

ICAC

INDEPENDENT
COMMISSION
AGAINST
CORRUPTION

**Report on an attempt to
obtain entry to a selective
public high school through
payment of money**

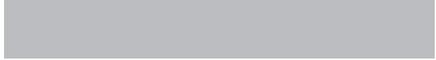
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Independent Commission Against Corruption

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 an attempt to obtain entry to a selective public high school through payment of money.

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

Contents

Executive summary	5
Chapter 1: Introduction	6
Why the Commission investigated	6
Conduct of the investigation	6
The public inquiry	7
This report	7
Investigation outcomes	7
Recommendation that this report be made public	8
Chapter 2: Background	9
The Westmead Public School	9
Selective public high schools	9
Qinghua Pei, Xiaodong Lu and their son	9
Chapter 3: The payments	10
Introduction	10
Mr Pei and Ms Lu “struggle”	10
The first payment	10
Was Mr Pei involved in the first payment transaction?	11
What was Ms Lu’s purpose when she made the payment?	12
The second payment	13
Was Ms Lu involved in the second payment transaction?	13
What was Mr Pei’s purpose when he made the payment?	13
Findings of fact	14
Corrupt conduct	14
Section 74A(2) statements	15
Xiaodong Lu	15
Qinghua Pei	15
Appendix 1: The role of the Commission	16
Appendix 2: Corrupt conduct defined and the relevant standard of proof	17

Executive summary

This report concerns an investigation by the Independent Commission Against Corruption (“the Commission”) into allegations that in 2008 Ms Xiaodong Lu and Mr Quinghua Pei made two payments, totalling \$2500, to their son’s teacher with a view to gaining favouritism for their son and enhancing his chances of gaining entry into a New South Wales selective public high school.

Ms Lu and Mr Pei’s son has been a student at the Westmead Public School. In 2008 he was a year 5 student in a year 5/6 composite class for gifted and talented students. His teacher was JodieLee Pearce.

The investigation arose from information provided by the NSW Department of Education and Training alleging that on Tuesday 5 August 2008 Ms Lu met with Ms Pearce and provided her with an envelope. When Ms Pearce opened this envelope, after Ms Lu had left, she found it contained \$2,000 in \$50 notes and a letter. The letter was two pages long. It generally canvassed the son’s health and educational circumstances. The letter concluded:

“In the next time leading to the selective school exam, we hope you could help him more in all area, especially reading comprehension. We hope his ability was recognized and he can get a good school marks and also do well in the selective exam.”

The Commission elected to investigate the allegation in accordance with section 13 and section 19(1) of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”). During the course of this investigation the Commission received further information alleging that Mr Pei had made a second payment of \$500 to Ms Pearce on Tuesday, 28 October 2008. It was alleged that this payment also came in an envelope accompanied by a letter. The letter highlighted the son’s academic achievements and aspirations and concluded:

“In the light of the above, I hope you give him a favourable consideration in the school assessment and report.”

The Commission extended its investigation to encompass this second alleged incident.

The Commission’s findings

The Commission’s findings are set out at the conclusion of Chapter 3 of this report. In particular the Commission found that:

- On Tuesday 5 August 2008, at approximately 3:00 pm, Ms Xiaodong Lu met JodieLee Pearce at the Westmead Public School. After a brief discussion about Ms Lu’s son, Ms Lu left. As she left, she handed Ms Pearce an envelope. Later Ms Pearce opened the envelope and found it contained a letter written by Mr Quinghua Pei, the father of Ms Lu’s son, and \$2,000 cash in \$50 notes.
- In making the \$2000 payment, Ms Lu was improperly seeking to directly influence the school’s internal assessment marks to be awarded to her son for the purpose of improving his prospects of admission to a selective public high school.
- On Tuesday 28 October 2008 Mr Pei met Ms Pearce in her classroom. After a brief discussion about Mr Pei’s son, he left. As he left he handed an envelope to Ms Pearce which contained \$500.
- In making the \$500 payment Mr Pei was improperly seeking to directly influence the internal assessment marks given to his son, for the purpose of improving his prospects of admission to a selective public high school.

Findings of corrupt conduct are made against Ms Xiaodong Lu and Mr Quinghua Pei.

Chapter 3 of this report also contains statements made pursuant to section 74A(2) of the ICAC Act that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (“DPP”) with respect to the prosecution of Ms Xiaodong Lu and Mr Quinghua Pei for offences contrary to section 249B(2) of the *Crimes Act 1901 (NSW)* (“the Crimes Act”).

