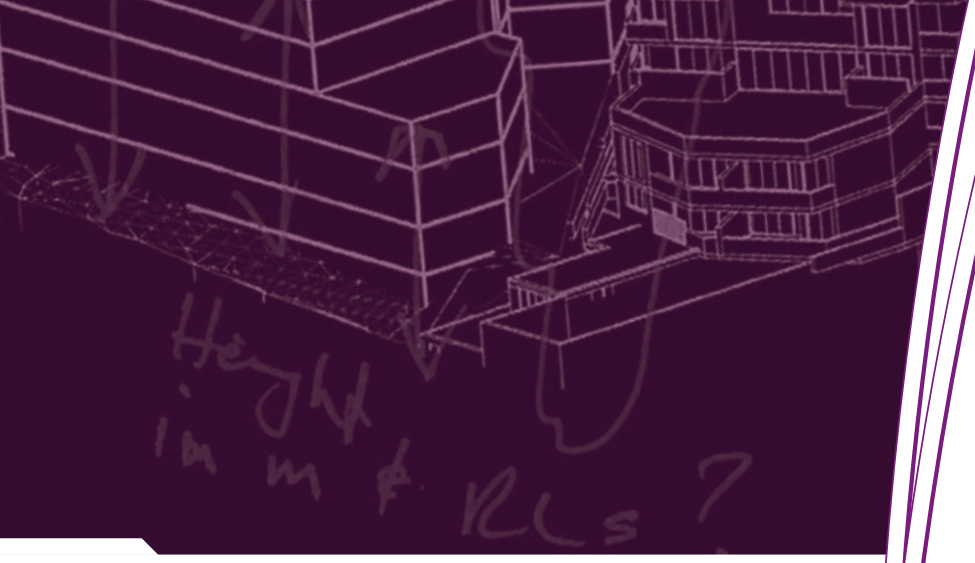
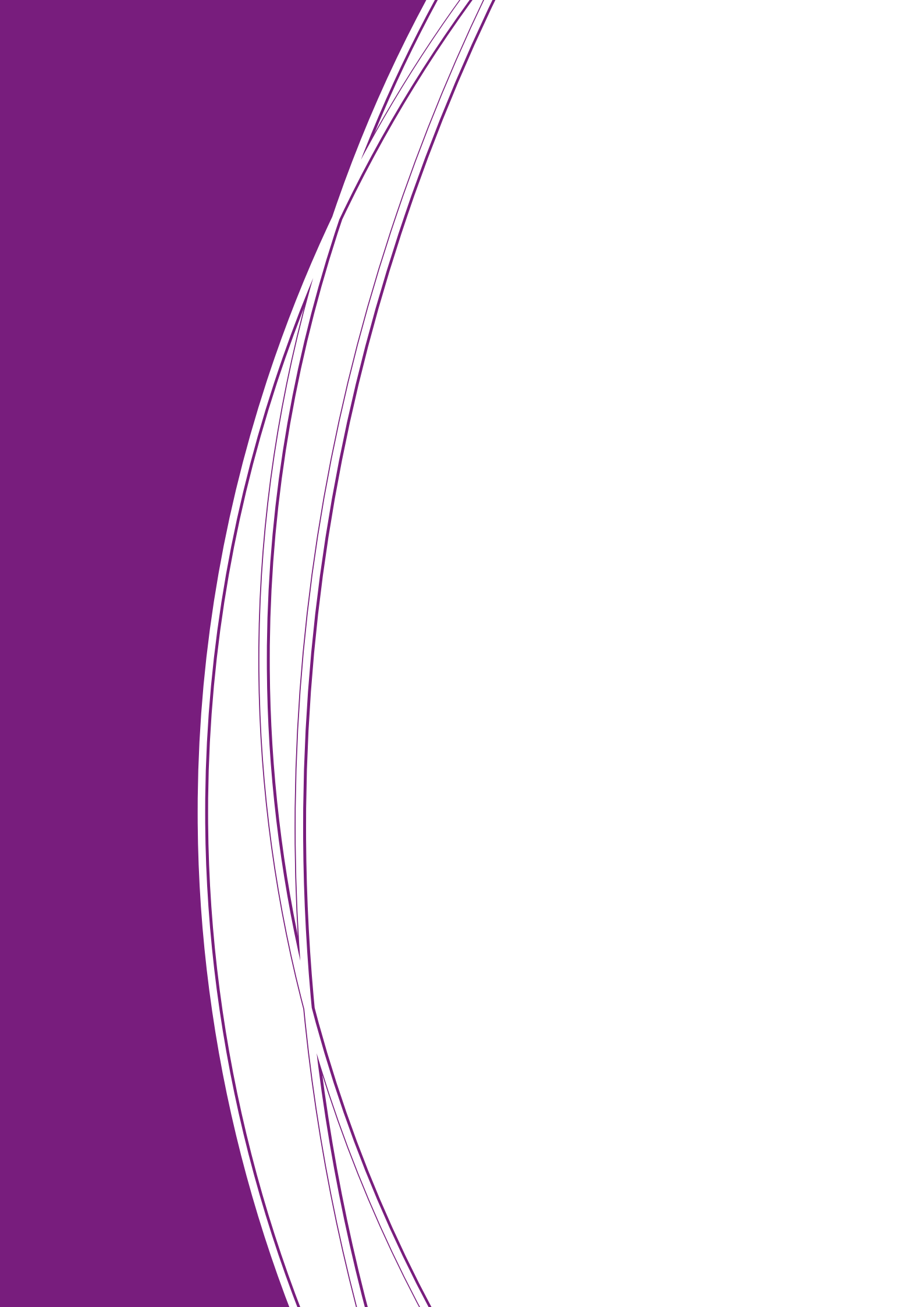


INVESTIGATION INTO THE CONDUCT OF COUNCILLORS OF THE FORMER CANTERBURY CITY COUNCIL AND OTHERS

ICAC
INDEPENDENT COMMISSION AGAINST CORRUPTION
NEW SOUTH WALES

ICAC REPORT
MARCH 2021



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Speaker
Legislative Assembly
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Mr President
Mr Speaker

In accordance with s 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into the conduct of councillors of the former Canterbury City Council and others.

I presided at the public inquiry held in aid of the 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 s 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely

P. McDonald

Patricia McDonald SC
Commissioner

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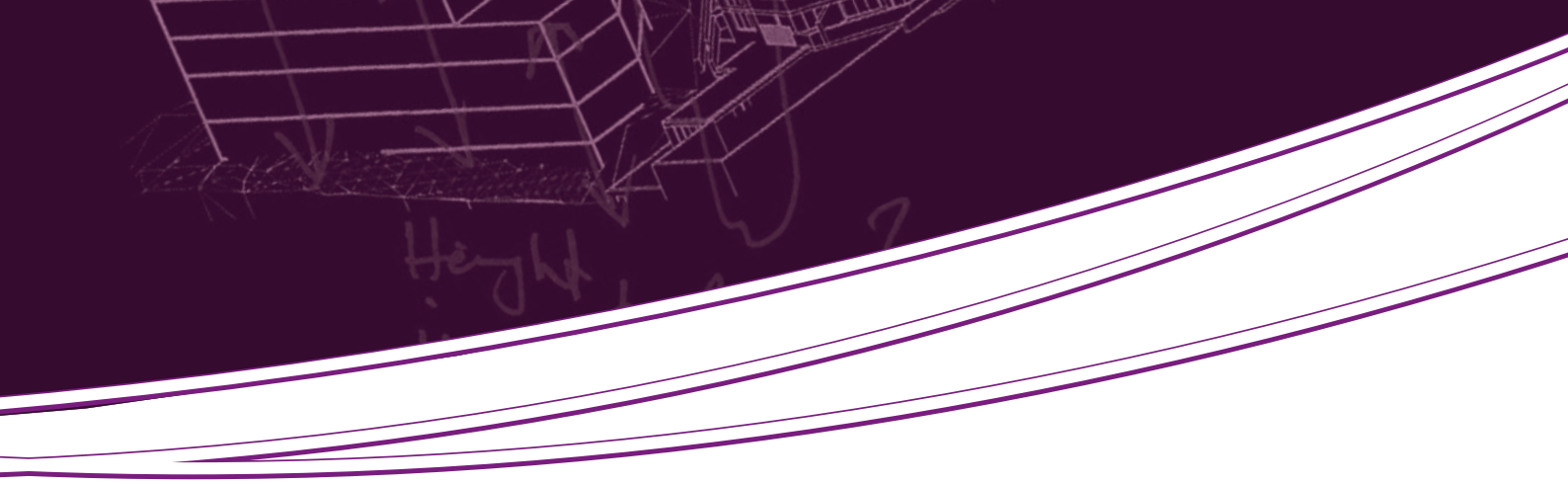

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Summary of investigation and results

This investigation by the NSW Independent Commission Against Corruption ("the Commission") was concerned with:

1. whether, between 2013 and 2016, public officials, including councillors of the former Canterbury City Council ("the Council"), Michael Hawatt and Pierre Azzi, Jim Montague (the former general manager) and Spiro Stavis (the former director of city planning) dishonestly and/or partially exercised their official functions in relation to planning proposals and/or applications under the *Environmental Planning and Assessment Act 1979* concerning properties in the local council area
2. the circumstances surrounding the appointment of Mr Stavis to the role of Council's director of city planning, including:
    a) whether, between November 2014 and January 2015, Mr Montague exercised his official functions dishonestly or partially in relation to the appointment of Mr Stavis to the role of director of city planning
    b) whether, between November 2014 and January 2015, Mr Hawatt and Mr Azzi engaged in conduct that adversely affected, or could have adversely affected, either directly or indirectly, the honest or impartial exercise of official functions by Mr Montague, the general manager of the Council, by expressly or impliedly threatening to cause the termination of Mr Montague's employment unless he appointed Mr Stavis as director of city planning.

Corrupt conduct findings

Michael Hawatt

The Commission found that Mr Hawatt engaged in serious corrupt conduct by:

- on 16 November 2014, providing Mr Stavis with access to the "suggested interview questions" for the position of director of city planning, which Mr Hawatt had obtained in the course of his role as a councillor of the Council, and allowing Mr Stavis to photograph them, thereby improperly advantaging Mr Stavis in his application for the position (chapter 2)
- between about 24 December 2014 and 18 February 2015, misusing his position as a councillor of the Council to pressure improperly Mr Montague to appoint Mr Stavis as the director of city planning (chapter 2)
- on 13 January 2015, misusing his position as a councillor of the Council by offering Mr Montague a gratuity payment of 20 weeks' salary if he appointed Mr Stavis as director of city planning and retired early (chapter 2)
- between about May 2015 and December 2015, misusing his position as a councillor of the Council to influence Mr Stavis to act favourably in relation to the development application for 51 Penshurst Road, Roselands, being property in which his daughter and son-in-law had a pecuniary interest (chapter 4)
- between about December 2015 and February 2016, misusing his position as a councillor of the Council to influence Mr Stavis to act favourably in relation to the development application for 23 Willeroo Street, Lakemba, being property in which his daughter and son-in-law had a pecuniary interest (chapter 4)

- on 3 December 2015, exercising his official functions as a councillor of the Council to vote in favour of a development application to add two additional storeys to a six-storey development at 548-568 Canterbury Road, Campsie, and an application to modify the existing development approval without disclosing his relationship with the development proponent, Charbel Demian, which included the role that Mr Hawatt had begun to play in introducing potential purchasers to Mr Demian for the sale of that site (chapter 7)
- failing to disclose his relationship with Jimmy Maroun, and proceeding to exercise his official functions as a councillor of the Council to vote on the development application with respect to Mr Maroun's property at 538-546 Canterbury Road for six storeys on 4 December 2014, the planning proposal on 14 May 2015, and the modification application under s 96 ("the s 96") of the *Environmental Planning and Assessment Act 1979* and development applications on 10 March 2016 (chapter 8)
- on 3 December 2015, failing to disclose his relationship with Marwan Chanine, and proceeding to exercise his official functions as a councillor of the Council to vote on the development applications with respect to the properties at 212-218 Canterbury Road, 220-222 Canterbury Road and 4 Close Street, Canterbury, being properties in which he knew Marwan Chanine had an interest (chapter 9).

