

ICAC

INDEPENDENT COMMISSION
AGAINST CORRUPTION



**INVESTIGATION INTO THE
OFFER OF A CORRUPT
PAYMENT TO AN OFFICER
OF STRATHFIELD MUNICIPAL
COUNCIL**

**ICAC REPORT
MAY 2010**

I·C·A·C

INDEPENDENT COMMISSION
AGAINST CORRUPTION

**INVESTIGATION INTO THE
OFFER OF A CORRUPT
PAYMENT TO AN OFFICER
OF STRATHFIELD
MUNICIPAL COUNCIL**

**ICAC REPORT
MAY 2010**



Thank y

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

ISBN 978 1 921688 02 7

© May 2010 – Copyright in this work is held by the Independent Commission Against Corruption. Division 3 of the *Copyright Act 1968* (Cwlth) recognises that limited further use of this material can occur for the purposes of “fair dealing”, for example study, research or criticism, etc. However if you wish to make use of this material other than as permitted by the Copyright Act, please write to the Commission at GPO Box 500 Sydney NSW 2001.

I·C·A·C

**INDEPENDENT COMMISSION
AGAINST CORRUPTION**

Level 21, 133 Castlereagh Street
Sydney, NSW, Australia 2000

Postal Address: GPO Box 500,
Sydney, NSW, Australia 2001

T: 02 8281 5999

1800 463 909 (toll free for callers outside metropolitan Sydney)

TTY: 02 8281 5773 (for hearing-impaired callers only)

F: 02 9264 5364

E: icac@icac.nsw.gov.au

www.icac.nsw.gov.au

Business Hours: 9.00 am - 5.00 pm Monday to Friday



ICAC

INDEPENDENT COMMISSION
AGAINST CORRUPTION

The Hon Amanda Fazio MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

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

Madam President
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into why Mr David Pyo, who was engaged in negotiations with officers of Strathfield Municipal Council in relation to a licence agreement, sent \$2,000 to the General Manager of Strathfield Municipal Council.

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

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

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

Yours faithfully



The Hon David Ipp AO QC
Commissioner

Contents

Executive summary	5
Chapter 1: Introduction	7
Why the Commission investigated	7
Conduct of the investigation	7
The public inquiry	7
This report	8
Investigation findings and section 74A(2) statements	9
Recommendation that this report be made public	9
Chapter 2: Background	10
David Pyo	10
Expression of interest for 26 Pomeroy Street, Homebush	10
Chapter 3: The \$2,000 payment	14
Mr Pyo's evidence	14
Chapter 4: Findings and section 74A(2) statement	17
Findings of fact	17
Corrupt conduct	17
Section 74A(2) statement	17
Chapter 5: Corruption prevention issues	19
Advertising the expression of interest and acceptance of late submissions	19

Appropriate and accurate record-keeping	20
Valuation of the Pomeroy Street property	21
Communicating to a culturally and linguistically diverse community	21
Appendix 1: The role of the Commission	23
Appendix 2: Corrupt conduct defined and the relevant standard of proof	24

Executive summary

The investigation

This report concerns an investigation by the Independent Commission Against Corruption (“the Commission”) into why David Pyo sent, unsolicited, \$2,000 in cash to David Backhouse, the General Manager of Strathfield Municipal Council (“the Council”). In particular, the investigation was concerned with whether the payment was intended by Mr Pyo as an inducement to facilitate a favourable outcome to negotiations for a licence agreement with the Council relating to Council property at 26 Pomeroy Street, Homebush or was made in the expectation of receiving some future benefit from the Council or Mr Backhouse.

On 2 December 2009 Mr Pyo met with the Council’s Manager of Community Services, Michael Chau, and provided him with a sealed envelope to be given to Mr Backhouse. Mr Backhouse later opened the envelope and discovered that it contained a Christmas card, a handwritten note and \$2,000 in \$100 notes. Mr Backhouse reported the matter to the Commission.

The investigation

The Commission’s investigation involved examining numerous documents obtained from the Council and other sources, as well as interviewing and obtaining statements from a number of witnesses.

On 4 December 2009 the Commission arranged for Mr Backhouse to telephone Mr Pyo to discuss the receipt of the \$2,000. The conversation was lawfully recorded and authorised pursuant to the *Surveillance Devices Act 2007* (NSW).

Mr Pyo gave evidence at a compulsory examination on 23 December 2009.

The public inquiry

As part of its investigation the Commission conducted a public inquiry on 18 February 2010. Mr Pyo and Mr Chau gave evidence. Robert Bourke, the Director of

Operations at the Council, also gave evidence. Theresa Hamilton, Assistant Commissioner, presided. Greg Farmer acted as Counsel Assisting the Commission.

The Commission’s findings

The Commission found that in sending \$2,000 to Mr Backhouse, Mr Pyo intended, or expected, that Mr Backhouse would keep the money for his personal use and in return, if necessary, use his position as General Manager to assist Mr Pyo to achieve a favourable outcome to the licence agreement negotiations.

A statement is made pursuant to section 74A(2) of the *Independent Commission Against Corruption Act 1988* (NSW) that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Pyo for an offence of offering a corrupt benefit contrary to section 249B(2) of the *Crimes Act 1900* (NSW).

Corruption prevention issues

Chapter 4 sets out the Commission’s corruption prevention response to the conduct disclosed during the investigation. The Commission identified some deficiencies in the Council’s expression of interest (“EOI”) process for 26 Pomeroy Street. It also became apparent that the Council’s record-keeping in relation to the EOI process was poor.

The Commission also identified the need for local councils to clearly communicate business ethics to those with limited literacy skills in English who are engaging in commercial transactions with councils.

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

Recommendation 1

That Strathfield Municipal Council review its Purchasing and Tendering Operational Guidelines to provide clear guidance on expression of interest (EOI) processes that do not form part of a formal tender. In particular, guidance should be provided on the circumstances surrounding the acceptance of late submissions, including appropriate approval requirements.

Recommendation 2

That Strathfield Municipal Council amend its Purchasing and Tendering Operational Guidelines to specify the types of EOI that must be advertised in a Sydney metropolitan daily newspaper as well as in the local press and on its website.

Recommendation 3

That Strathfield Municipal Council undertake the following activities in relation to its record-keeping requirements for EOI processes:

- a complete review of its record-keeping practices to ensure adequate procedures are in place to capture and maintain all relevant documents from every stage of the process. This should include all Council-generated correspondence, Council reports and minutes, evaluation panel reports and decisions, and information received from proponents;
- the clear documentation of all record-keeping requirements in Council's Purchasing and Tendering Operational Guidelines;
- the training of all Council staff involved in EOI processes in Council's record-keeping requirements and their obligations;
- the conduct of a compliance audit of its record management systems against the requirements of the *State Records Act 1998*.