Chapter 1: Introduction

This report concerns an investigation into allegations that Ms Xiaodong Lu and Mr Qinghua Pei made two payments totalling \$2,500 to their son's teacher with a view to gaining favourable treatment for their son and enhancing his chances of gaining selection into a NSW selective public high school.

The NSW Department of Education and Training ("the Department") administers a series of selective public high schools across the State. These cater for the educational needs of academically gifted students once they have completed their primary school education. There are a limited number of places available in these schools. Accordingly, placements are highly sought after by students and their families. Selection for a placement in a selective public high school involves internal and external assessment marks. The internal assessment is judged by the student's primary school principal, and based on the child's work in year 5 at the primary school. The external assessment marks are from a public examination sat by applicants in March of their year 6.

On Wednesday 6 August 2008 the Department contacted the Commission and provided information about an incident that was alleged to have taken place the previous day, Tuesday 5 August 2008, at the Westmead Public School ("the School"). The Department advised that Jodie-Lee Pearce, a teacher at the School, had met with Ms Lu to speak about Ms Lu's son. During this conversation an envelope was handed over. After Ms Lu left, Ms Pearce opened the envelope and found it contained \$2,000 in \$50 notes and a letter. The letter generally canvassed the son's health and educational circumstances. It concluded:

"In the next time leading to the selective school exam, we hope you could help him more in all area, especially reading comprehension. We hope his ability was recognised and he can get a good school marks and also do well in the selective exam."

While enquiries were taking place, on Tuesday 28 October 2008 the School contacted Commission investigators and alleged that a second similar incident had taken place, involving a payment of \$500 by the student's father, Mr Pei.

Why the Commission investigated

One of the Commission's principal functions is to investigate any allegation, complaint, or any circumstance which in the Commission's opinion imply that the following may have occurred, may be occurring or may be about to occur:

- corrupt conduct, or
- conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
- conduct connected with corrupt conduct

The Commission's role is set out in more detail in Appendix 1. The definition of corrupt conduct under the *Independent Commission Against Corrupt Act 1988* ("ICAC Act") is stated in Appendix 2.

In determining to conduct an investigation into these matters the Commission took into account the seriousness of the allegations made. The conduct appeared to be directed at obtaining an unfair advantage with respect to the selective public high school selection process. If shown to have taken place, this conduct threatened the integrity of a core public sector process that affects the lives of many young persons in this State.

Conduct of the investigation

The Commission obtained and analysed relevant documentation from the Department relating to the Department's dealings with Ms Lu, Mr Pei and their son.

Information was obtained by interviewing and taking statements from a number of witnesses. Enquiries were made to the financial institutions associated with Ms Lu and Mr Pei to assess the source of the money provided to Ms Pearce.

Two compulsory examinations (or private hearings) were conducted on Thursday 20 November 2008 in which evidence was taken from Ms Lu and Mr Pei.

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.

Prior to making that determination, it was necessary to consider those matters set out in section 31(2) of the ICAC Act, which provides that:

Without limiting the factors that it might 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 determined that it was in the public interest that a public inquiry be conducted into this matter. In reaching this determination the Commission took into account the following considerations:

- There was likely to be a significant benefit through exposing the circumstances of this matter to the public and making it aware of the possible existence of this type of conduct, and its implications in the context of public education in this State.
- As mentioned above, the Commission was of the view that the conduct alleged was serious in nature.
- The Commission was satisfied that, with appropriate protections in place, the public interest in exposing the matter was not outweighed by the public interest in preserving the privacy of persons concerned.

The public inquiry commenced on Tuesday 9 December 2008 and concluded the same day. The Hon Jerrold Cripps QC, Commissioner, presided over the public inquiry. Mr Don McKenzie appeared as Counsel Assisting the Commission. Evidence was given by three witnesses.

Following the conclusion of the public inquiry, the Commissioner sought oral submissions from Counsel Assisting and the legal representatives of the affected

persons. Counsel Assisting made representations as did Ms Lu's legal representative. Ms Lu's legal representative also made written representations which were received and considered.

This report

Chapter 2 of this report sets out some background information in relation to the School, the selective public high school assessment process, and the circumstances of Ms Lu, Mr Pei and their son.