Pierre Azzi

The Commission found that Mr Azzi engaged in serious corrupt conduct by:

- on 16 November 2014, allowing Mr Stavis to photograph Mr Hawatt's copy of the "suggested interview questions" for the position of director of city planning, thereby improperly advantaging Mr Stavis in his application for that position (chapter 2)
- between about 24 December 2014 and 18 February 2015, misusing his position as a councillor of the Council to pressure improperly Mr Montague to appoint Mr Stavis as director of city planning (chapter 2)
- failing to disclose his relationship with Mr Maroun, and proceeding to exercise his official functions as a councillor of the Council to vote in favour of the development application with respect to Mr Maroun's property at 538-546 Canterbury Road, Campsie, for six storeys on 4 December 2014, the planning proposal on 14 May 2015, and the s 96 and development applications on 10 March 2016 (chapter 8)
- in or around November 2015, misusing his position as a councillor of the Council by threatening Mr Stavis that he would be out of a job if he did not "fix" a deferred commencement condition requiring a three-metre setback from the rear boundary recommended in respect of development applications for 212-218 Canterbury Road, 220-222 Canterbury Road and 4 Close Street, Canterbury (chapter 9)
- on 3 December 2015, failing to disclose his relationship with Marwan Chanine, and proceeding to exercise his official functions as a councillor of the Council to vote on the development applications with respect to the properties at 212-218 Canterbury Road, 220-222 Canterbury Road and 4 Close Street, Canterbury, being properties in which he knew Marwan Chanine had an interest (chapter 9).

Jim Montague

The Commission found that Mr Montague engaged in serious corrupt conduct by:

- on or about 8 December 2014, appointing Mr Stavis as director of city planning believing that he was not the most meritorious candidate for that position because he improperly allowed himself to be influenced by pressure from Mr Hawatt and Mr Azzi to make the appointment (chapter 2).

Spiro Stavis

The Commission found that Mr Stavis engaged in serious corrupt conduct by:

- misusing his position as director of city planning at the Council in relation to a development application lodged in respect of his neighbour's property at Ridgewell Street, Roselands, by on:
  - 4 March and 23 July 2015, requesting Council planning staff provide him with the amended plans for the development application
  - 16 June 2015, attempting to have a Council planning officer arrange for the development assessment report for the development application to be finalised knowing that the finalisation of the report at that time would likely result in a recommendation that the development application be refused

  - 16 June 2015, suggesting that a Council planning officer should send the applicant a final email giving the applicant 14 days to lodge amended plans for the development (chapter 3)
- between 22 September and 8 October 2015, misusing his position as director of city planning to obtain an improper advantage when negotiating changes to the plans for a development application lodged in respect of his neighbour's property at Ridgewell Street, Roselands, including by using Mr Hawatt as an intermediary with his neighbour (chapter 3)
- misusing his position as director of city planning in relation to a development application lodged in respect of his neighbour's property at Ridgewell Street, Roselands by:
  - in or around October 2015, directing a Council planning officer that he be given access to the Council consultant's draft assessment report for the development application
  - on or after 16 November 2015, after having obtained the draft assessment report, marking up amendments to the report to favour his interests and directing a Council planning officer to make those changes (chapter 3)
- on or about 20 April 2016, attempting to offer Russell Olsson inducements, being that he could charge the Council what he wanted for preparing a further report and by suggesting that he could be considered favourably for inclusion on an urban design panel that Mr Stavis was attempting to establish, in return for Mr Olsson preparing a favourable report with respect to the planning proposal for 15-23 Homer Street, Earlwood (chapter 5)
- between about June 2015 and January 2016, improperly exercising his official functions as director of city planning by influencing Peter Annand to prepare a report with respect to a planning proposal for 998 Punchbowl Road, Punchbowl, to favour the developer's interests (chapter 6)
- in or around February 2016, improperly exercising his official functions as director of city planning by editing a draft report to the Council's City Development Committee to remove material that was critical of the planning proposal for 998 Punchbowl Road, Punchbowl (chapter 6)
- in or around March 2016, improperly exercising his official functions as director of city planning by allowing the report about the planning proposal for 998 Punchbowl Road, Punchbowl, to be put before the Council's City Development Committee relying on what was said to be independent urban design advice, knowing that the advice was not independent, and overstating the conclusions of the advice to the developer's advantage (chapter 6).

Section 74A(2) statements

Statements are made in this report pursuant to s 74A(2) of the *Independent Commission Against Corruption Act 1988* ("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 the following persons:

- Mr Hawatt for the offence of blackmail under s 249K(1) of the *Crimes Act 1900* ("the Crimes Act") and the common law offence of misconduct in public office, in respect of his actions directed to achieving Mr Stavis' appointment between 24 December 2014 and 18 February 2015 (chapter 2)
- Mr Hawatt for the offence of corruptly offer a benefit under s 249B(2)(a)(i) of the Crimes Act and the common law offence of misconduct in public office for offering Mr Montague a gratuity payment if he appointed Mr Stavis and retired early (chapter 2)
- Mr Hawatt for three offences of giving false or misleading evidence in a compulsory examination under s 87 of the ICAC Act in respect of evidence given on 5 December 2016 (chapter 7)
- Mr Azzi for the offence of blackmail under s 249K(1) of the Crimes Act and the common law offence of misconduct in public office, in respect of his actions directed to achieving Mr Stavis' appointment between 24 December 2014 and 18 February 2015 (chapter 2)
- Mr Stavis for the common law offence of misconduct in public office in relation to using his public office to negotiate changes to the plans for the Ridgewell Street development application between 22 September and 8 October 2015, and amending the consultant's report on or after 16 November 2015 (chapter 3)
- Mr Demian for three offences under s 87 of the ICAC Act of giving false or misleading evidence in a compulsory examination in respect of evidence given on 30 November 2016 (chapter 7)

- Daryl Maguire for two offences under s 87 of the ICAC Act of giving false or misleading evidence at the public inquiry on 13 July 2018 (chapter 7)
- Marwan Chanine for one offence of giving false or misleading evidence in a compulsory examination under s 87 of the ICAC Act in respect of evidence given on 28 February 2018 (chapter 9).

Corruption prevention

Corrupt planning decisions at the Council were a consequence of both underlying integrity issues and poor controls, and a NSW planning system that lacks effective anti-corruption safeguards. The Commission concludes that the conduct exposed in the investigation was facilitated by the:

- poor foundations for preventing corruption at the Council, including a poor "tone at the top" that led to the pursuit of developer interests by Mr Montague, Mr Stavis and some councillors
- "no reason" termination provision in the former Department of Local Government's *Standard Contract of Employment: General Managers of Local Councils in NSW* ("the Standard Contract"), which lacked effective constraints on its use
- unsound recruitment practices and procedures used to appoint senior staff at Council, and the ambiguity that existed around a provision in the *Local Government Act 1993* ("the LGA") that requires general managers to consult with councillors on the appointment of senior staff
- weak regulation of lobbying in the local government sector
- poor recordkeeping of senior staff at the Council, including the general manager, which provided opportunities for corrupt conduct
- failure of the relevant NSW Government department to oversee effectively the use of clause 4.6 in the Canterbury Local Environmental Plan 2012 (CLEP 2012), as well as other local environmental plans (LEPs) in NSW, thereby providing opportunities for misuse of the clause
- failure of the relevant NSW Government department to properly oversee the making and amendment of LEPs
- weak processes at the Council for appointing and interacting with independent planning consultants, and the lack of clarity around the appointment and arrangements of independent planning consultants to ensure that the integrity of their reports was maintained
- lack of clarity that allowed applicants to manipulate methodologies for calculating the value of a development to reduce fees and avoid the scrutiny of planning panels
- poor processes at the Council, which meant that design quality requirements were not met by applicants.

Chapter 10 of this report sets out the Commission's review of the corruption risks identified during the course of the investigation. The Commission has made the following corruption prevention recommendations.

Recommendation 1

That the DPIE amends the *Guidelines for the Appointment and Oversight of General Managers* to recommend that the performance agreements of general managers include performance indicators related to ethical culture. Specific measures that could be promoted include the conduct and measurement of outcomes from staff surveys and the promotion of whistleblowing procedures.

Recommendation 2

That the DPIE conducts a review into the no "reason" termination provision in the Standard Contract, which should canvass options such as requiring a two-thirds majority vote of a council, an absolute majority vote or the availability of mediation.

Recommendation 3

That the City of Canterbury Bankstown Council ensures that it has a recruitment policy that applies to the appointment of senior staff, which is consistent with the relevant provisions of the *Local Government Act 1993* ("the LGA").

Recommendation 4

That the DPIE clarifies what constitutes "consultation" with council by the general manager for the purpose of appointment and dismissal of senior staff as required by s 337 of the LGA. The clarification should:

- detail acceptable consultation processes and procedures
- in the absence of compelling reasons to the contrary, recommend restricting or, preferably, prohibiting councillor-dominated interview panels.

Recommendation 5

That the DPIE introduces guidelines under s 23A of the LGA concerning the appointment of senior staff.

The guidelines should address the following:

- that a senior human resources manager, or external recruitment consultant, be involved in recruitment processes, and have a role in verifying that council processes and procedures were followed in the appointment of senior staff
- the inclusion of subject matter experts on interview panels for the appointment of senior staff, especially for high-risk positions that require specialised technical knowledge
- the provision of independent assurance through the involvement of internal audit in conducting periodic reviews into senior staff recruitment processes
- the appropriate avenues for reporting concerns about process or complaints about suspected corrupt conduct.

Recommendation 6

That the DPIE amends the *Model Code of Meeting Practice for Local Councils in NSW* to require that council business and briefing papers include a reminder to councillors of their oath or affirmation, and their conflict of interest disclosure obligations.

Recommendation 7

That the NSW Government amends the *Lobbying of Government Officials Act 2011* to ensure all provisions apply to local government.

Recommendation 8

That the DPIE, following a reasonable period of consultation, issues guidelines under s 23A of the LGA to introduce measures to enhance transparency around the lobbying of councillors. The guidelines should require that:

- councils provide meeting facilities to councillors (where practical) so that they may meet in a formal setting with parties who have an interest in a development matter
- councils make available a member of council staff to be present at such a meeting and to prepare an official file note of that meeting to be kept on the council's files (any additional notes made by the member of council staff and/or the councillor should also be kept as part of the council's records)
- all councillors be invited when a council conducts formal onsite meetings for controversial re-zonings and developments
- council officers disclose in writing to the general manager any attempts by councillors to influence them over the contents or recommendations contained in any report to council and/or relating to planning and development in the local government area.