Recommendation 4

That Strathfield Municipal Council ensure procedures are in place to determine the market rental value and amount of work required to be undertaken by potential licensees prior to the selection of preferred proponents during EOI or formal tender processes.

Recommendation 5

That the Local Government Division of the Department of Premier and Cabinet issue a Circular to all local councils in NSW to communicate anti-corruption messages to their communities in relevant languages for their areas.

Recommendation 6

That Strathfield Municipal Council commence a campaign to educate its community in relevant languages that corrupt acts such as bribery or other inducements are not acceptable and will be reported to the Commission.

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

The recommendations will be communicated to Strathfield Municipal Council and the Department of Premier and Cabinet (Local Government Division) with a request that an implementation plan for the recommendations be provided to the Commission. The Commission will also request progress reports and a final report on the implementation of the recommendations.

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

Chapter 1: Introduction

This report concerns an investigation by the Independent Commission Against Corruption (“the Commission”) into why David Pyo sent \$2,000 in cash to David Backhouse, the General Manager of Strathfield Municipal Council (“the Council”). In particular, the investigation was concerned with whether the payment was intended by Mr Pyo as an inducement to facilitate a favourable outcome to negotiations for a licence agreement relating to Council property at 26 Pomeroy Street, Homebush or was made in the expectation of receiving some future benefit from the Council or Mr Backhouse.

On 2 December 2009 Mr Pyo met with the Council’s Manager of Community Services, Michael Chau, and gave him a sealed envelope to give to Mr Backhouse. The envelope was stamped with the Australian Korean Welfare Association’s stamp and had the handwritten words on the back of the envelope: “from David Pyo”. Mr Chau gave the envelope to Mr Backhouse. When he opened the envelope Mr Backhouse found a Christmas card, \$2,000 in \$100 notes and an A4 sheet of paper with the handwritten words: “Hello David. Thank you for your advice and help. Thank you form [sic] David”. At the time, Mr Pyo was involved in ongoing negotiations with Council in relation to the terms of a licence agreement for the operation of Council premises at 26 Pomeroy Street, Homebush.

Mr Backhouse reported the matter to the Commission.

Why the Commission investigated

One of the Commission’s principal functions, as specified in section 13(1)(a) of the *Independent Commission Against Corruption Act 1988* (“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. It was important to establish whether the payment of \$2,000 was intended by Mr Pyo as an inducement to facilitate ongoing negotiations for the licence agreement or was made in the expectation of receiving some future benefit from the Council. The Commission determined that it was in the public interest to conduct an investigation for the purpose of establishing whether corrupt conduct had occurred, the extent of any such corrupt conduct, whether there were any corruption prevention issues which needed to be addressed, and to send a clear message to the public that giving money to public officials who are dealing with issues concerning the giver is not acceptable.

Conduct of the investigation

The Commission’s investigation involved examining numerous documents obtained from the Council and other sources, as well as interviewing and obtaining statements from a number of witnesses.

In order to obtain evidence about Mr Pyo’s motives for giving money to Mr Backhouse, the Commission arranged for Mr Backhouse to discuss the receipt of the money with Mr Pyo. The conversation took place on 4 December 2009 and was lawfully recorded using a listening device.

In addition, the Commission conducted a compulsory examination of Mr Pyo on 23 December 2009 to obtain further relevant evidence. During this examination, Mr Pyo denied having engaged in any corrupt conduct.

The investigation was assisted by the cooperation of the Council’s General Manager, Mr Backhouse.

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 Mr Pyo gave at his compulsory examination. The Commission also took the following matters into account:

- The need to establish why Mr Pyo gave Mr Backhouse \$2,000.
- The matter being investigated was serious, involving payment of \$2,000 to a public official.
- 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. The public interest in exposing this matter was not outweighed by any other factor, including the public interest in preserving the privacy of the persons concerned.
- The importance of publicly exposing what occurred with a view to sending a clear message to the public that giving money to public officials who are dealing with issues concerning the giver is not acceptable.

The issue of public officials being offered money or gifts by persons with whom they are dealing in an official capacity remains prevalent and problematic in the community.

Since December 2008 the Commission has conducted three public inquiries involving cash and gifts being improperly offered to public officers. Between 1 January 2008 and the commencement of the public inquiry, the Commission had received 183 reports from principal officers of public authorities where the allegations involved the giving or offering of a bribe or gift. In 44 of these cases public officials reported members of the public offering a bribe or gift. Thirty-three of those reports were made by

general managers of councils about bribes or gifts offered to themselves or council staff. While not all of these matters were investigated or substantiated, the figures suggest an unacceptably high number of cases where public officials have formed the view that they are being offered inappropriate gifts or benefits by those with whom they are dealing.

The public inquiry took place on Thursday 18 February 2010. Theresa Hamilton, Assistant Commissioner, presided at the inquiry and Greg Farmer acted as Counsel Assisting the Commission.

Mr Pyo gave evidence at the public inquiry. Robert Bourke, the Director of Operations at the Council and the head of the panel assessing the expression of interest ("EOI") applications for the licence agreement, gave evidence. Mr Chau, who was a member of the panel assessing the EOI applications and the person to whom Mr Pyo gave the envelope, also gave evidence.

Mr Backhouse's statement dated 3 December 2009 was tendered. James Ng, the Council's Legal Officer and a member of the panel assessing the EOI applications, gave a statement dated 13 January 2010 and this was also tendered in evidence.

Following the conclusion of the public inquiry, Counsel Assisting made oral submissions regarding possible findings and recommendations. The legal representative of Mr Pyo made oral submissions in response and subsequently provided further written submissions. All submissions were considered in the preparation of this report.

This report

Chapter 2 of this report sets out some background information in relation to the Council, the EOI process and the circumstances of the payment.

Chapter 3 canvasses the available evidence in relation to the \$2,000 payment and examines Mr Pyo's motivation in sending \$2,000 in cash to Mr Backhouse.

Chapter 4 sets out the Commission's findings and a statement pursuant to section 74A(2) of the ICAC Act.

Chapter 5 sets out the Commission's corruption prevention response to the investigation and contains six corruption prevention recommendations.

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

The recommendations will be communicated to Strathfield Municipal Council and the Department of Premier and Cabinet (Local Government Division) with a request that an implementation plan for the recommendations

be provided to the Commission. The Commission will also request progress reports and a final report on the implementation of the recommendations.

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

Investigation findings and section 74A(2) statements

Findings of fact and corrupt conduct are set out in Chapter 4.

The Commission found that in sending \$2,000 to Mr Backhouse, Mr Pyo intended or expected that Mr Backhouse would keep the money for his personal use and in return, if necessary, use his position as General Manager to assist Mr Pyo to achieve a favourable outcome to the licence agreement negotiations.