Chapter 3 canvasses the available evidence in relation to the two alleged payment incidents. It commences by reviewing relevant activities leading up to the first alleged payment on Tuesday 5 August 2008. It then addresses the evidence relating to the alleged payment of money on that day, particularly Ms Lu's actions and intentions, and Mr Pei's involvement. The chapter then canvasses evidence in relation to the second alleged payment of money on Tuesday 28 October 2008, Mr Pei's actions on that day, Ms Lu's involvement in this episode and Mr Pei's intentions at relevant times.

Finally, Chapter 3 details the relevant factual determinations that the Commission has made, findings as to whether any persons have engaged in corrupt conduct and statements that are made pursuant to section 74A(2) of the ICAC Act.

Investigation outcomes

The Commission has made the following factual findings:

1. On Tuesday 5 August 2008, at approximately 3:00 pm Ms Xiaodong Lu met with her son's teacher, Jodie-Lee Pearce, at Ms Pearce's classroom at the Westmead Public School. After a brief discussion about Ms Lu's son, Ms Lu left. As she left, she handed Ms Pearce an envelope. Ms Pearce opened this envelope after Ms Lu had left and found it contained a letter written by Mr Qinghua Pei, the father of Ms Lu's son, and notionally signed by Mr Pei and Ms Lu, together with \$2,000 cash in \$50 notes.
2. Immediately after opening the letter Ms Pearce proceeded into the next classroom occupied by her colleague, Ms Laraine Carr. Together they counted the money and proceeded to the Principal's office. The Principal, Ms Jeanette Detheridge, was not present at her office. In the Principal's absence, the envelope was handed to the

Deputy Principal, Ms Jenny Simmonds. The Commission was notified of these developments shortly afterwards.

3. In making the \$2000 payment Ms Lu was improperly seeking to directly influence the school's internal assessment marks to be awarded to her son for the purpose of improving his prospects of gaining admission to a selective public high school.
4. On Tuesday 28 October 2008 Mr Pei met Ms Pearce in her classroom. After a brief discussion about Mr Pei's son, he left. As he left he handed an envelope to Ms Pearce containing a letter and \$500 in cash in \$50 notes.
5. Ms Pearce had contacted Ms Simmonds prior to meeting with Mr Pei and alerted Ms Simmonds to Mr Pei's presence outside her classroom. Ms Simmonds proceeded immediately to Ms Pearce's classroom and arrived just as Mr Pei was leaving. She entered the classroom and saw Ms Pearce, who was alone. Ms Pearce held up an envelope. In Ms Simmonds' presence, Ms Pearce opened the envelope and found the letter and the \$500.
6. In making the \$500 payment, Mr Pei was improperly seeking to directly influence the internal assessment marks given to his son, for the purpose of improving his prospects of gaining admission to a selective public high school.

The Commission has determined that both Xiaodong Lu and Qinghua Pei engaged in corrupt conduct.

The Commission has made statements pursuant to section 74A(2) that it 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 Lu and Mr Pei for offences contrary to section 249B(2) of the *Crimes Act 1901 (NSW)* ("the Crimes Act").

Recommendation that this report be made public

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

Chapter 2: Background

The Westmead Public School

The Westmead Public School was established in 1917. It operates as a public school and primary school, catering for male and female students from kindergarten level through to year 6 level. Approximately 830 students enrolled in the School at the commencement of 2008. In that year it had three year 5 classes and two year 5/6 composite classes. Each had a class size of approximately 30 students.

In year 4, students at the Westmead Public School can apply for a place in the area's Opportunity Class which is situated at the Greystanes Public School. Applicants undergo assessment to gain selection into the class. If selected, students in this class experience an accelerated learning program during year 5 and year 6. The Westmead Public School also provides its own accelerated learning program through a Gifted and Talented Class that operates in the School for year 5 and year 6. Entry into this class is also secured through an application, assessment and selection process.

Selective public high schools

Primary school students can apply for acceptance into a selective public high school. These high schools cater specifically for the needs of academically gifted students, once they have completed their primary school education. Application for a position in a selective public high school is usually made when the student is in year 5. The allocation of selective public high school places occurs when the student is in Year 6. Successful students are able to take up these placements in year 7.

Positions in these schools are highly sought after and many students are unsuccessful. Last year 13, 336 students applied for 3,522 available places at selective public high schools.

The process by which students are selected for positions within selective public high schools has essentially two components.

The primary component is an externally conducted examination. All applicants sit this exam on the same day in March when they are in year 6.