Recommendation 9

That, where there has been corrupt conduct as defined in the ICAC Act, the NSW Government reviews the *State Records Act 1998* in relation to the appropriateness of:

- offence provisions, including where there has been a wilful failure to keep records required by the *State Records Act 1998*
- time limitation for the commencement of a prosecution for an offence
- penalties for offences.

Recommendation 10

That the DPIE reviews the concept of "assumed concurrence", including the avenues that exist for clause 4.6 in each council's LEP, to be used as a de facto plan-making device when concurrence is assumed.

Recommendation 11

That the DPIE identifies the circumstances and establishes criteria to determine when the secretary's assumed concurrence will be granted and when it will be withdrawn from councils, which takes into account:

- the potential for clause 4.6 to be used as a de facto plan-making device
- that the risk of the improper use of clause 4.6 extends to all local government areas in NSW.

Recommendation 12

That the DPIE prepares and, following a period of public consultation, makes public new guidelines on varying development standards for councils that consider the criteria for assessing variations to development standards that are applicable to clause 4.6.

Recommendation 13

That the DPIE establishes a clear process to ensure that guidelines for councils on varying development standards are subject to regular review and can accommodate advice or changes arising from decisions of the NSW courts.

Recommendation 14

That the DPIE prepares and publicises guidelines that establish a framework for conducting risk-based audits on the use of clause 4.6 by consent authorities. These guidelines should include:

- the scope and frequency of audits conducted to monitor the use of clause 4.6, including the circumstances for conducting any special audits
- a requirement that the matters to be examined in an audit reinforce the objectives of conducting the audit
- an outline of the audit methodology
- clear instructions for the staff undertaking the audit
- a requirement to publish ongoing records of the audits and their results, observations and recommendations
- the necessary skills required by staff conducting the audits.

Recommendation 15

That the DPIE provides advice to councils regarding the inclusion of clause 4.6 in the cycle of audits conducted by the audit and risk committees of councils.

Recommendation 16

That the DPIE:

- considers the circumstances in which the application of both maximum height of building development standards and maximum floor space ratio (FSR) development standards should be mandatory in LEPs
- establishes clear, robust and objective criteria to determine when it is impractical to pair maximum height of building development standards with maximum FSR development standards in LEPs.

Recommendation 17

That the DPIE:

- applies a risk-based assessment that considers corruption risks prior to the drafting of Gateway Determinations authorising councils to make LEPs
- takes measures to verify that councils have complied with Gateway Determination conditions
- establishes a program of regular risk-based auditing of council processes relating to the making of LEP amendments to help provide assurance over systems and to establish whether gateway conditions were met (the outcome of audits should inform future Gateway Determinations authorising councils to make LEPs).

Recommendation 18

That the method for calculating fees associated with local development applications be reviewed by the DPIE with the aim that estimated cost of works is no longer relied on. Instead fees should be:

- determined by criteria that are clear, robust and objective
- capable of easy verification by consent authorities.

Recommendation 19

That the DPIE considers a clear, robust and verifiable alternative to capital investment value as a jurisdictional threshold for planning panels.

Recommendation 20

That the DPIE strengthens guidance for councils and planning panels to help ensure development applications are not split by development proponents into multiple applications to avoid referrals to planning panels.

Recommendation 21

That the City of Canterbury Bankstown Council develops standardised provisions for consultancy services agreements and a statement of business ethics for suppliers. The agreements and statement of business ethics should advise consultants about:

- how to make disclosures under the *Public Interest Disclosures Act 1994*
- the City of Canterbury Bankstown Council's ethical obligations
- their ethical responsibilities
- the jurisdiction of the ICAC Act.

Recommendation 22

That the DPIE issues a practice note, or other similar guidance, on the topic of local councils obtaining specialist advice about planning matters, including obtaining urban design studies. The practice note should address:

- what constitutes proper interactions between councils and consultants engaged to provide advice

- when specialist advice, independent of a development proponent, should be requested and relied on.

Recommendation 23

That the City of Canterbury Bankstown Council ensures that its development assessment procedures assess and verify compliance with design requirements for residential apartment developments, including provisions relating to design verification statements.

These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and, as required by s 111E of the ICAC Act, will be furnished to the DPIE, Department of Premier and Cabinet, the City of Canterbury Bankstown Council, NSW Government and the responsible minister.

As required by s 111E(2) of the ICAC Act, the relevant minister and general manager of the City of Canterbury Bankstown Council must inform the Commission in writing within three months (or such longer period as the Commission may agree to in writing) after receiving the recommendations, whether they propose to implement any plans of action in response to the recommendations and, if so, details of the proposed plan of action.

In the event a plan of action is prepared, the relevant minister and general manager of the City of Canterbury Bankstown Council are required to provide a written report to the Commission of their progress in implementing the plan 12 months after informing the Commission of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the first report.

The Commission will publish the response to its recommendations, any plans of action and progress reports on their implementation on the Commission's website at www.icac.nsw.gov.au.

Recommendation this report be made public

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

Chapter 1: Background

This chapter sets out some background information about the investigation, including in relation to the former Canterbury City Council ("the Council") and the NSW planning framework.

How the investigation came about

In January 2015, the Commission received a written complaint about the conduct of councillors Michael Hawatt and Pierre Azzi concerning the attempted employment termination of the general manager of the Council, Jim Montague. The complaint included allegations to the effect that Mr Hawatt and Mr Azzi had, while they were councillors, dishonestly or partially exercised their official functions in respect of planning decisions made by the Council.

The complaint originated from Brian Robson, mayor of the Council, under s 10 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

A few days before Mr Robson's written complaint was lodged with the Commission, Mr Montague made a report under s 11 of the ICAC Act about an offer made to him by Mr Hawatt on 13 January 2015 for his resignation. This complaint was referred by the Commission to the former Office of Local Government (OLG) for assessment. The OLG conducted an investigation and advised the Commission that there was insufficient information to indicate deliberate wrongdoing. During the Commission's investigation into allegations concerning planning decisions at the Council, additional information about the attempt to terminate the employment of Mr Montague and the process of recruiting Council's director of city planning, Spiro Stavis, was located and on that basis the Commission proceeded to investigate that allegation.

Why the Commission investigated

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

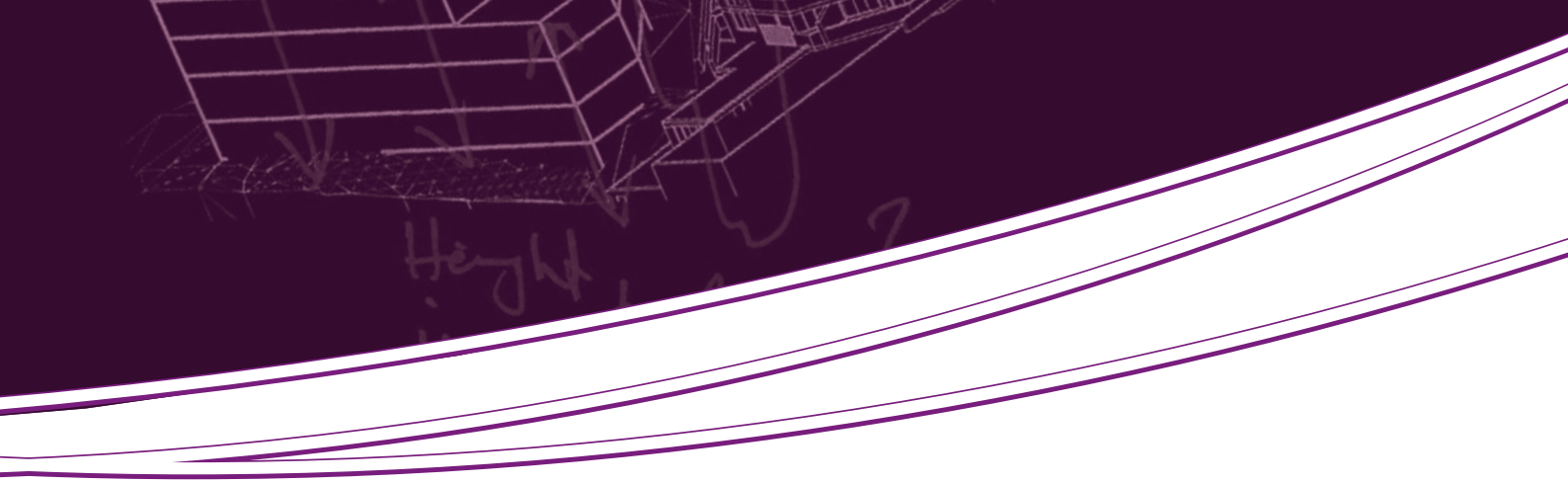
> *(i) corrupt conduct, or*
>
> *(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or*
>
> *(iii) conduct connected with corrupt conduct*
>
> *may have occurred, may be occurring or may be about to occur.*

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

The conduct reported to the Commission, if established, would involve a serious misuse of public office. At the time of the alleged conduct, the Canterbury local government area, like a number of other areas in Sydney, was experiencing significant development interest in the form of planning proposals and development applications, along with an expectation from the NSW Government that it would contribute to the additional housing required for Sydney's projected population demands.

In this context, it was all the more important that development decisions were made honestly and impartially. The Commission considers it to be a serious matter for the exercise of planning functions to be infected by an improper purpose, or by dishonesty, which is obscured from public scrutiny. The Commission determined that it was in the public interest to investigate the allegation raised by Mr Robson.

In determining whether to investigate the allegations concerning the recruitment of the director of city planning, the Commission considered that recruitment of



senior staff in local government and the vulnerability of general managers to adverse influence were matters of significant public interest, given the public functions and public money for which local government is responsible.

During the course of the investigation and the public inquiry, the Commission received other related complaints. Among these matters, the Commission determined to investigate a complaint concerning Mr Stavis' involvement in the assessment of a development application lodged by his neighbour, on the basis that the:

- subject matter fell within the scope and purpose of the public inquiry
- information provided was sufficiently reliable
- conduct alleged against Mr Stavis was sufficiently serious to warrant investigation in the public inquiry.

Conduct of the investigation

The Commission's investigation involved obtaining information and documents from public authorities and other organisations by issuing 186 notices under s 21 and s 22 of the ICAC Act, interviewing and obtaining statements from witnesses and the conduct of compulsory examinations.

As part of its investigation, the Commission executed four search warrants at the Council premises, a real estate office at Earlwood, Mr Hawatt's residence and an office used by Mr Hawatt.

The Commission also lawfully intercepted telecommunications sent to and from a mobile telephone used by Mr Hawatt, and obtained access to call charge records for relevant periods, under the *Telecommunications (Interception and Access) Act 1979* (Cth).

The public inquiry

The Commission reviewed the information obtained during the course of its investigation and, after taking into account each of the matters set out in s 31(2) of the ICAC Act, determined that it was in the public interest to hold a public inquiry. In making that determination, among the other matters specified in s 31(2) of the ICAC Act, the Commission had regard to the seriousness of the alleged conduct, including the seniority of affected persons within the Council, and the importance of the public functions involved. Further, the Commission had regard to the significant corruption prevention issues raised by the investigation, particularly concerning the integrity of the NSW planning system and the vulnerability of senior staff in local government to receive pressure and influence from individual councillors in the exercise of their functions.