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 Mr Pyo for an offence of offering a corrupt benefit contrary to section 249B(2) of the *Crimes Act 1900* (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 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: Background

This chapter sets out background information about Mr Pyo and the dealings between Mr Pyo and the Council for the granting of a licence to Mr Pyo's Pyo Family Trust to operate Council premises at 26 Pomeroy Street, Homebush.

David Pyo

Mr Pyo is a Korean businessman. He was born on 9 November 1954. Prior to arriving in Australia in 2000, he lived in New Zealand for five or six years. In Korea, he was involved in the importation of motor vehicles and also worked as a teacher at a private high school. He worked as a cleaner in New Zealand. In Australia, his wife owns and runs a Korean restaurant. He operates a cleaning business, PNS Pty Ltd, of which his wife is the director. The business employs 20 staff. He is one of the Directors of the Pyo Family Trust which was established in July 2008 to undertake investment in various businesses. He is involved in the Korean community, as one of the Directors of the Australian Korean Welfare Association and as the President of the Sydney West Lions Club.

Mr Pyo told the Commission that he tried to learn English but because of his background and age, did not do well. He required the services of an interpreter at both his compulsory examination and the public inquiry. He appears to have relied on his solicitor and his son to act as interpreters for him in his dealings with the Council. Mr Bourke, who met with Mr Pyo a number of times at Council, describes his English language skills as limited and noted that at all the meetings Mr Pyo used either his solicitor or his son to translate for him.

Expression of interest for 26 Pomeroy Street, Homebush

The property at 26 Pomeroy Street, Homebush is owned by the Council. The property is 7718m² and comprises a former sheltered workshop, the former Homebush Bowling Club and open space. As of January 2008 it had been unused for a considerable period.

On 8 January 2008, the Council placed an advertisement in the *Inner West Courier* newspaper calling for EOIs in relation to the future use of the property. The advertisement was also placed outside the premises at 26 Pomeroy Street. The advertisement noted that EOIs were being sought for information purposes only and that there was no obligation on either the Council or any interested party to enter into an agreement. The advertisement set out the following three-stage process:

Stage 1 – Call for non-binding expressions of interest.

Stage 2 – Detailed and binding leasing or licensing proposals will be invited to [sic] selected parties from Expression of Interest process. Council will determine which, if any, to accept.

Stage 3 – Parties submitting proposals, which are accepted and approved, will result in Council entering into an agreement.

Parties submitting an EOI were required to address a number of criteria including a description of the proposed use of the premises, proposed investment in the site and proposed financial investment in the site. As the site was a community facility, proposals for future use were required to focus on providing services with an identifiable community benefit. The closing date for the EOIs was 20 June 2008.

Mr Pyo told the Commission he saw a display board notice seeking EOIs and instructed his solicitor to prepare an EOI on behalf of the Pyo Family Trust. The resulting EOI was dated 6 August 2008 and was addressed to the General Manager, Strathfield Council. This was some 47 days after the advertised closing date for EOIs. Despite this, the Council did not reject the EOI but considered it along with others it had received. The acceptance of the late submission is dealt with in Chapter 5.

The Pyo Family Trust's EOI proposed using the site as a sports facility for a community youth group, a restaurant and entertainment centre, a space for a (unspecified) community service and a golf practice range for beginners. It proposed a total investment of \$1,100,000 comprising \$300,000 for each for the restaurant and golf range and

\$250,000 for each for a function area and BBQ area. It proposed a lease arrangement of eight years with an option for renewal of a further eight years and payment of a licence fee of \$12,000 per annum.

In the event his proposal was successful, Mr Pyo told the Commission, he intended to raise the necessary funds by selling property in Korea.

On 25 November 2008 the Council proceeded to Stage 2 of the EOI process and sought more detailed proposals from the Pyo Family Trust and some of the other parties who had lodged EOIs. The closing date for receipt of proposals was 20 March 2009.

On 10 February 2009 the Pyo Family Trust submitted a detailed business plan in support of its application. The business plan was far more detailed than the initial EOI document, but essentially replicated the proposed uses set out in the EOI document. It also contained financial projections, including net profit projection over a five-year period varying from a "worst case" scenario of \$69,477 to a "best case" scenario of \$173,900.

By 20 March 2009 the Council had received more detailed proposals from five parties, including the Pyo Family Trust. The Council officers who assessed these proposals were Mr Bourke, Mr Chau and Mr Ng. Only the Pyo Family Trust and one other proposal, submitted by JAG Promotions, were included as satisfying the provisions of the Strathfield Planning Scheme Ordinance 1969 and as being consistent with the core objectives of the *Local Government Act 1993* (NSW).

Mr Bourke prepared a report on the project which was placed before a closed session of the Council on 7 July 2009. The report to the Council recommended that Council give delegated authority to Mr Backhouse to enter into negotiations and to establish a licence agreement with one of the two preferred parties for a period not exceeding five years. As set out in section 46A of the *Local Government Act 1993*, a lease or licence for a term exceeding five years may be granted only by tender, unless it is granted to a non-profit organisation.

Council then established a formal evaluation panel to review the merits of the two remaining proposals. The panel was headed by Mr Bourke and also comprised Mr Chau and Mr Ng. As part of the process, Council engaged an independent chartered accountant to undertake due diligence and financial assessments of both parties. The chartered accountant's report, completed on 27 July 2009, recommended that Council accept the Pyo Family Trust proposal.

On 14 September 2009, the Council received a letter from Mr Pyo bearing that date and marked to the attention of the General Manager. The letter referred to a meeting between Mr Pyo and Mr Bourke on 10 September 2009 at Council premises. The letter noted that as a result of that meeting Mr Pyo understood any licence period would be for five years and the proposed golf driving range would not be permitted. He requested temporary approval for the golf driving range and proposed that, as the licence period was shorter than he had expected, the licence fee should be the same as the fee that he had initially proposed (\$12,000 per annum).

By letter dated 30 September 2009, signed by Mr Bourke, Council advised Mr Pyo that the Pyo Family Trust proposal was the preferred submission subject to final Council approval. The letter advised that the maximum licence term would be five years at a rate to be determined by Council but noted that the golf driving range would be excluded from the proposed licence. The letter advised that the next step in the process would be the tabling of a report at the Council meeting in November outlining the outcome of negotiations to date and including a recommendation that Council resolve to enter into a licence agreement with the Pyo Family Trust. Mr Pyo was advised that if the recommendation was accepted by Council a licence agreement would be drafted incorporating relevant terms and conditions.

On 3 November 2009, at a closed session, Council unanimously voted to authorise Mr Backhouse to negotiate a licence agreement and licence fee with the Pyo Family Trust. Mr Bourke told the Commission that once a resolution made in a closed session is passed that resolution is made public. There is, however, no evidence that Mr Pyo

became aware that this resolution made Mr Backhouse responsible for negotiating the licence agreement.

