts in certain circumstances extends to all types of gifts, that is, token gifts as well as gifts of value.

The inconsistency between the council's Code of Conduct and its policy is unnecessary and confusing. It also overly complicates what should be a relatively straightforward policy area for the council.

Appendix 1: The role of the Commission

The ICAC Act is concerned with the honest and impartial exercise of official powers and functions in, and in connection with, the public sector of New South Wales, and the protection of information or material acquired in the course of performing official functions. It provides mechanisms which are designed to expose and prevent the dishonest or partial exercise of such official powers and functions and the misuse of information or material. In furtherance of the objectives of the ICAC Act, the Commission may investigate allegations or complaints of corrupt conduct, or conduct liable to encourage or cause the occurrence of corrupt conduct. It may then report on the investigation and, when appropriate, make recommendations as to any action which the Commission believes should be taken or considered.

The Commission can also investigate the conduct of persons who are not public officials but whose conduct adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority. The Commission may make findings of fact and form opinions based on those facts as to whether any particular person, even though not a public official, has engaged in corrupt conduct.

The ICAC Act applies to public authorities and public officials as defined in section 3 of the ICAC Act.

The Commission was created in response to community and Parliamentary concerns about corruption which had been revealed in, inter alia, various parts of the public service, causing a consequent downturn in community confidence in the integrity of that service. It is recognised that corruption in the public service not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority

(and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The principal functions of the Commission, as specified in section 13 of the ICAC Act, include investigating any circumstances which in the Commission's opinion imply that corrupt conduct, or conduct liable to allow or encourage corrupt conduct, or conduct connected with corrupt conduct, may have occurred, and co-operating with public authorities and public officials in reviewing practices and procedures to reduce the likelihood of the occurrence of corrupt conduct.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

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

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

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

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

Subsection 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection.

Subsection 9(1) provides that, despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

- (d) in the case of conduct of a Minister of the Crown or a Member of a House of Parliament – a substantial breach of an applicable Code of Conduct.

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

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

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

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

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

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

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

See also *Rejzek v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution, Queensland, 1977* (McGregor J) and the *Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

As indicated above, the first step towards making a finding of corrupt conduct is to make a finding of fact. Findings of fact and determinations set out in this report have been made applying the principles detailed in this Appendix.