The Commission considered that, while there was a risk of prejudice to the reputations of the affected persons from holding a public inquiry, there was also a reputational risk from not holding a public inquiry, including to former councillors and staff who were not affected persons, arising from the fact that some of the matters which were the subject of the investigation had already been aired in public. The Commission determined that the public interest in exposing the conduct outweighed the public interest in preserving the privacy of the persons concerned.

Patricia McDonald SC, Commissioner, presided at the public inquiry. David Buchanan SC and Anna Mitchelmore SC acted as Counsel Assisting the Commission. The public inquiry commenced on 16 April 2018 and continued over a total of 88 days, as follows:

- 16–27 April 2018
- 19–29 June 2018
- 2 July 2018
- 9–31 July 2018

- 2–6 August 2018
- 9–17 August 2018
- 8–18 October 2018
- 10–21 December 2018
- 29 January–1 February 2019
- 1 April–3 May 2019.

A total of 43 witnesses gave evidence.

At the conclusion of the public inquiry, Counsel Assisting prepared detailed written submissions setting out the evidence and the findings and recommendations they contended the Commission could make based on the evidence. These submissions were provided to all relevant parties on 7 August 2019. The last of the submissions in response was received on 25 October 2019. All submissions have been taken into account in preparing this report. Further information is provided in Appendix 3.

Canterbury City Council

Until it was amalgamated with the Bankstown local government area on 12 May 2016, the Canterbury local government area comprised an area of 34 square kilometres across 17 suburbs. Prior to the amalgamation, Canterbury was divided into three wards: West Ward, Central Ward and East Ward.

The City of Canterbury Community Strategic Plan 2014–2023 ("the Strategic Plan"), adopted on 13 February 2014, projected population growth in Canterbury from 145,000 people in 2014 to 157,000 people in 2023. Like many other parts of Sydney, there was an identified need for an increase in dwellings to support that population growth, and the NSW Government had set targets in its draft Metropolitan Strategy for Sydney to 2031 requiring an increase in the number of dwellings and jobs.

The Strategic Plan also emphasised the need for sustainability. It recorded that the Canterbury community had indicated that its priorities included "better roads, less traffic congestion, good parks and gardens, balanced development, a cleaner Cooks River, better shopping and a cleaner, safer and greener City".

Some affected persons told the Commission that they held pro-development views and thought that Canterbury had fallen behind other councils in development. Such views are legitimate, and the Commission does not suggest otherwise. In this context, the Commission's investigation was focused on whether decisions that were made in the Council between 2014 and 2016 were infected with dishonesty or partiality, and on the corruption risks that existed in circumstances of intense development pressure at the time.

Code of conduct

The conduct of councillors and staff is regulated primarily under the *Local Government Act 1993* ("the LGA") and the code of conduct adopted by each council. The applicable codes of conduct for this investigation were adopted in August 2013 and February 2016. As most of the conduct considered in this investigation fell under the August 2013 code, all references to the code of conduct in this report are to the 2013 document unless otherwise specified. Generally, the provisions of the code of conduct with which this report is concerned are the same in the February 2016 code of conduct.

Each code of conduct was based on the *Model Code of Conduct* promulgated under the Local Government (General) Regulation 2005.

The LGA requires that councillors and staff act honestly and exercise a reasonable degree of care and diligence. The Council's code of conduct provided a framework for decision-making in the public interest explaining that:

> *You act "honestly" if you act in good faith, with no ulterior or improper purpose. A breach of the obligation to act honestly involves a consciousness that what is being done is not in the interests of Council, or the community, or both, and deliberate conduct in disregard of that knowledge. Honesty is more than the absence of dishonesty. Anything that is not a fact, or not in accordance with the facts, is dishonest.*

The code of conduct was also concerned with clearly preserving the lines of communication between the Council as a governing body and its staff. Council staff were required to give effect to the lawful decisions of the Council, expressed to the general manager by way of Council or committee resolution, and were not to be subject to the direction or influence of any particular councillor.

Generally, the code of conduct prohibited direct approaches to staff from councillors on Council-related business, with one exception. During the period of the Commission's investigation, councillors were permitted to request information or advice from a general manager, director or manager outside the forum of a Council or committee meeting.

Managing conflicts of interest in local government

At the relevant times, the LGA provided that councillors, the general manager and senior staff were to disclose pecuniary interests by:

- preparing and submitting written returns of interests in accordance with s 449 of the LGA

- at meetings of council or committees, disclosing an interest in any matter with which the council is concerned as soon as practicable, in accordance with s 451 of the LGA (if a councillor)
- when dealing with Council matters, disclosing an interest in writing in accordance with s 459 of the LGA (if the general manager, to the councillors; if a member of senior staff, to the general manager).

Pecuniary interests are "an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person".

Non-pecuniary conflicts of interest are "private or personal interests the council official has that do not amount to a pecuniary interest". The code of conduct gave further guidance that "these commonly arise out of family, or personal relationships, or involvement in sporting, social or other cultural groups and associations and may include interests of a financial nature".

The code of conduct required that:

> *…where you have a non-pecuniary interest that conflicts with your public duty, you must disclose the interest fully and in writing even if the conflict is not significant* [and that] *you must do this as soon as practicable.*

Once disclosed, the code of conduct provided that "how you manage a non-pecuniary conflict of interests will depend on whether or not it is significant".

The code further provided that:

> *…as a general rule, a non-pecuniary conflict of interests will be significant where a matter does not raise a pecuniary interest but it involves:*
>
> *(a) a relationship between a council official that is particularly close (for example, involving a member of the person's family)*
>
> *(b) other relationships that are particularly close, such as friendships or business relationships. Closeness is defined by the nature of the friendship or business relationship, the frequency of contact and the duration of the friendship or relationship*
>
> *(c) an affiliation between the council official and an organisation, sporting body, club, corporation or association that is particularly strong.*

General manager

Between 2013 and 2016, functions of the Council's general manager included:

- general responsibility for the efficient and effective operation of the Council's organisation and for ensuring implementation, without undue delay, of decisions of the Council
- assisting Council in connection with the development and implementation of the community strategic plan
- the day-to-day management of the Council
- exercising such functions of the Council as are delegated by the Council to the general manager
- appointing staff in accordance with an organisation structure and resources approved by the Council
- directing and dismissing staff
- implementing the Council's equal employment opportunity management plan.

General managers are public officials for the purposes of the ICAC Act.

Mr Montague started working in local government in August 1965. He was appointed town clerk at the Council on 18 October 1982. When the LGA commenced, Mr Montague's title changed from town clerk to general manager.

Mr Montague was the general manager of the Council until it was amalgamated with the City of Bankstown on 12 May 2016. He was employed within the amalgamated council as interim deputy general manager until 3 June 2016.

Director of city planning

After the general manager, the most senior members of staff at the Council were the three directors: director of city planning, director of corporate services and director of city works. The director of city planning had three areas of responsibility within the Council:

- development assessment
- land use and environmental planning
- regulatory services.

A manager for each area reported to the director of city planning. Marcelo Occhiuzzi was the director of city planning from 2010 to November 2014. He was replaced by Mr Stavis, who started work in March 2015.

The director of city planning was a public official for the purposes of the ICAC Act.

Canterbury City Council from 2012 to 2016

On 8 September 2012, six Labor councillors, including Mr Azzi (West Ward), three Liberal councillors, including Mr Hawatt (West Ward), and one Greens councillor, were elected. Councillors are public officials for the purposes of the ICAC Act.

Following the resignation of the previous mayor, Mr Robson, a Labor councillor, became the mayor on 1 November 2011, and was then directly elected mayor by the Canterbury electors in September 2012.

Mr Hawatt had been a councillor since 1995 in a consistently Labor-dominated council. Mr Azzi was first elected to Council in 2012. The Commission heard that, after this election, although the Council had a majority of Labor councillors, it was in practice dominated by a group that formed across political parties led by Mr Hawatt and Mr Azzi.

Mr Montague described the Council which formed after 2012 as follows:

> *…the council was transformed by the presence of those two councillors and by other factors that meant the traditional structure of the City of Canterbury pre-2012 changed dramatically. And there was a lot of reasons for that, but what it meant was in the end, in the ultimate, was that councillor Hawatt and councillor Azzi and the others who joined them – what I call "the junta", the group – gained control of that council.*

There was some conflicting evidence as to whether Mr Montague used the word "junta" to describe a group of councillors, or to describe Mr Hawatt and Mr Azzi operating together. Contemporaneous records, including notes taken by Mr Occhiuzzi, the former director of city planning, and evidence given by witnesses who heard Mr Montague use the word at the time, suggest that Mr Montague used the expression to refer to the two councillors who, in his own words, were "directing traffic".

An explanation for the change in the Council dynamic after 2012 was that, in August 2013, consistent with the *Model Code of Conduct*, the Council adopted a code that prohibited councillors from participating in binding caucus votes. Where the Labor councillors had previously dominated proceedings on the basis of caucus votes, there was a vacuum, filled by Mr Hawatt, joined by Mr Azzi.

In their evidence to the Commission, both Mr Azzi and Mr Hawatt denied that they together controlled the numbers on Council, or that they caucused. Further, they denied that they would support each other regardless of the merits of a particular application. Mr Hawatt's denial was inconsistent with his words to a Liberal party colleague in 2016, as the Council faced amalgamation:

> *we have – we have control over – over bloody council in Canterbury which we're in the minority and we still* [have] *control over it.*

Mr Hawatt indicated that this was a reference to the three Liberal councillors having control "in regards to working with a team that's broken the back of, of the Labor party, which had control for many years". Con Vasiliades, another Liberal councillor, said that Mr Hawatt was the "senior Liberal councillor". He told the Commission that he, Mr Hawatt and the other Liberal councillor would meet before a meeting and discuss any issues and sort them out, and that they would all then vote the same way.

It was submitted for Mr Hawatt that for the Commission to find that Mr Hawatt and Mr Azzi controlled the numbers on Council would necessarily implicate other councillors in breaches of the code of conduct. The Commission does not consider that to be the case. In any event, the Commission's findings are more nuanced. Having regard to the contemporaneous evidence and the evidence of witnesses who observed the Council at the time, the Commission is satisfied that:

- between 2014 and 2016, Mr Hawatt had a significant role in Council decision-making
- in late 2013 to early 2014, Mr Hawatt and Mr Azzi formed a working alliance across party lines.

These findings do not implicate any councillor in any improper conduct. Nor do they in any way involve a finding that other councillors were passive and disinterested in the political process. Rather, they describe a political reality experienced by the staff of Council from late 2013 until council amalgamations. In this respect, the Commission accepts submissions from Mr Montague and Mr Stavis to the effect that Mr Hawatt and Mr Azzi were powerful figures on Council at the time. Mr Montague described this effect in his submissions as one that he was obligated to take into account, in determining who would be director of city planning.

The import of the new power dynamic was conveyed through the general manager to Council staff. Mr Occhiuzzi said that Mr Montague:

> *…made it very clear that the political climate had changed at council after 2012. He made it very clear that it was a very pro-development council, he made it very clear that Hawatt and Azzi were in charge.*

Contemporaneous notes made by Mr Occhiuzzi were consistent with this evidence. The Commission is of the view that Mr Occhiuzzi was a truthful witness, and his evidence can generally be accepted.