Mr Bourke, Mr Ng and Mr Chau met with Mr Pyo and his solicitor at Council premises on 12 November 2009 to discuss the licence terms. According to Mr Bourke, Mr Pyo offered to pay a licence fee of \$12,000 which Mr Bourke rejected. Mr Bourke and Mr Ng recalled that Mr Pyo wanted an option to extend the licence agreement exercisable within six months of the expiration of the agreement. They said it was explained to Mr Pyo that Council could not agree to such an option. Mr Bourke said he told Mr Pyo that if Council offered a licence period of more than five years it would be necessary to go to public tender and there could be no guarantee that Mr Pyo would emerge as the successful tenderer.

Mr Bourke wrote to Mr Pyo on 12 November 2009, referring to the meeting and advising him that he could enter the premises to carry out works pending finalisation of the licence agreement subject to a number of terms and conditions set out in the letter. The conditions included that any work carried out needed Council approval. Mr Pyo subsequently signed the letter signifying the acceptance of the terms and conditions. It is not clear from the evidence when Mr Pyo signed the letter and received the key to the premises. Although at his compulsory examination he suggested that once this occurred he believed the licence agreement had largely been negotiated, leaving only a few matters to be settled between Council and his lawyer, at the public inquiry he agreed that money was still an important issue to be settled between him and the Council. The Commission is satisfied that despite obtaining agreement from the Council to enter the premises, and obtaining the key for that purpose, Mr Pyo knew that negotiations for the licence agreement remained on foot and that important issues concerning how much the Pyo Family Trust would have to pay to secure the licence remained unresolved.

Mr Pyo sent a letter to Council dated 16 November 2009 referring to the meeting with Mr Bourke on 12 November confirming that as a result of that meeting he understood the licence would be for five years. He sought to extend the licence period by giving notice six months before the expiration and to pay a licence fee of \$16,000 per annum with annual increments of 4.5%.

After receiving Mr Pyo's letter of 16 November 2009 Mr Bourke discussed it with Mr Ng and asked him to negotiate with Mr Pyo with the object of achieving a licence fee of \$20,000 per annum with a 5% annual increment and some form of profit-share arrangement for the Council. Mr Ng said that sometime in late November he telephoned Mr Pyo's son and offered a licence fee of \$26,000 and requested some form of revenue sharing. Mr Ng told the Commission that in asking for a fee of \$26,000 he was

expecting Mr Pyo to offer a lower sum and was hoping to negotiate a figure that was ultimately around the \$20,000 level Mr Bourke had requested.

At 10.40 am on 25 November 2009, Mr Ng sent an email to Mr Pyo's son, Eric Pyo, attaching a draft licence agreement. The draft specified a five-year period but left the amount of the annual licence fee blank. Provision was made for annual CPI increases in the licence fee. The draft contained revenue-sharing provisions requiring the licensee to pay Council 10% of its gross monthly income. It provided that the General Manager was the Council contact person for the purpose of any negotiations or disputes arising under the licence. The draft contained a section for signing by the parties which identified the General Manager as the person who would sign on behalf of the Council.

At some stage Mr Pyo arranged for his solicitor to translate the draft licence agreement and obtained a copy translated into Korean. Mr Pyo told the Commission that after reading the draft licence agreement he realised that the General Manager was the person responsible for signing the agreement on behalf of the Council. Such knowledge could explain why, if Mr Pyo wished to obtain a favourable outcome to negotiations by making a payment to someone at Council, he would select Mr Backhouse rather than one of the other Council officers with whom he had been dealing.

Initially, the evidence as to when Mr Pyo had possession of a translated version of the draft licence agreement was not clear. In his statement of 13 January 2010 Mr Ng recalled emailing Mr Pyo's solicitor a copy of the draft licence agreement on 2 December 2009 and was aware that Mr Pyo had a translated copy of the document at a meeting at Council. He did not nominate the date of that meeting in his statement but believed that the last meeting with Mr Pyo had occurred sometime in early December.

In his statement of 14 January 2010 Mr Bourke referred to a meeting with Mr Pyo at Council sometime in early December 2009 but made no mention of whether or not he had observed Mr Pyo in possession of a translated version of the draft licence agreement. In his evidence at the public inquiry Mr Bourke said he thought the meeting with Mr Pyo may have occurred on 27 November or sometime in late November or early December but could not be sure of the date without checking his records.

Mr Ng subsequently located the email of Wednesday 25 November 2009 he sent to Eric Pyo which attached a copy of the draft licence agreement. The email contained the sentence "See you on Friday" which suggests that a meeting was proposed for Friday 27 November. Mr Ng also located another email sent to Silvio Falato, another Council officer, on 30 November thanking him for joining a meeting with Mr Pyo on 27 November. He also located a

meeting reminder in his Outlook calendar that referred to a meeting with Mr Pyo and others on 27 November.

Based on these records Mr Ng made a further statement advising that he had attended a meeting at Council with Mr Pyo, Mr Pyo's solicitor, Mr Bourke and Mr Chau on 27 November 2009 and that it was at this meeting that he saw Mr Pyo in possession of a translated version of the draft licence agreement. He was sure it was at that meeting he saw the translated version of the draft licence agreement as he recalled being surprised that Mr Pyo had been able to get the document translated so soon after Mr Ng had sent it to Eric Pyo.

Mr Bourke also located a meeting reminder in his Outlook calendar referring to a meeting with Mr Pyo on 27 November. Having seen a copy of Mr Ng's email of 30 November to Mr Falato thanking him for joining the meeting of 27 November, Mr Bourke recalled that he had asked Mr Falato to join the meeting to explain Council's development assessment application procedure to Mr Pyo. Mr Bourke stated that it was at the meeting of 27 November that he saw Mr Pyo in possession of what appeared to be a copy of the draft licence agreement translated into Korean. He recalled Mr Pyo's solicitor saying that he had translated the agreement for Mr Pyo and noticed that Mr Pyo referred to the document during the course of the meeting.

Mr Bourke recalled that at the meeting of 27 November Mr Pyo repeated his offer to pay a licence fee of \$16,000 per year and stated that he could not afford to pay more. Although Council's requirement for some form of profit-sharing arrangement was raised it was not discussed in detail.

Mr Falato provided a statement to the Commission. He recalled briefly attending the meeting on 27 November to explain Council's development application procedures. During the short period he was present the licence agreement was not discussed and he did not notice whether Mr Pyo had a copy of the draft licence agreement.

Mr Chau, who was also identified as attending the meeting, could not recall the date of any meeting and could not recall if Mr Pyo had a copy of the draft licence agreement translated into Korean.

The Commission is satisfied that Mr Pyo met with Council officers at Council on 27 November and that at that time he had a copy of the draft licence agreement which had been translated into Korean. The Commission is satisfied that at least by that time Mr Pyo was aware that Mr Backhouse was the Council officer nominated to sign the agreement on behalf of the Council.