The other component is an internal school assessment based on the child's school performance in year 5. These marks are determined by the applicant's school principal, routinely on the advice of the pupil's actual teacher. The marks settled by the school are moderated according to the school's overall performance in the external examination.

The marks from both components are combined to achieve an overall mark out of 300. This provides the basis for an applicant's selection, or non-selection, into a selective public high school.

Qinghua Pei, Xiaodong Lu and their son

Qinghua Pei was born in Shanghai, China, in 1960. Xiaodong Lu was born in Beijing in 1961. Both migrated to New Zealand and then Australia.

In 1997 Ms Lu gave birth to a son. Mr Pei was the boy's father. Mr Pei and Ms Lu have never married and have never lived in a domestic relationship. Their son has always lived with Mr Pei and his parents. However, Ms Lu has had constant contact with her son and has been closely involved in his upbringing.

The son commenced school in New Zealand. After he migrated to Australia he initially attended the East Toongabbie Public School. In May 2006 he was transferred across to the Westmead Public School. In 2007, when the boy was in year 4, he applied for a place in the School's Gifted and Talented Class, commencing in year 5. He was not initially accepted into the class, but was moved into the class in the second week of 2008. The teacher of the year 5/6 Gifted and Talented Composite Class was Jodie-Lee Pearce.

Chapter 3: The payments

Introduction

Both Mr Pei and Ms Lu have been eager for their son to gain acceptance into a selective public high school, in particular, the Baulkham Hills Public High School. They believe he is academically capable of gaining selection, but both have had concerns about whether he would. Ms Pearce told the Commission that the boy was consistently strong in mathematics, but had been “letting himself down” in English, although he had been improving in the period leading up to the Commission’s public inquiry.

Mr Pei and Ms Lu had been worried about aspects of their son’s health and the impact this might have on his application for a selective public high school placement. In a letter dated 25 December 2007 to the School’s Principal, Ms Jeanette Detheridge, Mr Pei canvassed whether his son should repeat year 4 on account of these concerns. This did not happen.

Mr Pei and Ms Lu became increasingly concerned about whether their son would be accepted into a selective public high school. Mr Pei had a number of disputes with the School and, in his evidence, detailed a series of incidents which, he said, led him to believe the School was being unfair in its treatment of his son. Mr Pei may have believed his son was being treated unfavourably. However, the Commission did not find this to have been established.

Mr Pei and Ms Lu “struggle”

According to Mr Pei, Ms Lu and he began discussing the possibility of making a payment of money to Ms Pearce well before any payment was made.

Mr Pei told the Commission that he had discussed this approach with other parents of students from the School, who also came from a Chinese background. According to Mr Pei, when he suggested to these people that his son had been treated unfairly, they would tell him “Because you don’t pay. You didn’t pay”. When asked whether these people had made payments to his knowledge, Mr Pei replied that no-one had said this, but “they implied that they have paid”. When asked who these people were, Mr Pei told the Commission he did not know their names. Indeed, he told the Commission there was no single person that

he spoke to, but rather, groups of people that he spoke to at the same time. He said he engaged a number of different groups in conversations about this issue.

Ms Lu also spoke about conversations she had which caused her to believe that making a payment might be a viable approach. She spoke to a friend who had given her child’s teacher a gift voucher and seemed to win favour for their child through this. In line with this approach, Ms Lu made a scarf which she gave to her son to pass on to Ms Pearce. However, after Ms Pearce seemed not to respond in any way to this, Ms Lu thought “maybe she want something else”.

Ms Lu told the Commission how she had overheard a couple of conversations amongst other parents of the School, from a Chinese background, that implied payments were being made to teachers. She said she did not know these people. She rarely collected her son from school as she worked. Mr Pei normally did this. According to Ms Lu, Mr Pei, who “talks to parents everyday”, told her that other parents had paid money and had received a benefit through this.

Overall, the evidence that other parents had paid teachers, or had claimed to have paid them, was unsatisfactory and unreliable. That being so, the Commission makes no findings as to whether these rumours were being spread and, if they were, whether they were accurate

According to Mr Pei, Ms Lu and he discussed the possibility of making a payment over a long period of time, “we have struggles”. Through these discussions, according to Mr Pei, Ms Lu had consistently been opposed to the idea. Indeed, she had been so opposed to the idea, that when she finally told him that she had made a payment, he did not know if he could believe her.

The first payment

On Friday 1 August 2008, Ms Lu arranged for her son to pass a note to Ms Pearce asking if she could arrange a time for them to discuss her son’s circumstances.