This political reality, coupled with evidence that Mr Hawatt and Mr Azzi had the most frequent communications with staff about planning and development, is a critical piece of context in examining decisions that were made from 2014 to 2016. An additional element is that, although they took different approaches, each of Mr Hawatt and Mr Azzi has a strong personality and could be very forthright in expressing their views. The Commission also received evidence that Mr Azzi had a temper and could become aggressive when he lost it. As set out later in this report, the Commission is satisfied that this occurred on at least one occasion.

Councillors held their roles part time, and were not "professional" office holders in the sense that it was not their day job to be a councillor. However, councils were also entrusted with significant public functions in respect of planning and development. Each councillor was entrusted with the public functions of voting in respect of those matters, to set the Council's policy as a collegiate group, with the expectation that it would be acted on in a timely manner by Council staff. At the Council, councillors were also permitted to approach directly certain senior staff below the level of general manager to request information.

Further, planning and development requires the balancing of complex, often competing considerations. Mr Montague went so far as to describe planning as a "dark art" and an "imperfect science". Submissions received by the Commission emphasised that it was a matter about which reasonable minds can differ.

Amalgamation

On 12 May 2016, the Canterbury City Council was amalgamated with the City of Bankstown Council. All councillors were removed from their positions. An administrator was appointed, and the council remained in administration until a new City of Canterbury Bankstown Council was elected in September 2017. Neither Mr Hawatt nor Mr Azzi was elected to the City of Canterbury Bankstown Council.

Planning framework

Planning decisions in NSW are made within a legislative framework comprising:

- the *Environmental Planning and Assessment Act 1979* ("the EPA Act") and regulations under the EPA Act
- state environmental planning policies (SEPPs)
- local environmental plans (LEPs).

Councils may also prepare development control plans (DCPs) if they consider it to be necessary or desirable for the reasons set out in the EPA Act, including to provide guidance on:

- giving effect to the aims of any environmental planning instrument (such as a LEP) that applies to the development
- facilitating the development that is permissible under any such instrument
- achieving the objectives of land zones under any such instrument.

The Council had a DCP at the relevant times. The Commission received evidence that, during 2013 to 2016, that plan had some flaws, including that it was inconsistent with the provisions of the relevant LEP.

The Canterbury Local Environmental Plan 2012

Many of the decisions that were the subject of this investigation were made in the context of the Canterbury Local Environmental Plan 2012 (CLEP 2012) and the Council's attempt to implement a residential development strategy.

CLEP 2012 was made as part of the rollout by the NSW Department of Planning and Environment of a Standard Instrument Local Environmental Plan. During the public exhibition of a draft version of CLEP 2012, the Council received submissions on behalf of landowners seeking to amend existing planning controls. A significant number of the submissions sought increases in height and density on particular sites. The Council decided to proceed with the making of CLEP 2012 and to have the submissions seeking to increase height and density dealt with in a residential development strategy. CLEP 2012 commenced on 1 January 2013.

Residential development strategy

External consultants were engaged to prepare a residential development strategy (RDS) for the consideration of Council. The purpose of the residential development strategy was to guide the future growth of the Canterbury local government area and provide a basis for assessing submissions seeking increases in height and density.

The draft residential strategy was considered by the Council on 31 October 2013. Mr Occhiuzzi, director of city planning at the time, submitted a report on the strategy and the submissions made to it. He also provided some written comments to Mr Hawatt and Mr Montague on 23 October 2013, including in relation to a proposal to increase the height of B5 Business Development and B6 Enterprise corridor zones to 25 metres, which included 548-568 Canterbury Road, Campsie:

> *…we have seen significant problems arise with a proposed development at 878 Canterbury Road with an 18m height limit and its impact upon residents at the rear. This allotment has a depth of approximately 80m. I think a lot more analysis should be done before this amendment is made.*

On 30 October 2013, Mr Occhiuzzi attended a meeting with Mr Robson, Mr Azzi, Mr Hawatt and Mr Montague "to go through Cr Hawatt's amended motion for the RDS item on the extraordinary … meeting". A copy of a file called "LEP Amendments 2" had been sent through by email from Mr Hawatt that day, and included amendments to:

- increase the height limit applying to 548-568 Canterbury Road, Campsie, to 24.5 metres "as proposed by the applicant", instead of 21 metres
- rezone 998 Punchbowl Road, Punchbowl, to R4 (residential high-density zone), floor space ratio (FSR) of 1.6:1 and a height of 15 metres.

FSR is a ratio of the total floor area of a development to the size of the land on which it is built. An increase in the FSR indicates the ability to increase the density of a development, albeit subject to other development standards and controls such as building height and setbacks.

In roughly contemporaneous notes about the meeting, Mr Occhiuzzi recorded that:

> [Mr Azzi] *lost his temper stating that Canterbury is getting left behind and that our controls were not facilitating development. He said "I don't care about consultant's reports or officers' reports, I was elected to make decisions and that's what to do." He said that if the people didn't like it, they should kick him out in 3 years time.*

Mr Occhiuzzi also recorded in his notes that Mr Montague said this was fine, so long as councillors approached their decisions with "clean hands". In his evidence to the Commission, Mr Occhiuzzi told the Commission that, "I made very clear the position of staff and my position was on the public record … I wanted to make very clear that my position was not going to change".

The Council meeting of 31 October 2013 was unusual. Mr Occhiuzzi described this meeting as being "a real landmark in the way that the council operated". After commencing at 7.35 pm, the meeting was adjourned at 7.37 pm and Council moved into recess. The meeting resumed at 8.30 pm. During the recess, the councillors moved out of public view and had a discussion in relation to a motion to amend the RDS recommendations made to Council. The motion sought to make a number of amendments to the recommendations made to Council. Relevantly, it sought that a planning proposal be prepared to implement the following changes to CLEP 2012:

- an increase in the maximum building height applying to 548 Canterbury Road, Campsie from 18 metres to 25 metres (the officer's report had recommended an increase to 21 metres).
- an increase in the FSR applying to 998 Punchbowl Road, Punchbowl (also known as 1499 Canterbury Road), from 0.5:1 to 1.8:1, an increase in the height from 8.5 metres to 15 metres and a change in zoning from R3 (medium-density residential) to R4 (high-density residential). The director of city planning's report considered submissions that sought an increase in FSR to 2.5:1 and building height to 18 metres on the site. The officer recommended that the existing zoning and planning controls be retained and that, in the event of a significant increase in housing targets for the local government area, that properties along the Canterbury Road frontage zoned R3 medium-density residential be reviewed.

The submissions for 998 Punchbowl Road, Punchbowl, had also been considered in the draft residential development strategy, which had noted that it would result in "ad hoc rezoning", which would be "out of character with the neighbouring properties". The strategy also noted that "any change to the zoning and planning controls should be reviewed in terms of the wider area if there is need to meet higher housing targets".

Mr Hawatt told the Commission that the substance of these amendments came from Mr Occhiuzzi. The Commission does not accept this evidence, in light of Mr Occhiuzzi's reliable evidence that he was not called on to speak to his recommendations at any stage, and in light of Mr Occhiuzzi's notes of the meeting where proposed amendments provided to him by email from Mr Hawatt were considered. The evidence indicates that the amendments came from Mr Hawatt.

Mr Hawatt said that, in moving the amendments, he was only performing the duty of the deputy chair. The Commission does not accept that claim, given that Mr Hawatt was the source of the proposed amendments. The evidence is that, as Mr Montague and Mr Occhiuzzi told the Commission, the amendments were driven by Mr Hawatt.

Mr Hawatt also said that he did not know where the amendments came from other than someone had given them to him. Mr Hawatt accepted that the changes sought in relation to 998 Punchbowl Road, Punchbowl, could have been as a result of someone speaking to him

with a view to achieving an advantage for developer Charbel Demian, who owned the site.

Council voted to approve the amendments moved by Mr Hawatt.

Between 10 June and 11 July 2014, the amendments were publicly exhibited in a planning proposal to amend CLEP 2012. On 2 October 2014, the planning proposal was returned to the Council for consideration.

The officer's reports to the Council on 2 October 2014 attached submissions made by the former Roads and Maritime Services (RMS) dated 7 August 2014, which expressed concerns about the cumulative traffic impacts of increasing density in the local government area, particularly on Canterbury Road, and required that these be considered and assessed.

The officer's reports also indicated that, during the public exhibition period, Council had received submissions seeking to increase to 25 metres the height limit on the sites neighbouring 548-568 Canterbury Road, Campsie; those being:

- 538-546 Canterbury Road, Campsie
- 570-572 Canterbury Road, Belmore.

The reports advised that these matters would be reported to Council separately. The reports also noted that the Council had received two submissions in relation to the proposal for 998 Punchbowl Road, Punchbowl; one objecting to the proposal and one from a consultant for the owner seeking a further increase in building height and FSR. The report noted in particular that:

> *The diagrammatic scheme supplied as part of the submission does not appear to have taken into consideration road widening on the site, nor does it appear to comply with relevant* [development control plan] *setbacks. The requested FSR of 2.2:1 is inconsistent with other FSRs in CLEP 2012 and would exacerbate amenity issues on adjoining land.*

The reports also noted that:

> *…the proposed increase in height may pose some challenges in terms of the interface of this site with the adjoining lower density zone. The CLEP 2012 usually applies an FSR of between 1.6:* [sic] *and 1.8:1 to land with a maximum building height of 18m. As the proposed maximum height of building is proposed to be 15 metres,* ***it is recommended that a lower FSR of 1.5:1 be applied to this site****, given its relationship to adjoining properties and the need to ensure adverse impacts on the adjoining lower density land is minimised.* (Emphasis added)

During the meeting of 2 October 2014, Mr Hawatt moved a motion to amend the planning proposal. The motion was seconded by Mr Azzi. Relevantly, contrary to the recommendation to decrease the FSR, the amendments proposed increasing the FSR on 998 Punchbowl Road, Punchbowl, to 2.2:1. The motion was passed by the Council, which also endorsed the remainder of the planning proposal.

Mr Hawatt told the Commission that it was the right thing to increase the FSR for 998 Punchbowl Road, Punchbowl, on both occasions, because of the available building envelope and calculations that he performed in relation to the site. Although he had been a councillor since 1995, Mr Hawatt did not have any training or background in planning. Absent advice from a planner or developer, the Commission is not satisfied that Mr Hawatt had the knowledge or skills to perform FSR calculations.

Planning proposals

The Commission's investigation was principally concerned with planning proposals and development applications. Among other things, planning proposals seek to make changes to the development controls that apply to a particular site in the council's LEP (s 55 of the EPA Act). For the period with which the Commission's investigation was concerned, planning proposals were dealt with by the NSW Government through a process that included a key decision known as a "Gateway Determination" (s 56 of the EPA Act).

Once it has prepared a planning proposal, the Council could forward it to the NSW Planning Department for a key decision called a Gateway Determination. The department had authority delegated from the minister for planning as to, among other matters:

- whether the proposal should proceed, with or without variation
- the community or other consultation required before consideration is given to making the proposed change
- the times within which the various stages are to be completed.

In addition to any other Gateway conditions, before the amendment could be made, the council was required to consult with the community (s 57 of the EPA Act). Councils were permitted to vary planning proposals at any time for any reason, but if that were to occur, the council was required to forward a revised planning proposal to the NSW Planning Department (s 58 of the EPA Act). Thedepartment could require that the planning proposal be re-exhibited for community consultation (s 58(3) of the

EPA Act). In certain circumstances, a proponent could also forward a planning proposal to the NSW Planning Department directly if council had not considered within 90 days whether to support a planning proposal.