Even if Mr Pyo had not seen the draft licence agreement prior to sending the \$2,000 to Mr Backhouse he was aware

that negotiations had not been finalised and, for reasons set out in the next chapter, appreciated that Mr Backhouse could intervene in those negotiations.

Chapter 3: The \$2,000 payment

As of 2 December 2009 the negotiations between Mr Pyo and Council had not resulted in any final agreement. In particular, no agreement had been reached as to the amount of the licence fee or whether Council would be granted any share in the Pyo Family Trust revenues from the project. Both these issues were of significance to Mr Pyo, as their resolution would affect not only the profitability of the proposed operation but the return he could expect to make on the significant capital outlay proposed to be made by the Pyo Family Trust.

On 2 December 2009, Mr Pyo telephoned Mr Chau and asked to meet him at Council chambers. Mr Chau was not sure whether Mr Pyo said he had a Christmas card for Mr Backhouse. Mr Chau met with Mr Pyo outside Council chambers and was handed a white sealed envelope that Mr Pyo asked him to give to Mr Backhouse. The envelope was stamped with the Australian Korean Welfare Association's stamp. The words "from David Pyo" in Mr Pyo's handwriting were on the back of the envelope. Mr Chau told the Commission that Mr Pyo told him the envelope contained a Christmas card for Mr Backhouse. Mr Pyo did not say anything about money in the envelope. Mr Pyo told the Commission he gave the envelope to Mr Chau rather than directly to Mr Backhouse because it was hard to arrange a meeting with Mr Backhouse.

It is notable that Mr Pyo did not give a Christmas card to anyone else at Council, including any of those with whom he had dealt directly over the licence agreement.

Mr Chau gave the envelope to Mr Backhouse at 5.00 pm that afternoon. Mr Backhouse said he was told the envelope contained a Christmas card. As he was about to attend a meeting he left the envelope unopened.

At about 7.30 pm, after returning from his meeting, Mr Backhouse opened the envelope. He found a Christmas card containing a folded A4 size sheet of paper in which he found twenty \$100 notes. The folded sheet of paper had the handwritten words: "Hello David. Thank you for your advice and help. Thank you form [sic] David".

Mr Backhouse told the Commission he was shocked and alarmed by what he found. At the time he was generally

aware that Mr Pyo was involved in negotiations with Council officers for a licence agreement but he had had very little involvement in those negotiations or the selection of the preferred licensee. The Commission accepts that the money sent to him by Mr Pyo came as a complete surprise to Mr Backhouse and that he had done nothing, either directly or indirectly, to prompt Mr Pyo to send anything to him.

Mr Ng had emailed a copy of the draft licence agreement to Mr Pyo's solicitor on 2 December. Mr Pyo's solicitor responded by email sent at 3.20 pm the next day. The email advised that Mr Pyo had instructed him to respond. In particular, the email specified the licence fee as \$16,000, sought deletion of the revenue-sharing clause, and sought a licence fee-free period for the first two months of the licence agreement. Mr Pyo told the Commission he instructed his solicitor to "fix" the licence fee at \$16,000 per annum.

It is clear that as of 3 December, the terms of the licence agreement had not been settled and Mr Pyo wanted Council to agree to his terms rather than meet the terms proposed by Council.

Mr Pyo's evidence

Mr Pyo claimed that it was a Korean custom to give a *kum il bong*, a small gift, at Christmas time. However, Mr Pyo said that if money was given with an expectation of getting something in return the payment was considered illegal in Korea. He told the Commission that if he gave money to someone and asked them for a favour in return that would be a bribe. The Commission is satisfied that Mr Pyo knew that it was wrong to offer money to a public official with the expectation the public official would do something in return for that payment.

In his evidence, Mr Pyo agreed that \$2,000 was a significant amount of money for him. Previously, in his compulsory examination evidence, Mr Pyo stated that he was not a rich man and had to work "very hard" to make \$2,000 in Australia.

Mr Pyo claimed he did not expect anything in return for sending the \$2,000 to Mr Backhouse.

He said that if he had wanted the money to influence the outcome of the licence agreement negotiations he would have given it to one of the Council officers engaged in those negotiations. The Commission does not accept that sending the money to Mr Backhouse, as opposed to one of the officers directly involved in the negotiations, demonstrates that Mr Pyo did not intend to influence the outcome of the negotiations.

Mr Pyo said he had previously met Mr Backhouse in a short meeting with other Council officers on 28 August 2008 but they had not had any detailed discussion about Mr Pyo's proposal. He had also met Mr Backhouse at the annual meeting of the Australian Korean Welfare Association. Mr Backhouse recalled having met Mr Pyo at a number of Council functions for the Australian Korean Welfare Association. Mr Pyo was clearly aware that Mr Backhouse was the Council General Manager. Although he had dealt with other Council officers in relation to the terms of the proposed licence, he clearly did not consider that he was thereby prevented from contacting Mr Backhouse about the matter. Mr Pyo said that he had tried to meet with Mr Backhouse but only got to speak to his receptionist or someone else and had not been able to speak to Mr Backhouse. He said he sent the money to Mr Backhouse rather than anyone else engaged in the negotiations because Mr Backhouse was "...the leader of the organisation so I thought I was just giving that, giving it through the leader, I thought the leader will do whatever he has to do for his team". The Commission is satisfied that Mr Pyo appreciated that, as Council General Manager, Mr Backhouse had authority over the Council officers engaged in the negotiations and could, if he wanted, either influence or direct those officers in relation to those negotiations or override any recommendations they made.

Mr Pyo did not discuss sending the money to Mr Backhouse with his family or anyone else. He did not tell Mr Chau that the envelope contained money. He denied that he wanted to keep the payment secret and claimed that if he had wanted to keep it secret he would not have given the envelope to Mr Chau. He conceded, however,

that he never expected Mr Chau to open the envelope. It is clear from the evidence that he gave the envelope to Mr Chau because he was unable to contact Mr Backhouse directly. He agreed that if Mr Backhouse did not tell anyone about the money it would be a secret between him and Mr Backhouse.

At his compulsory examination Mr Pyo said the money was a Christmas gift for Mr Backhouse to use as Council General Manager. He made no reference to it being for a Council staff Christmas party. At the public inquiry Mr Pyo said the money was "a gift solely for a Christmas dinner party" for Council staff. He calculated there were about 100 Council staff and allowed \$20 per head for the party.

The handwritten note enclosing the money made no mention of any Christmas party for Council staff. In a telephone conversation between Mr Backhouse and Mr Pyo on 4 December Mr Pyo made no reference to a Council staff Christmas party.