On Monday 4 August 2008, Ms Pearce told the boy to tell his mother that she could speak to her the following day at 3.00 pm.

At approximately 3.00 pm on Tuesday 5 August 2008, Ms Lu met with Ms Pearce in her classroom as planned. No-one else was present at this meeting. They began discussing an upcoming school camp, but the conversation quickly turned to the son's academic development. According to Ms Pearce, Ms Lu expressed concerns about her son's English marks and how he needed to improve to gain selection into Baulkham Hills High School. According to Ms Pearce, Ms Lu said something similar to "I hope you will give him more work so that his marks could improve". Ms Pearce said she advised Ms Lu "It's up to him to put more of an effort in", and, "the final mark for the selective test will be based on everything that he does in class". As Ms Lu left, she handed Ms Pearce an envelope.

Ms Pearce told the Commission that she opened the envelope shortly after Ms Lu had left. She unfolded a letter that was inside the envelope and found it to enclose a "wad" of \$50 notes. She said she was "stunned, shocked and disbelieving". She ran into the classroom next door and said to the teacher in that room, Laraine Carr, "Laraine, be my witness". They counted the money together and ascertained that there were 40 \$50 notes.

Ms Pearce then took the envelope and its contents to the School Principal's office. The School Principal, Jeanette Detheridge, was absent, so she spoke to the Deputy Principal, Jenny Simmonds. Ms Simmonds took responsibility for the money and the matter was reported to Ms Detheridge when she returned to the School the following day. The matter was referred to the Department's Misconduct and Education Team ("MET"). MET, in turn, notified this Commission.

Was Mr Pei involved in the first payment transaction?

The letter that was in the envelope, wrapped around the money, is two pages long and typed. It provides a detailed outline of difficulties that the son had experienced in the course of his schooling in New Zealand, East Toongabbie Public School and Westmead Public School. The letter concludes:

"In the next time leading to the selective school exam, we hope you could help him more in all the area, especially English reading comprehension. We hope his ability was recognized and he can get a good school marks and also do well in the selective school exam."

Mr Pei told the Commission that he prepared this letter. He said he had been aware that Ms Lu was meeting with Ms Pearce. Ms Lu had asked him to prepare a letter to assist her at this meeting as he had a better capacity to write in English. He said that he was not aware that Ms Lu was planning to make a payment at this meeting. He said he only found out that money had been paid when Ms Lu told him a week after the event. He said that when he heard this he initially felt "relieved". Subsequently, according to Mr Pei, he began to have doubts as to whether Ms Lu had made the payment as she alleged.

Ms Lu said that she did not tell Mr Pei about her intention to pay Ms Pearce at their meeting, "I just got the letter and told him I need to talk to Ms Pearce first". She said that when she later told Mr Pei about the payment, he did not believe her.

Mr Pei told the Commission that he ultimately made the second payment because he was not satisfied that the first payment had been made and he "panicked".

Overall the evidence about Mr Pei's involvement in the first payment is equivocal. Mr Pei had advocated to Ms Lu that they should make a payment. He knew Ms Lu was meeting with Ms Pearce. He prepared the note that accompanied the payment. Although he developed doubts about whether the payment was made, which led to the making of a second payment, this did not mean that he had not been involved in arranging the first payment. Both Ms Lu and Mr Pei said that Mr Pei was not privy to the first payment. The Commission has concerns about the reliability of both witnesses. In all the circumstances, the Commission is unable to form a conclusive view on the nature of Mr Pei's involvement in the first payment.

What was Ms Lu's purpose when she made the payment?

What is clear from the available evidence is that when Ms Lu met with Ms Pearce, she was focused on her son's results in the selective public high school assessment process and was hoping to sway these results. The Commission is of the opinion that at all relevant times Ms Lu's dominant motive was to seek to influence the discretion of Ms Pearce with respect to the internal assessment marks for Ms Lu's son. She attempted, in the Commission's view unsuccessfully, to water-down her conduct by asserting that she was only attempting to persuade Ms Pearce to increase her commitment to the education of her son and to cease treating him unfairly. Of course, even if this were the case, it would not have excused her conduct, but it is not accepted by the Commission which is of the opinion, as stated above, that she was trying improperly to get an advantage for her son when internal assessment marks were to be awarded. The payment made by Ms Lu took place after extensive discussions between Mr Pei and Ms Lu about paying money to Ms Pearce. As discussed later in this report, Mr Pei's payment on Tuesday 28 October 2008 was clearly motivated by his desire to influence Ms Pearce with respect to his son's internal assessment marks. It is clear Mr Pei was aware of the significance of these marks and would have discussed this with Ms Lu in their discussions leading up to the first payment on 5 August 2008.