Following the completion of community consultation, the minister for planning could give effect to the planning proposal by making the LEP or could decide not to make the proposed LEP. At the time of this investigation, the minister could delegate the plan-making function to a local council as part of the Gateway Determination.

Development applications

Development applications seek consent from the relevant consent authority, such as a council, to a particular development on a particular site. At all relevant times, they were to be evaluated in accordance with s 79C of the EPA Act. This included consideration of the provisions of any environmental planning instrument (such as an LEP), "any proposed instrument that is or has been the subject of public consultation" and any DCP. Section 79C also required consideration of the public interest.

An application under s 96 of the EPA Act could also be made to modify a previously issued consent for a development application. Unless otherwise provided by s 96, the consent authority had to consider s 79C, among other things. It also had to consider whether the development, as modified, would be substantially the same.

Development applications lodged with the council could also object to the application of particular development standards that applied to the site under CLEP 2012, if the application met the criteria set out in clause 4.6 of CLEP 2012. Clause 4.6 permits councils to grant development consent although development would contravene a development standard in its LEP or any other environmental planning instrument. The council is required to consider a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances of the case
- there are sufficient environmental planning grounds to justify contravening the development standard.

The objectives of clause 4.6 of CLEP 2012 are to:

- provide an appropriate degree of flexibility in applying certain development standards to particular development.
- achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Pursuant to clause 4.6(4), council is not permitted to grant consent for a development that contravenes the development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

Clause 4.6(5) requires that:

in deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

On 9 May 2008, the NSW Planning Department[1] issued a circular, "variations to development standards", which notified councils that the director-general's concurrence to variations under clause 4.6 could be assumed. The effect of this notification was that councils are not required to seek the concurrence of the director-general

[1] The 2019 Machinery of Government changes led to the abolition and creation of NSW Government agencies referred to in this report. Other than direct quotes from documents or individuals, this report includes the word "former" to denote any of these agencies that have been abolished.
An exception to this is the NSW Government agency responsible for planning. Currently, this is the NSW Department of Planning, Industry and Environment ("the DPIE") but the Commission's investigation relies on documents and a time when that agency had various and different names. Additionally, since 2019, the DPIE is now the agency responsible for local government in NSW, replacing the Office of Local Government.
For clarity in this report, the Commission uses "NSW Planning Department" to mean only the DPIE and its predecessor agencies that were responsible for the NSW Government's planning functions. Relevant corruption prevention recommendations in this report, in accordance with s 13(3)(b) and s 111E of the ICAC Act, are directed to the DPIE as the NSW Government public authority responsible for planning and local government in NSW.

(now the secretary) on each occasion that they are considering varying a development standard on a particular application, and that the matters set out in clause 4.6(5) are not considered.

Clause 4.6, as outlined by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [21], was not (and is not):

> *…a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act*.

There was evidence in the Commission's inquiry that clause 4.6 was used as an alternative to a planning proposal seeking to amend the controls that applied to the site.

A draft report of an audit conducted by the NSW Planning Department into the use of clause 4.6 between 2012 and 2016 recorded "significant concerns at the lack of rigor and consistency in the assessment of variations at the former Canterbury Council".

The consent authority

The Council was the consent authority for most of the development applications identified in this report. Decisions could be made by the Council itself, or under delegation by the City Development Committee (CDC) or a member of Council staff. The CDC comprised the mayor and all the councillors.

The Joint Regional Planning Panel was the consent authority for development applications with a capital investment value of over $20 million.

Independent Hearing and Assessment Panel

At the time with which the Commission's investigation is concerned, the Council had an Independent Hearing and Assessment Panel (IHAP). The purpose of the IHAP was to provide:

- increased transparency in relation to decisions made by the Council
- interested people with increased opportunities for involvement and participation in the assessment and consideration of applications
- an independent forum for open discussion of the applications among the IHAP members, the local community and the wider public.

The IHAP's role was to consider development applications referred to it under its operational rules and make a recommendation, which was reported to the Council along with the officer's assessment report for the development application. Importantly, the IHAP had no power to determine a development application. Its role was confined to giving advice and making recommendations. A striking feature of the process adopted by the Council was that the officer's report would not be amended to take into account or respond to any recommendations made, or concerns expressed, by the IHAP, but the report submitted to Council would be identical to the report submitted to the IHAP.

Council had a policy that set out the criteria for referral to the IHAP. These included applications attracting significant community interest, or involving significant development (the latter included mixed development with 20 or more residential units). The IHAP policy could be bypassed by Council resolution.

IHAP recommendations did not bind the Council, but were intended to provide an independent view of the applications. IHAP policy required that the CDC or Council provide reasons in its resolution of a development application where it did not agree with a recommendation from the panel. Its operational rules required that, if it asked for more information, the application would be referred back to the IHAP for final consideration prior to a determination by the CDC or Council.

Credibility and reliability of affected persons

The most reliable evidence available in this matter is the contemporaneous records available to the Commission, particularly in the form of emails and lawfully intercepted telephone calls. The Commission also took evidence from a large number of witnesses, many of whom the Commission considered to be honest and reliable witnesses. Against this background, it is appropriate to make a general comment about the credibility and reliability of evidence given by some of the affected persons in this matter. Given the matters identified below, the Commission has taken a great deal of care in assessing the sometimes competing evidence of these witnesses in making findings in this report.

Mr Stavis

Mr Stavis was a patient and careful witness. He gave evidence over a significant period of time.

On several occasions, when confronted with evidence that was adverse to his own interests, as will be clear in this report, Mr Stavis was not frank with the Commission.

His evidence was also contradicted by witnesses whom the Commission considers to be reliable, as set out in this report.

On some occasions, Mr Stavis also gave evidence that was inconsistent with the evidence he gave in his earlier compulsory examination. Generally, Mr Stavis told the Commission that the evidence he gave in his compulsory examination was more likely to be true than the evidence in the public inquiry, as the compulsory examination took place closer in time to the events in question. There were also times at which he said that the evidence he gave in his compulsory examination may have been confused.

It was submitted that, after a number of days of questioning at the Commission, Mr Stavis displayed characteristics of "gratuitous concurrence"; that is, he was ready to accept propositions put to him to appease the questioner. It was also submitted that Mr Stavis was an unreliable witness. Although the Commission has been very careful in its assessment of Mr Stavis' evidence, it does not accept that Mr Stavis' evidence was directed to appeasing the questioner, or otherwise so unreliable, such that his answers are of no probative value.

Mr Montague

The Commission found that Mr Montague was not always a witness of credit. He also had some issues recalling significant events, or giving evidence that could not be accepted in light of all of the other evidence and, on occasion, in light of his own evidence.

Mr Azzi

Mr Azzi gave evidence that, on occasion, downplayed or failed to acknowledge frankly his role and influence in events that were the subject of the Commission's inquiry. The Commission has identified occasions on which Mr Azzi's evidence cannot be accepted in light of other evidence available. It was submitted for Mr Azzi that English was not his first language, and that giving evidence in the English language was not easy for him. The Commission has taken this into account in assessing Mr Azzi's evidence.

Mr Hawatt

Mr Hawatt was not an impressive witness. The Commission found that he was willing to change his evidence when he considered it to be in his interests to do so. There were also examples, identified throughout this report, where the Commission is of the view that Mr Hawatt was not telling the truth. In those circumstances, the Commission does not rely on any evidence given by Mr Hawatt unless otherwise corroborated.

On behalf of Mr Hawatt, it was submitted that he acted with integrity, honesty and impartiality at all times and that he was a prime example of how a councillor should comport themselves. For the reasons set out in this report, the Commission does not accept that submission. The submissions also raised that Mr Hawatt had some health issues immediately prior to giving evidence. Without detailing those issues, the Commission has had regard to medical reports provided on Mr Hawatt's behalf.

It was also submitted for Mr Hawatt that, just because a councillor may falter or be unsure about their understanding of a discrete council-related planning issue, does not mean they should be disbelieved in their evidence. That submission can be accepted, but it is not the basis on which the Commission has made an adverse credit finding in respect of Mr Hawatt.

Knowledge of the code of conduct

Mr Hawatt

Mr Hawatt claimed that he was not familiar with the Council's code of conduct. He said that this was because he:

- was a part-time councillor with a full-time job elsewhere and a family to look after
- did not read every line in the Council business papers, but read the recommendations.

In particular, he told the Commission that he believed that he was only required to declare conflicts of interest if there was a personal benefit, business dealing or relative involved. This is incorrect. In addition to matters involving pecuniary interests, the code of conduct required that Mr Hawatt declare any non-pecuniary conflict of interest in relation to a matter on which he was being called to exercise a vote, whether or not it was significant, including interest arising out of friendships and business relationships.

Mr Hawatt tried to distinguish between the interests he knew that he was required to declare by referring to "friends" as against "friend-friends". His view was that a relationship he described as a "friend-friend" relationship would need to be declared, but a friend would not. His position as a director for another organisation he described as a "friend-friend-friend" relationship, which he knew would need to be declared. Mr Hawatt described his approach to permissible conduct at the Council as "more to do with common sense approaches".

Mr Hawatt told the Commission that, in his view, whether there was a conflict of interest was a matter for the individual councillor to determine "based on your honour, what you believe is, is the right thing to do at the time".

He also indicated to the Commission that he knew that "we have a code of conduct and we need to follow that". He knew that:

- "we can't pressure anybody to do the wrong thing"
- "we have a code of conduct and if we try to influence anybody, code of conduct [sic] will apply to us"
- "under the code of conduct, you need to declare interests if you have some, some relative"
- if he failed to comply with the provisions of the code of conduct, that would constitute misconduct for the purposes of the LGA.

Further, Mr Hawatt had been a councillor since 1995. The Council introduced a code of conduct in 2000. Mr Hawatt said that, at the time, he "didn't take [the code of conduct] too strongly because [he] didn't understand initially what the code of conduct really was at all". He also told the Commission that:

> *…a common sense approach that we take, that we believe if there's a pecuniary interest you declare it, if there's a non-pecuniary interest you don't declare it and you make a judgment based on that particular time and, and that incident at the moment*.

This was contradicted by Mr Hawatt's own conduct. On 22 August 2013, Mr Hawatt declared a less than significant non-pecuniary interest in an item considering the Council's financial assistance program, being his association with a community group.

The evidence also revealed that Mr Hawatt was involved in drafting a code of conduct complaint. Additionally, the Commission located a "Code of Practice for Liberals in Local Government" on a computer seized under search warrant from Mr Hawatt's residence. This document:

- applied to Mr Hawatt as a Liberal councillor from 1 July 2013
- required that Liberal councillors and candidates familiarise themselves and comply with the provisions of all state laws relevant to local government, including in particular the LGA, the *Election Funding, Expenditure and Disclosures Act 1981*, the *Model Code of Conduct for Local Councils in NSW 2013*, and all delegated legislation made under those Acts
- required that Liberal councillors familiarise themselves and comply with the provisions of the Council code of conduct, code of meeting practice, and other relevant codes and policies regulating the behaviour of elected members.

Mr Hawatt's response on being shown this document was unsatisfactory, in that it sought to minimise his knowledge and responsibilities under the code, by asserting that:

- he did not recall the document
- his real job was to help people, and relay messages for them, and it was not his job to "sit down and understand the details of, of laws and everything else, which is very difficult, especially on a part-time basis".