Acting at the Commission's request, Mr Backhouse telephoned Mr Pyo at 4.58 pm on 4 December 2009. The conversation was lawfully recorded by the Commission. Mr Backhouse told Mr Pyo that Mr Chau had given him the card and said that he was a bit surprised. Mr Backhouse said \$2,000 was a lot of money, to which Mr Pyo replied "Ah, that's right is the, for the paperwork [unintelligible] families because, long time helping me and my family, everything. So do you spend for your family."

The Commission is satisfied that if Mr Pyo had really intended the money be used for a Council staff Christmas party he would have made that clear in the handwritten note and in the telephone conversation. The Commission rejects Mr Pyo's evidence that he intended the money be used for a Council staff Christmas party.

The handwritten note enclosing the money indicated the money was in thanks "for your advice and help". Mr Pyo agreed that as of 2 December Mr Backhouse had not provided him with any advice or help. He said he wrote this as he understood Mr Backhouse represented the Council and it was appropriate to express his gratitude "to the top man" for the work done by Mr Backhouse's subordinates.

However, the words written by Mr Pyo are also consistent with an intention on the part of the writer that the money was provided in the expectation that Mr Backhouse would provide assistance to Mr Pyo.

At the public inquiry Mr Pyo was asked what he meant when in their telephone conversation of 4 December he told Mr Backhouse that “Ah, that’s right is the, for the paperwork [unintelligible] families because, long time helping me and my family, everything. So do you spend for your family.” Mr Pyo claimed that what he meant was that the “money (is) for your hard work so far, so far you have done good work so far” but he had not expressed it that way due to his poor English. He claimed the reference to “your family” meant the Council family not Mr Backhouse’s family. He conceded however that his reference to “my family” meant his personal family and did not include those employed in any of the family businesses.

Neither in the note or his telephone conversation with Mr Backhouse on 4 December did Mr Pyo specifically say the money was a payment for Mr Backhouse to help ensure the negotiations were settled in Mr Pyo’s favour.

Although Mr Pyo had met Mr Backhouse on some formal occasions the evidence indicates that he did not know Mr Backhouse very well. Although he had attempted to see Mr Backhouse about the licence agreement his attempts had failed. Mr Pyo clearly understood that it was unlawful to offer money to Mr Backhouse in return for Mr Backhouse intervening in the negotiations. In such circumstances it would not be surprising that, if Mr Pyo intended Mr Backhouse keep the money for his own use to help Mr Pyo achieve a favourable outcome to the negotiations, he would not express the gift in those terms, at least until such time as he had ascertained Mr Backhouse’s attitude to the payment. The use of less precise language in any written note or telephone discussion would, if necessary, give Mr Pyo room to deny that anything improper was intended.

In all the circumstances the Commission is satisfied, to the requisite standard, that in sending \$2,000 to Mr Backhouse Mr Pyo intended, or expected, that Mr Backhouse would

keep the money for his personal use and in return, if necessary, assist Mr Pyo to achieve a favourable outcome to the licence agreement negotiations. In reaching this conclusion the Commission has taken into account the following matters:

- As of 2 December 2009 no agreement had been finalised. In particular, the licence fee had not been settled and the issue of what, if any, share Council would take of the profits had not been resolved.
- Significant financial benefits would flow to the Pyo Family Trust in the event the negotiations settled on terms proposed by Mr Pyo.
- The \$2,000 was sent to Mr Backhouse at a crucial point in the negotiations.
- Mr Pyo understood that, although not directly involved in the negotiations, Mr Backhouse had the ability to either influence or direct how those negotiations progressed or if necessary to override any recommendations made by other Council officers involved in the negotiations.
- Mr Pyo kept the payment secret.
- The amount of \$2,000 was a significant amount for Mr Pyo.
- Despite claiming at the public inquiry that the \$2,000 was for a Council staff Christmas party, Mr Pyo made no mention of this in his handwritten note, in his telephone conversation with Mr Backhouse or at his compulsory examination.
- The words used by Mr Pyo in the handwritten note are consistent with an intention that Mr Backhouse should keep the money for his own use in return for providing help and assistance to Mr Pyo.
- The words used by Mr Pyo in his telephone conversation with Mr Backhouse on 4 December should be given their natural meaning. In particular, the phrase “so do you spend for your family” meant that Mr Pyo was inviting Mr Backhouse to keep the money for himself or his family.

Chapter 4: Findings and section 74A(2) statement

This chapter sets out the Commission's findings of fact and contains a finding of corrupt conduct against Mr Pyo. 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 Chapter 3, the Commission is satisfied that the following facts have been established to the requisite standard of proof.

1. On 6 August 2008, the Pyo Family Trust lodged an EOI application in relation to Strathfield Council owned property at 26 Pomeroy Street, Homebush. Council subsequently decided to enter into negotiations with the Pyo Family Trust to conclude a licence agreement. Mr Pyo conducted the negotiations on behalf of the Pyo Family Trust.
2. As of 2 December 2009 negotiations for the licence agreement had not concluded. In particular, the licence fee had not been settled and the issue of what, if any, share Council would take of the profits made by the Pyo Family Trust from operating the premises had not been resolved.
3. Significant financial benefits would flow to the Pyo Family Trust in the event the negotiations settled on terms proposed by Mr Pyo.
4. On 2 December 2009, Mr Pyo gave an envelope to Council officer Michael Chau to be given to David Backhouse, the Council's General Manager. The envelope contained a Christmas card, handwritten note and \$2,000 in cash.
5. In sending \$2,000 to Mr Backhouse Mr Pyo intended, or expected, that Mr Backhouse would keep the money for his personal use and in return, if necessary, use his position as General Manager to assist Mr Pyo to achieve a favourable outcome to the licence agreement negotiations.

Corrupt conduct

In determining findings of corrupt conduct, the Commission has applied the approach set out in Appendix 2 to this report. The Commission finds that David Pyo engaged in corrupt conduct on the basis that his conduct, set out in findings of fact 5, is conduct that:


- could adversely affect the honest or impartial exercise of official functions by Mr Backhouse, in his public official capacity as the General Manager of the Council, within the meaning of section 8(1) (a) of the ICAC Act, or
- could adversely affect the exercise of official functions by Mr Backhouse or the Council (a public authority) and also involves bribery, within the meaning of section 8(2)(b) of the ICAC Act.

The conduct 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.

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 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 service 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 Mr Pyo is an “affected” person.

Mr Pyo denied sending the \$2,000 with any intention of improperly influencing Mr Backhouse. While some of his evidence may be relevant to consideration of his conduct, Mr Pyo gave his evidence subject to a declaration under section 38 of the ICAC Act and accordingly his evidence is not available to be used against him in any criminal prosecution.

There is available evidence from Council officers concerning the negotiations for the licence agreement, the evidence of Mr Chau concerning his receipt of the envelope from Mr Pyo, the envelope and its contents, Mr Backhouse’s evidence and the telephone conversation of 4 December. The Commission is of the opinion there is sufficient admissible evidence to justify seeking the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Pyo for an offence under section 249B(2) of the Crimes Act.