At the compulsory examination Ms Lu explained how her decision to pay was affected by advice from a friend who benefited from providing a teacher (at another school) with a gift voucher. It is clear that Ms Lu was seeking similar favouritism for her son. She detailed how she made a scarf for Ms Pearce and arranged for her son to pass this on to her. When she received no positive response, she described herself as thinking "maybe she want something else, or something ...", Counsel Assisting "or some money?", Ms Lu "Yes, something like this".

She followed this evidence with a clear admission that she paid the money hoping to influence the internal assessment marks to be given to her son.

Counsel Assisting: You were aware that (her son) was applying to get in to a selective school at the time that you paid the money?

Ms Lu: We were going to, I know, yeah.

Counsel Assisting: And you knew that the selective school depended on a mark given by the school as well as a test?

Ms Lu: Yes, I know, yes.

Counsel Assisting: When you paid that money, were you hoping that she would give him a better mark from the school?

Ms Lu: Yeah, I hope.

Counsel Assisting: In return for the money you paid?

Ms Lu: Yes. And also to make – take more time on my son's study, especially for English. But actually I say so when I give to her.

At the public inquiry Ms Lu denied that she was seeking to influence the internal assessment mark. She said her sole motivation for giving the money was to encourage Ms Pearce to direct more of her attention to assisting Ms Lu's son with a view to enhancing his performance in the assessment process. She claimed that her compulsory examination evidence resulted from confusion arising from her poor English skills. The Commission rejects this evidence. At the compulsory examination Ms Lu demonstrated a reasonable grasp of English. She had the services of a duly accredited interpreter available to her. She also had the protection through a legal representative appearing for her before the Commission. In all these circumstances, and having regard to the manner of her evidence at the compulsory examination, the Commission is satisfied that her compulsory examination evidence reflected the true situation and her assertions that she was confused at the time of compulsory examination were contrived. They were made in an attempt to change her evidence and water-down her culpability.

There were other parts of Ms Lu's public inquiry evidence where she manipulated her account to meet her convenience. When Ms Lu claimed that rather than seeking to influence the internal assessment mark, she was "only" trying to have Ms Pearce provide more attention to her son, she was asked "You know that if she spent more time with him on a daily basis, she would be spending less time with other students?" Ms Lu answered "Yes, but what – what if she does it after school," to refute the suggestion that she was seeking improper advantage at the expense of others. This served her purpose of minimising her culpability in the course of the public inquiry. However it contradicted her evidence at the compulsory examination. Here she

told the Commission that she was too ashamed to ask Ms Pearce to spend more time with her son after school, so she was specifically asking her to “take more time on my son” in school time.

There is always some potential for confusion, or occasional misunderstanding. However, in the view of the Commission, Ms Lu’s public inquiry evidence was generally unsatisfactory and unreliable. Her attempts to change her earlier compulsory examination evidence were not convincing.

In all these circumstances, the Commission is satisfied that Ms Lu was, through her payment of money to Ms Pearce, seeking a benefit beyond a mere re-adjustment of perceived bias, or potential bias, or the due performance by Ms Pearce of her public official duties. She was certainly seeking an improper advantage for her son, at the expense of others if necessary. In the context of her ongoing discussions with Mr Pei, his obvious determination to influence the internal assessment marks through the payment of money, and the evidence given by Ms Lu at her compulsory examination, the Commission is satisfied that Ms Lu intended that the payment be made to directly and improperly influence the internal assessment marks given to her son.

The second payment

Mr Pei developed doubts about whether Ms Lu had made a payment to Ms Pearce. He explained how, on Monday 27 October 2008, he became concerned when his son told him that he would be having a replacement teacher the following day, as Ms Pearce was “doing school marks”.

The following day, Tuesday 28 October 2008, Mr Pei went to the School and waited outside Ms Pearce’s classroom.

Ms Pearce told the Commission that when she saw Mr Pei she panicked, left the room and rang Deputy Principal, Jenny Simmonds. She told Ms Simmonds that she did not want to talk to Mr Pei alone as the Commission had advised against that. Ms Simmonds said that she would “come right down”.