On the evidence before the Commission, it is well satisfied that Mr Hawatt knew of the Council's code of conduct, and his obligations under it.

Mr Azzi

Mr Azzi said that he received the code of conduct at some stage; although he said he was not given any training. He said that he understood that he was supposed to read it, and he read most of it, including the parts about conflicts of interest and personal benefits. He understood that the code of conduct contained rules that he had to follow as a councillor. Mr Azzi also accepted that he knew, in December 2015, that the code of conduct required him to disclose a non-pecuniary interest that conflicted with his public duty.

It was submitted for Mr Azzi that the business papers for the Council provided advice about declaring pecuniary conflicts of interest, but did not refer to non-pecuniary conflicts of interest. The Commission is not satisfied that this, in any way, detracted from Mr Azzi's understanding that, under the code of conduct, he had an obligation to declare and manage any non-pecuniary conflicts of interest.

Section 440F of the LGA

In its submissions, the NSW Planning Department requested that the Commission state in its report whether it was satisfied that a councillor has engaged in misconduct as defined in s 440F of the LGA (under s 440N(2) of the LGA this applies to a former councillor).

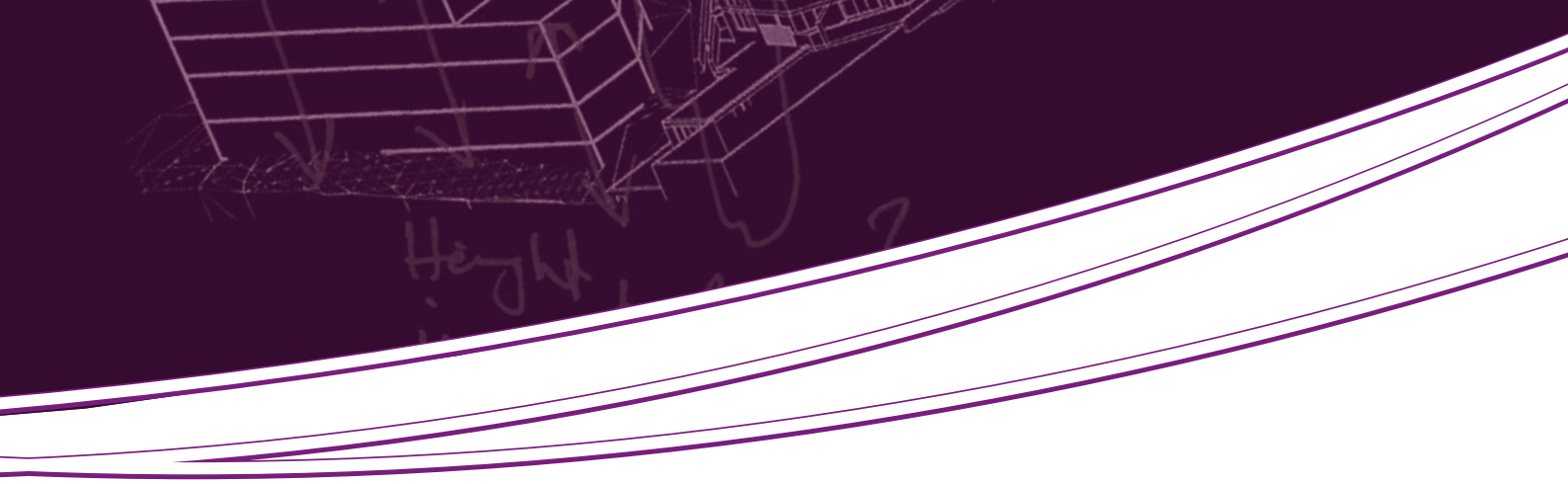
As is relevant for this report, s 440F of the LGA provides that misconduct means any of the following:

> *(a) a contravention by the councillor of this Act or the regulations,*
>
> *(b) a failure by the councillor to comply with an applicable requirement of a code of conduct*

Section 439 of the LGA provides that every councillor must act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act.

If such a statement is made by the Commission in its report, the departmental chief executive may investigate the matter and may refer the matter to the NSW Civil and Administrative Tribunal (NCAT) for consideration of whether to disqualify the councillor from holding civic office for a period not exceeding five years.

The Commission has stated in this report where it is satisfied that a councillor, including Mr Hawatt and Mr Azzi, has engaged in misconduct under s 440F of the LGA.



Chapter 2: Recruitment of the director of city planning

This chapter examines the circumstances surrounding Spiro Stavis' appointment to the position of director of city planning at the Council in December 2014, the withdrawal of the offer of that appointment, and the attempts to terminate Jim Montague's employment that followed.

Resignation of Marcelo Occhiuzzi

Eight days after the Council meeting of 2 October 2014 (see chapter 1), Mr Occhiuzzi resigned as director of city planning (a position he held since 2010). Mr Occhiuzzi told the Commission that he felt his position was untenable as "my recommendations and my team's recommendations and directions and proposals were constantly being questioned". Apart from the events of 2 October 2014, a notebook kept by Mr Occhiuzzi from October 2013 to 2014 provides some insight into the interactions that led to this view, including:

- A telephone call with Mr Azzi on 28 October 2013, in which Mr Azzi indicated that he was unhappy with strategic planning and regulatory services staff and that Mr Occhiuzzi was "under his protection" and "he was prepared to give me one more chance or two but that I need to be careful". Mr Occhiuzzi said he inferred that he was "running out of chances".

  Mr Azzi denied that he had said these words to Mr Occhiuzzi, but told the Commission that he had said that Mr Occhiuzzi had his support on Council.

- A conversation with Mr Montague in late May 2014, in which Mr Montague indicated that:
  - the political environment had changed dramatically in the last 12 months
  - the "junta" was in control (which Mr Occhiuzzi understood to be a reference to Mr Hawatt and Mr Azzi)
  - there was a growing dissatisfaction with Mr Occhiuzzi's performance, especially when putting matters to Council that made the councillors' jobs difficult and embarrassing
  - in the current climate, Mr Montague had no choice but to consider not renewing Mr Occhiuzzi's contract. Mr Occhiuzzi told Mr Montague that:

    > *…my integrity was very important to me and* [if] *not bending sufficiently cost me my job, then so be it. I said that even if I were to leave, any Director worth his salt, would run into head winds with these* [councillors] *given their unreasonable expectations.*

  Mr Montague said that there were comments recorded by Mr Occhiuzzi in this entry that reflected the way the Council had changed politically after 2012. He did not accept that he thought that Mr Occhiuzzi should have acceded to the requirements of Mr Azzi and Mr Hawatt, but said that he thought there was "an impasse between the three of them that could have been resolved and should have been resolved earlier". However, when asked how it should have been resolved, he indicated that he expected Mr Occhiuzzi "to do his job and to come up with an outcome". Mr Montague refused to use the word "solution" as he said he thought that the word had become unpopular through the Commission's hearings.

- A conversation with Mr Montague in August 2014, in which Mr Montague told Mr Occhiuzzi that George Vasil (a real estate agent operating in the Canterbury area) had disagreed with Mr Occhiuzzi's opinion and that, if the Council was challenged in court and lost, it would not be good for Mr Occhiuzzi.

> When taken to this entry, Mr Montague said that his concern was legal costs, and if Council were to engage in legal activity, he "needed to know that we had a fair chance of success because of the costs involved to ratepayers". Mr Montague also said that the notes "could have been exaggerated or he may have got it wrong when he … put it on paper".

The Commission accepts that Mr Occhiuzzi's notes, which were made roughly contemporaneous to the events in question, are generally reliable. There was no challenge by any party in cross-examination as to the reliability of those notes.

In his final performance review, for the 2013–14 financial year, signed on 23 September 2014, Mr Montague confirmed that Mr Occhiuzzi had met or exceeded organisational expectations. This was contrary to the concerns expressed by Mr Montague in May 2014. Mr Montague said that he agreed that Mr Occhiuzzi, "notwithstanding some issues I had with him" was doing a good job. Mr Montague also thought that Mr Occhiuzzi felt he was being subjected to too much pressure from various sources and that Mr Hawatt and Mr Azzi were "certainly part of it" (although he said that he was also part of it, in a way).

It is inconsistent with evidence he gave in the Commission's public inquiry and reflects poorly on Mr Montague's credit that, when interviewed by Commission investigators in 2016 as to whether he knew why Mr Occhiuzzi left, Mr Montague said "no", which was untrue. Similarly, it reflects poorly on Mr Montague's credit that, when interviewed, he was only prepared to concede that there was tension between Mr Hawatt and Mr Azzi on one side, and Mr Occhiuzzi on the other. When asked in the Commission's inquiry whether pressure from Mr Azzi and Mr Hawatt contributed to Mr Occhiuzzi resigning, Mr Montague said "undoubtedly".

Kingsgrove site

A flash point in the relationship between Mr Occhiuzzi, on the one hand, and Mr Hawatt and Mr Azzi, on the other, appears to have occurred around a modification application under s 96 of the EPA Act for a site in Kingsgrove. The then mayor, Brian Robson, indicated to the Commission that this is when he began to be concerned about the "sum of the influences" on Mr Occhiuzzi.

When the s 96 modification application was received, the development had already been built and significantly, the front yard had been covered in concrete, although the approval required landscaping. The s 96 modification application sought retrospectively to approve the concrete.

On 8 May 2014, the s 96 modification application came before the City Development Committee ("the CDC"). Mr Occhiuzzi recommended refusal of the application because to approve the modification would render the development inconsistent with the objectives and provisions for setbacks in the Canterbury Development Control Plan (CDCP) 2012.

The CDC resolved that the matter be deferred to the Council meeting on 22 May 2014.

Mr Hawatt, Mr Azzi, Mr Occhiuzzi and the owner all attended a site inspection in early 2014. Mr Occhiuzzi told the Commission that, at the inspection, "it was made very clear to me that my role was to find some sort of solution, some sort of compromise to ensure that the development could go ahead and be approved". He said that both Mr Azzi and Mr Hawatt became "quite agitated" when he said that "it wasn't my role to be finding solutions onsite like this".

During his evidence to the Commission, Mr Azzi denied raising his voice, or criticising Mr Occhiuzzi for not being flexible. He said that he asked Mr Occhiuzzi for a solution that could be debated at Council. He said that he asked Mr Occhiuzzi if they could find anything in the DCP to fix the problem and:

> *We have to find a solution for the guy. If any way. We've been asking the question. He's, he's the one, his job is to give us an answer.*

The latter part of Mr Azzi's answer, extracted above, is consistent with the evidence of Mr Occhiuzzi. Mr Azzi said that he wanted Mr Occhiuzzi to tell the Council what the solution was so that it could be debated.

In his evidence to the Commission, Mr Hawatt accepted that he criticised Mr Occhiuzzi for not being flexible. He said that he became upset with Mr Occhiuzzi because he said that "the solution of moving, leaving the concrete in the middle and, and making more open space around the edges" would work, but he was not going to recommend it. He said that he had every right to be upset about that.

The Commission is satisfied that, where it differs, Mr Occhiuzzi's evidence should be preferred to the evidence of Mr Azzi or Mr Hawatt. The Commission found that Mr Occhiuzzi was a credible witness.