Chapter 5: Corruption prevention issues

In the course of its investigation into this matter, the Commission identified some deficiencies in Council's EOI process for 26 Pomeroy St. These included the way the different stages of the EOI were progressed.

It was also apparent throughout the investigation that Council's record-keeping practices in relation to the EOI process were poor. Council was unable to provide to the Commission a full set of documents in relation to the EOI process. Most notably, copies of some of the EOIs submitted were not available.

This investigation also highlights the need for local councils to communicate business ethics clearly to those with limited literacy skills in English who wish to do business with Council.

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

Advertising the expression of interest and acceptance of late submissions

Council's Purchasing and Tendering Operational Guidelines ("the Guidelines") state that an EOI process may be used prior to Council inviting tenders. The document does not appear to contemplate an EOI process being used as a stand alone procurement strategy when there is no intention to proceed to a formal tender.

The EOI process for Pomeroy St was divided into three stages, as set out in the EOI advertisement published on 8 January 2008:

- *Stage 1 – Call for non-binding expressions of interest.*
- *Stage 2 – Detailed and binding leasing or licensing proposals will be invited to [sic] selected parties from Expression of Interest process. Council will determine which, if any, to accept.*
- *Stage 3 – Parties submitting proposals, which are accepted and approved, will result in Council entering into an agreement.*

In a statement to the Commission by James Ng, the Council's Legal Officer, he says that while the Council received a number of submissions for Stage 1 "most of the submissions did not meet the evaluation criteria or were considered unsuitable or weak". This was also the view of Rob Bourke, the Council's Director of Operations: "To my best of my recollection most of the EOIs that I reviewed when assessed against the evaluation criteria were not rated highly".

Both the Pyo Family Trust and JAG Promotions proposals for Stage 1 were submitted to Council after the closing date of 20 June 2008 – Pyo Family Trust in August 2008 and JAG Promotions in September 2008. When relevant Council staff were asked why these EOIs were accepted, some reliance was placed on the fact that the EOI was not a formal tender process and consequently not governed by rigid rules. It was also stated that the late submissions were accepted in the interests of fairness. In Michael Chau's statement of 1 February 2010 he makes the following response to the question regarding why Mr Pyo's initial EOI was accepted when it was late:

...Neil Redman, Director of Corporate Services, told me that as a matter of fairness all applications had to be considered even if they were late.

Consequently, both the Pyo Family Trust and JAG Promotions proposals were accepted. They were both subsequently invited to proceed to Stage 2 of the EOI process.

The acceptance of late submissions in the circumstances surrounding this matter was not precluded by the Local Government (General) Regulation 2005 ("the Regulation") as the EOI process did not constitute a formal tender. Similarly, while Council's Guidelines referred to the requirements of the Regulation in relation to accepting late tenders, they did not provide any guidance on acceptance of late submissions in these circumstances.

The Commission believes that the acceptance of EOI submissions some months after a specified deadline has

expired is problematic for a number of reasons, including the potential of this practice to:

- bestow an unfair advantage by allowing a proponent more time to formulate their submission
- create confusion amongst proponents about the 'rules' governing the process, which in turn reduces confidence in Council's decision-making processes
- undermine the fairness of the process. For example, through the possibility that those submitting late submissions may have been privy to additional information due to the lapse in time.

These considerations need to be balanced against the risks of rejecting proposals that appear to be more meritorious than those submitted on time. Accordingly, the Commission believes that Council should fully consider these issues and formulate clearer guidance on the circumstances in which it accepts late submissions.

Council advertised the EOI in the *Inner West Courier* but placed no corresponding advertisement in a Sydney metropolitan daily newspaper. It is possible that Council may have received a higher quality of submissions by the specified deadline if it had widened the potential field of proponents by advertising the EOI more broadly. Indeed, at least one of the proponents, Mr Pyo, told the Commission that he was unaware of the EOI advertisement, instead being alerted to the EOI process by a display board at the property.

In addition, Council's decision to advertise the EOI only locally meant that it risked breaching the advertising requirements of the Regulation if it decided to embark on a formal tender process after the initial EOI advertisement.

Recommendation 1

That Strathfield Municipal Council review its Purchasing and Tendering Operational Guidelines to provide clear guidance on expression of interest (EOI) processes that do not form part of a formal tender. In particular, guidance should be provided on the circumstances surrounding the acceptance of late submissions, including appropriate approval requirements.

Recommendation 2

That Strathfield Municipal Council amend its Purchasing and Tendering Operational Guidelines to specify the types of EOI that must be advertised in a Sydney metropolitan daily newspaper as well as in the local press and on its website.

Appropriate and accurate record-keeping

Council could provide the Commission with only copies of the Stage 1 and 2 submissions from Pyo Family Trust and the Stage 1 submission from JAG Promotions. While summaries of other proposals are provided in Council minutes, Council could not locate many of the actual submissions and proposals. There is also no record of correspondence from Council to those making submissions, except for correspondence to the Pyo Family Trust and a letter to JAG Promotions informing them that an independent chartered accountant had been appointed by Council to conduct a due diligence review and financial assessment.

Furthermore, a report to the Extraordinary Council meeting of 25 November 2008, which authorises Council proceeding to Stage 2 of the EOI process, does not mention JAG Promotions. This is despite JAG Promotions being considered as one of two preferred proponents along with the Pyo Family Trust.

Council's Guidelines outline instructions on records maintenance for purchasing and tendering decisions. However, it is not clear whether these procedures are applicable to EOIs. Regardless of whether an EOI is part of a tender process, appropriate and accurate records should be maintained as stipulated under section 12 of the *State Records Act 1998*.

This is the second time the Commission has raised concerns about Council's record-keeping procedures as a result of an investigation. The Commission's *Report on corrupt manipulation of contract procurement procedures at Bankstown and Strathfield councils* (2007) noted Council's failure to record key documents relating to procurement processes in its record-keeping system. As a result, the Commission made the following recommendation in the report:

It is recommended that within 12 months of the publication of this report ... Bankstown Council and Strathfield Council conduct compliance audits of their records management systems against the requirements of the State Records Act 1998.

In response to this recommendation, Strathfield Council has advised the Commission that the implementation of this recommendation is ongoing and that correspondence to Council is now registered through a centralised record-keeping system.¹ It would appear that the Council had further work to undertake in this regard during the time the EOI was progressing.

1. Strathfield Municipal Council 12 and 24 month progress reports in relation to corruption prevention recommendations made in *Report on corrupt manipulation of contract procurement at Bankstown and Strathfield councils* (2007) available at www.icac.nsw.gov.au

The Commission has observed that poor record-keeping practices are a common problem across the public sector. This issue was most commonly rated as a major corruption risk requiring attention in the Commission's *Profiling the NSW Public Sector II - Report 1* (2009).