As Ms Pearce returned into her classroom, following this telephone call, Mr Pei entered. They had a short discussion about how his son would not be able to attend school that day. Ms Pearce told the Commission that Mr Pei then spoke about information he had “to help with the school mark for selective”. After a further brief conversation, Mr Pei left. As he did so, he handed Ms Pearce an envelope.

Ms Simmonds told the Commission that, after her telephone conversation with Ms Pearce, she proceeded to Ms Pearce’s classroom. As she arrived, she saw Mr Pei leaving the classroom. She walked into the classroom and saw Ms Pearce there by herself, appearing “really shaky and distressed”. Ms Pearce held up an envelope.

Both Ms Pearce and Ms Simmonds described to the Commission how Ms Pearce opened the envelope to find another letter and a further collection of \$50 notes. They counted the money. There were 10 \$50 notes. They then went immediately to Ms Detheridge’s office and reported the matter to her. This Commission was notified shortly afterwards.

Was Ms Lu involved in the second payment transaction?

The evidence points to Ms Lu not being privy to this second payment. Mr Pei described how the payment was motivated by his doubts about Ms Lu’s assertion that she had made an initial payment. He described how he had spoken to Ms Lu on the evening of Monday 27 October 2008, and asked Ms Lu to make another payment. She refused, saying “*I don’t do it. I won’t do it*”. On account of her refusal, Mr Pei made the payment himself. Ms Lu corroborates this account. Ms Lu may not have known Mr Pei paid an additional \$500 but she did know there was an arrangement between her and Mr Pei that money be paid to Ms Pearce for the purpose referred to above.

What was Mr Pei’s purpose when he made the payment?

Mr Pei did not attempt to conceal the fact that he was seeking, through this payment, to influence the internal assessment marks allocated to his son. Indeed, he made no secret of the fact that this was his motivation. His evidence contains clear admissions that money was being paid in the hope that it would persuade Ms Pearce to give his son “good marks” in the assessment process. On Monday 27 October 2008, having been told by his son that Ms Pearce would not be teaching him the next day as she would be settling “school marks”, he assumed that these would be the marks used for selective public high school purposes.

At his compulsory examination Mr Pei gave the following evidence:

<i>Counsel Assisting:</i>	<i>How much did you give her [Ms Pearce]?</i>
<i>Mr Pei:</i>	<i>\$500.</i>

Counsel Assisting: *That was in the hope that when she did the school marks she would give [his son] a good mark.*

Mr Pei: *Yeah.*

Counsel Assisting: *And that would assist [his son] to be accepted into a selective school.*

Mr Pei: *Yes.*

The letter that Mr Pei provided with this payment was consistent with this intent. This letter points to high moments in his son's academic performance. It emphasises his son's desire to be a scientist of renown. It then concludes as follows:

"[His son] has great ambition to become a scientist. First he must go to a good selective school. According to his performance at trial tests at Pre-Uni College and their assessment he is very like to make to Baulkham Hill High School or Sydney boys [sic] school.

In light of the above I hope you give him a favourable consideration in school assessment and report."

He confirmed this intention in his evidence at the public inquiry:

Q. *Mr Pei you paid the money?*

A. *Yeah.*

Q. *So that she [Ms Pearce] would give your son a good mark to go towards the assessment process?*

A. *Yes.*

Q. *And you were hoping that would assist him getting into a selective school?*

A. *Which he deserve.*

Findings of fact

Based on the evidence set out in this chapter, the Commission is satisfied to the requisite degree that the following facts have been established:

1. On Tuesday 5 August 2008, at approximately 3:00 pm, Ms Xiaodong Lu met with her son's teacher, Jodie-Lee Pearce, at Ms Pearce's classroom at the Westmead Public School. After a brief discussion about Ms Lu's son, Ms Lu left. As she left, she handed Ms Pearce an envelope. Ms Pearce opened this envelope after Ms Lu had left and found it contained a

letter written by Mr Qinghua Pei, the father of Ms Lu's son, together with \$2,000 cash in \$50 notes.

2. Immediately after opening the letter Ms Pearce proceeded into the next classroom occupied by her colleague Ms Laraine Carr. Together they counted the money. They then proceeded to the Principal's office. The Principal, Ms Jeanette Detheridge, was not present at her office. In the Principal's absence, the envelope was handed to the Deputy Principal, Ms Jenny Simmonds. The Commission was notified of these developments shortly afterwards.
3. In making the \$2000 payment, Ms Lu was improperly seeking to directly influence the school's internal assessment marks to be awarded to her son for the purpose of improving his prospects for admission to a selective public high school.
4. On Tuesday 28 October 2008, Mr Pei met with Ms Pearce in her classroom. After a brief discussion about Mr Pei's son, he left. As he left he handed an envelope to Ms Pearce containing a letter and \$500 cash in \$50 notes.
5. Ms Pearce had contacted Ms Simmonds prior to meeting with Mr Pei and alerted Ms Simmonds to Mr Pei's presence outside her classroom. Ms Simmonds proceeded immediately to Ms Pearce's classroom and arrived just as Mr Pei was leaving. She entered the classroom and saw Ms Pearce, who was alone. Ms Pearce held up an envelope. In Ms Simmonds' presence, Ms Pearce opened the envelope and found the letter and \$500 in \$50 notes.
6. In making the \$500 payment, Mr Pei was improperly seeking to directly influence the internal assessment marks given to his son, for the purpose of improving his prospects for admission to a selective public high school.

Corrupt conduct

In determining findings of corrupt conduct the Commission has applied the approach set out in Appendix 2 of this report. The Commission finds that Ms Xiaodong Lu engaged in corrupt conduct on the basis that her conduct, set out in findings of fact 1 and 3, is conduct that:

- could adversely affect the honest exercise of official functions of Jodie-Lee Pearce in her public official capacity as a teacher at Westmead Public School, and therefore comes within section 8(1)(a) of the ICAC Act, or
- could adversely affect the official functions of Ms Pearce in her public official capacity and could involve bribery, and therefore comes within section 8(2) of the ICAC Act.

The conduct set out in findings of fact 1 and 3 could also, for the purpose of section 9(1)(a) of the ICAC Act, constitute or involve a criminal offence of offering a corrupt benefit contrary to section 249B(2) of the Crimes Act and the common law offence of bribery.

The Commission finds that Mr Qinghua Pei engaged in corrupt conduct on the basis that his conduct, set out in findings of fact 4 and 6, is conduct that:

- could adversely affect the honest exercise of official functions of Ms Pearce in her public official capacity as a teacher at Westmead Public School, and therefore comes within section 8(1)(a) of the ICAC Act, or
- could adversely affect the official functions of Ms Pearce in her public official capacity and could involve bribery, and therefore comes within section 8(2) of the ICAC Act.

The same conduct could also, for the purposes of section 9(1)(a) of the ICAC Act, constitute or involve a criminal offence of offering a corrupt benefit contrary to section 249B(2) and the common law offence of bribery.

Section 74A(2) statements

In making a public report, the Commission is required by the provisions of section 74A(2) of the ICAC Act to include, in respect of each “affected” person, a 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 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 investigation into matters canvassed in this chapter, substantial allegations were made against Ms Xiaodong Lu and Mr Qinghua Pei. Accordingly, each person comes within the definition of “affected” person for the purposes of section 74A(2) of the ICAC Act.

Xiaodong Lu

Ms Lu made admissions during the course of her evidence at her compulsory examination and at the public inquiry. These admissions were made following a declaration made pursuant to section 38 of the ICAC Act and cannot be used against Ms Lu in any subsequent criminal prosecution except a prosecution under the ICAC Act. However there is additional evidence generally available to the DPP, including the evidence of Ms Pearce in relation to the payment made on Tuesday 5 August 2008, the letter that accompanied that payment, and associated authenticating evidence. 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 Ms Lu for an offence of offering a corrupt benefit contrary to section 249B(2) of the Crimes Act.

Qinghua Pei

Mr Pei made admissions in the course of his evidence at his compulsory examination and at the public inquiry. These admissions were made following a declaration made pursuant to section 38 of the ICAC Act and cannot be used against Mr Pei in any subsequent criminal prosecution except a prosecution under the ICAC Act. However there is additional evidence generally available to the DPP including the evidence of Ms Pearce in relation to the payment made on Tuesday 28 October 2008, the letter that accompanied that payment, and associated authenticating evidence. 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 Pei for an offence of offering a corrupt benefit contrary to section 249B(2) of the Crimes Act.

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:

- (e) *a criminal offence, or*
- (f) *a disciplinary offence, or*

- (g) *reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*
- (h) *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 fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

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

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

See also *Rejfeek 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.



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CORRUPTION