Recommendation 3

That Strathfield Municipal Council undertake the following activities in relation to its record-keeping requirements for EOI processes:

- a complete review of its record-keeping practices to ensure adequate procedures are in place to capture and maintain all relevant documents from every stage of the process. This should include all Council-generated correspondence, Council reports and minutes, evaluation panel reports and decisions, and information received from proponents;
- the clear documentation of all record-keeping requirements in Council's Purchasing and Tendering Operational Guidelines;
- the training of all Council staff involved in EOI processes in Council's record-keeping requirements and their obligations;
- the conduct of a compliance audit of its record management systems against the requirements of the *State Records Act 1998*.

Valuation of the Pomeroy Street property

The property at 26 Pomeroy St had been vacant for a number of years when it was advertised in January 2008. At this time, Council did not have an independent financial assessment of what work would be required on the property.

An independent market rental assessment of the property was carried out only on 28 July 2009, some 18 months after the EOI advertisement, by Egan National Valuers ("Egan"). This was the day after an independent chartered accountant had selected Pyo Family Trust over JAG Promotions as the preferred proposal.²

The annual rental value nominated by Egan took into consideration the work required on the property. The assessment stated:

It is immediately apparent upon inspection of the premises that they are not readily lettable in their current form. With the exception of disabled male amenities and

refurbished locker room and two offices, the building would not be suitable for immediate usage and will require considerable capital expenditure to bring it to a basic level suitable for occupation and usage, whether that be for community based activities or recreation based club facilities." (Section 7.1, p. 12)

Egan's valuation report provides significant information which may have benefitted Council in developing the EOI for the Pomeroy Street property and assessing the value of submissions. It may also have impacted on Council's approach in attempting to enter into a licence agreement for the property. Further, the fact that Council was not fully aware of the market rental value and the work required to be undertaken on the property by the licensee when it selected a preferred proponent potentially undermined its bargaining power and decision-making capacity.

Recommendation 4

That Strathfield Municipal Council ensure procedures are in place to determine the market rental value and amount of work required to be undertaken by potential licensees prior to the selection of preferred proponents during EOI or formal tender processes.

Communicating to a culturally and linguistically diverse community

The principles of multiculturalism, as set out in the *Community Relations Commission and Principles of Multiculturalism Act 2000*, provide guidance to all public authorities, including councils, on recognising and promoting the benefits of cultural diversity in NSW.

In 2008, the Community Relations Commission for a Multicultural NSW and the then Department of Local Government jointly developed a publication specifically for local councils. *Implementing the Principal of Multiculturalism Locally: Information Kit for Councils* was designed to help councils put into practice the principles of multiculturalism.

The four principles of multiculturalism deal with: leadership, community harmony, access and equity and economic and cultural opportunities.

In particular, principle 3 states:

Access and equity – All individuals should have the greatest possible opportunity to make use of and participate in relevant activities and programs provided or administered by the Government of NSW.

² Correspondence from PA Webster FCA, Warton Thompson & Co, Chartered Accountants to The General Manager, Strathfield Council, dated 27 July 2009.

This Commission recognises that Strathfield Municipal Council has made efforts to support this principle by making available information on its website in some of the key non-English languages spoken in the local area, including Korean. However, this information is generic and not specific to individuals who may be doing or are about to do business with Council. In this context, business can include basic transactions such as obtaining a parking permit, a development application or something more complex such as a licence or lease agreement over a Council property. In the latter case, it would be in Council's interests that all procedures and arrangements are clearly articulated and understood, especially when there are financial implications for both parties and contracts or agreements are to be signed.

While Mr Pyo went to the effort to have the draft licence agreement translated into Korean so that he could understand the terms and conditions being put to him, this agreement did not have a clause on ethical standards. Council's Guide, on p. 5, section 1.5.3, states that:

In all Council contracts, a clause must be inserted to provide for termination of a contract and the payment of damages, if any contract is entered into as a result of a corrupt act such as bribery or other inducements by the contractor/supplier or the contractor/supplier employees.

It may be assumed that if this clause was in the draft agreement, it would have been translated into Korean.

Mr Pyo also made it clear in his evidence that he never received any Council publications which refer to a code of ethics.

The Commission is concerned about the number of allegations concerning gifts of cash being made to public officers by persons with whom they are dealing in an official capacity. Since 1 January 2008, the Commission had received 183 reports under section 11 of the ICAC Act where the allegations involved the giving or offering of a bribe or gift. In 44 of these cases, public officials had reported members of the public offering a bribe or gift, and 33 of those reports were made by council general managers about bribes or gifts offered to themselves or council staff.

In the last 18 months, the Commission has conducted three other public inquiries where some sort of payment has been offered to a public official. In all these matters, including the current matter, the persons making the payments or inducements did not have English as their first language.

This investigation has further highlighted the need for councils across NSW to examine their local area population and undertake a campaign in relevant languages, including English, which sends a clear message that bribes and non-token gifts are not acceptable and that this conduct will be reported to the Commission.

The Commission recognises the seriousness of this issue and is of the opinion that the Local Government Division of the Department of Premier and Cabinet should issue a Circular to local councils in NSW to communicate anti-corruption messages to their communities. Strathfield Municipal Council should also make it a priority to commence a campaign with the aim to educate its diverse community that corrupt acts such as bribery or other inducements are not acceptable and will be reported to the Commission.

Recommendation 5

That the Local Government Division of the Department of Premier and Cabinet issue a Circular to all local councils in NSW to communicate anti-corruption messages to their communities in relevant languages for their areas.

Recommendation 6

That Strathfield Municipal Council commence a campaign to educate its community in relevant languages that corrupt acts such as bribery or other inducements are not acceptable and will be reported to the Commission.

Appendix 1: The role of the Commission

The *Independent Commission Against Corruption Act 1988* (“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. Section 8(1) provides that corrupt conduct is:

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

any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

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

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

- (a) a criminal offence, or
- (b) a disciplinary offence, or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

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


Three steps are involved in determining whether or not corrupt conduct has occurred in a particular matter.

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

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

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

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in



Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

... 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 *Rejtek 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.



I·C·A·C

INDEPENDENT COMMISSION
AGAINST CORRUPTION

Level 21, 133 Castlereagh Street
Sydney, NSW, Australia 2000

Postal Address: GPO Box 500,
Sydney, NSW, Australia 2001

T: 02 8281 5999

1800 463 909 (toll free for callers outside metropolitan Sydney)

TTY: 02 8281 5773 (for hearing-impaired callers only)

F: 02 9264 5364

E: icac@icac.nsw.gov.au

www.icac.nsw.gov.au

Business Hours: 9 am - 5 pm Monday to Friday