The Commission is also satisfied that this example is of assistance in determining what was meant by a "solutions-based" approach in the context it was used by various persons at the Council, and that this encompassed finding a way forward for non-complying development. Mr Stavis told the Commission that he learned about this interaction with Mr Occhiuzzi from Mr Hawatt.

Mr Occhiuzzi told the Commission that he reported the matter to Mr Montague, who responded that "perhaps it wasn't a good idea to meet with councillors out on-site on my own and he gave his blessing for me not to attend such meetings in future".

On 22 May 2014, the modification application came before the Council, again with a recommendation from Mr Occhiuzzi for refusal. On Mr Hawatt's motion, the application was approved.

By setting out this history, the Commission is not suggesting that Mr Hawatt or Mr Azzi asked or forced Mr Occhiuzzi to resign, or pressured Mr Montague to dismiss Mr Occhiuzzi. Nor is it suggested that Mr Hawatt and Mr Azzi pressured Mr Occhiuzzi with a view to replacing him with their own man. The events do, however, provide context to the recruitment process that followed and the environment in which Mr Stavis started work at the Council.

Appointment of senior staff at Council

At the relevant times, the LGA provided the following:

> *337 Council to be consulted as to the appointment and dismissal of senior staff*
>
> *The general manager may appoint or dismiss senior staff only after consultation with the council.*
>
> *344 Objects*
>
> *1) The objects of this Part are:*
>
> *(a) to eliminate and ensure the absence of discrimination in employment on the grounds of race, sex, marital or domestic status and disability in councils, and*
>
> *(b) to promote equal employment opportunity for women, members of racial minorities and persons with disabilities in councils.*
>
> *2) In this section, disability has the same meaning as in the* Disability Discrimination Act 1992 *of the Commonwealth.*
>
> *349 Appointments to be on merit*
>
> *1) When the decision is being made to appoint a person to a position:*
>
> *(a) only a person who has applied for appointment to the position may be selected, and*
>
> *(b) from among the applicants eligible for appointment, the applicant who has the greatest merit is to be selected.*
>
> *2) The merit of the persons eligible for appointment to a position is to be determined according to:*
>
> *(a) the nature of the duties of the position, and*
>
> *(b) the abilities, qualifications, experience and standard of work performance of those persons relevant to those duties.*
>
> *3) In determining the merit of a person eligible for appointment to a position, regard is to be had to the objects of Part 4 of this Chapter (see section 344).*

For the purposes of the *Local Government Act 1993* ("the LGA"), directors were "senior staff". The effect of the legislative scheme was that the decision to appoint a new director of city planning belonged to the general manager alone, to be exercised in consultation with the Council, and that the appointment was to be on merit.

When Mr Montague set out to recruit Mr Occhiuzzi's replacement, there was no written policy within the Council that applied to the recruitment and selection of senior staff. Further, Mr Montague did not keep any records of the processes he followed in the recruitment.

Engagement of the recruitment consultant

In October 2014, Mr Montague engaged Judith Carpenter, a specialised recruitment consultant with experience in local government, to conduct the recruitment of the new director of city planning.

Ms Carpenter assisted Mr Montague to advertise the position, and to assess applications received. Ms Carpenter told the Commission that, after the advertisement had been posted, she received a telephone call from Mr Montague in which he said, "I need you to tap a few people on the shoulder, including Simon Manoski and Spiro Stavis". Mr Montague wanted to ensure they were included in the shortlist. Ms Carpenter told Mr Montague that they had already applied.

Mr Montague told the Commission that he selected Mr Manoski's name because he had heard of him on the grapevine, knew his brother worked at Bankstown Council, and had had some dealings with him at the NSW Planning Department. Mr Montague thought that his experience might give the Council some insight into how they were tracking at state-government level.

Mr Stavis' name was selected by Mr Montague "out of loyalty to" his friend, Bechara Khouri. Mr Montague said that he had asked Mr Khouri whether he knew anyone in the planning sector who might be looking for a job, and Mr Khouri had returned Mr Stavis' name. Although their versions on this differed, Mr Khouri

accepted on cross-examination that it was possible that Mr Montague's account was correct. In explaining what he meant by loyalty, Mr Montague said that:

> *I ask people to help me and I don't want to just forget him. I didn't know the man from a bar of soap, but I thought, let's include him, no harm done, and that's how he came to be on the list.*

Mr Montague also noted that Mr Stavis had some experience that might be useful to the Council, including having run his own business and worked in private practice.

Mr Khouri

It is convenient here to say something about Mr Khouri, who is also referred to in chapter 9 of this report.

It is difficult to work out what Mr Khouri's occupation was from 2014 to 2016. Mr Khouri said that he sourced income variously from investments in restaurants, trading, import, export and investment in a property trust.

In 2012, Mr Khouri was retained as a consultant for property developer Charbel Demian, initially at $15,000 per month, which was reduced over time to $5,000 per month. Mr Demian said that this work included headhunting project managers, finding sites and opportunities, and working on obtaining finance.

Mr Khouri also had a relationship with Marwan Chanine and Ziad Chanine, which included investing with them in a significant site opposite Canterbury railway station with a view to developing it. Mr Khouri occasionally worked as a consultant for the Chanine brothers. Both Marwan Chanine and Ziad Chanine described Mr Khouri's role as facilitating the process and organising meetings. The Chanine brothers used Mr Khouri's connections in local government in the Canterbury area to assist in bringing them before decision-makers at councillor level, general-manager level and director level.

In his evidence to the Commission, Mr Khouri described his job generally as involving finding out what developers might be entitled to on a piece of land, costing, engaging architects and planners, facilitating reports, making appointments between planners, architects and the applicant, and organising meetings with the Council.

Mr Hawatt told the Commission that he thought Mr Khouri was a lobbyist, although he did not know what he did from 2014 to 2016 by way of lobbying. Mr Stavis also thought that Mr Khouri was a lobbyist. Mr Robson and Mr Montague, who had regular contact with Mr Khouri at the time, seemed to be unsure of his occupation. Mr Montague, would not accept the term "lobbyist" for Mr Khouri, and said that, as far as he (Mr Montague) was concerned, Mr Khouri "was representing people in the community … who held legitimate interest in council business or had some sort of dealings with the council".

Mr Khouri also denied being a lobbyist. He did not accept that lobbying included, as is set out in the *Lobbying of Government Officials Act 2011*, "lobbying a government official for the purpose of representing the interests of others in relation to … planning applications". By that definition, the Commission is satisfied that Mr Khouri sometimes acted as a lobbyist for developers in his contacts with Council officers.

According to Mr Khouri's evidence, by 2014, Mr Montague and he were good friends, and had known each other for nearly 20 years. He told the Commission that he was acquainted with Mr Hawatt and had been regularly invited to socialise at Mr Azzi's house. Mr Robson knew Mr Khouri through Labor circles, and said that he used Mr Khouri as an intermediary with Mr Azzi when their relationship soured.

The Commission received submissions to the effect that Mr Khouri was not a credible witness, as he avoided answering questions, obfuscated and gave evidence that was false or misleading. Submissions in reply for Mr Khouri cautioned the Commission that findings of credit require the utmost attention, and that the inconsistencies on the face of his evidence would normally be accepted as genuine errors. The Commission is satisfied that Mr Khouri's evidence should be treated with caution.

In April 2018, after giving evidence in the first tranche of the Commission's inquiry, Mr Khouri was not released from his summons and advised that he would be required to return in June. A few days before he was required to attend, the Commission was informed that he had travelled overseas and, while there, experienced some health issues that prevented him from returning.

Without going into the details of those health issues, these circumstances have prevented the Commission from interrogating some additional topics with Mr Khouri, although his evidence in relation to the recruitment of Mr Stavis is largely complete. Mr Khouri did not return at any time while the Commission's public inquiry was open, and, in the final days of the inquiry, provided the Commission with a medical certificate indicating that he had been advised against flying. On that basis, and without more, the Commission does not draw any adverse inference against Mr Khouri for failing to appear in answer to his summons.

The interview panel

Mr Montague put together a panel to assist him with the decision to appoint a new director of city planning, which, he told the Commission, he came to regret. The panel

was himself, the mayor, Mr Hawatt and Mr Azzi. It was unusual at the Council to include councillors in interview panels, although the Commission heard that it had happened at other councils. Notably, the panel did not include anyone with expertise in planning.

Counsel Assisting the Commission submitted that Mr Montague's reason for including Mr Hawatt and Mr Azzi on the panel was not to achieve a merit-based appointment, but was instead political – to satisfy the demands of Mr Hawatt and Mr Azzi and to protect himself from retribution if a director was appointed of whom they did not approve.

It was submitted for Mr Montague that:

- in considering the composition of the panel, the true question is whether he formed the interview panel in good faith to meet his obligation to consult with the Council prior to appointing a member of senior staff
- he was entitled to consult in the manner he saw fit, given the absence of guidance under s 337 of the LGA about what constitutes consultation with the Council.

The Commission agrees that there is no guidance as to what constitutes consultation and has made recommendations about this in chapter 10. However, the Commission is not satisfied that Mr Montague was seeking to fulfil his obligation to consult with Council by including a representative cross-section of councillors on the interview panel. Quite simply, Mr Montague did not give that evidence. He said that his general practice was to consult with Council by providing a formal report asking that they endorse the recruitment of a particular person. He was asked directly whether by including councillors on the panel he was discharging his requirement to consult, and answered:

> *I still would have prepared that report at the end of the interviews. As I said, the events overtook me. I would have, I would have prepared a report for council outlining what transpired in relation to the interviews and what my conclusions were. And the benefit of those councillors being there, they would corroborate that, particularly the mayor, because the mayor is the mayor and he'd be in a position to, as I said, corroborate what had transpired – if he was called on to, that is.*

Mr Montague told the Commission that, at the time, he thought it would be a good idea to include the councillors to give them some "ownership" of the appointment, particularly having regard to the interest of Mr Hawatt and Mr Azzi in planning matters.

Submissions for Mr Montague also argued that Counsel Assisting relied on evidence that Mr Montague was under "pressure" from Mr Hawatt and Mr Azzi prior to forming the interview panel, that there was no evidence of such pressure, and that the allegation of "pressure" had not been clearly defined.

In his evidence to the Commission, Mr Montague himself used the word "pressure" to describe the situation that existed at the Council in 2013 and 2014. He accepted that he knew that Mr Occhiuzzi was under pressure in relation to his job, and that the sources of that pressure included Mr Hawatt and Mr Azzi.

It was Mr Montague's evidence that, once Mr Occhiuzzi had resigned, he wanted a director of city planning with whom Mr Hawatt and Mr Azzi would be happier, although he said "that goes to the whole Council and not just those two". He accepted that there was some pressure exerted on him by Mr Hawatt and Mr Azzi; however, he also said later in his evidence that:

> *They didn't put me under any pressure. They put enormous pressure on the director and, and we know what happened to Mr Occhiuzzi, but they didn't put any direct pressure on me at all, and had they done that for the wrong reasons, I would have pushed back. They knew that.*

He then said, again speaking of the recruitment process, that "there was certainly a … certain pressure being exerted on me. The politics of the council were caustic at the time. I didn't know which way to jump".

Mr Montague was asked about the set of circumstances that he characterised as "storm clouds gathering", and he said:

> *Well I knew that there was dissatisfaction earlier with Mr Occhiuzzi and that there had been a conflict between he and the two councillors in particular and for all I knew, other councillors, I don't know that, and I wanted to prevent that happening again. So it was, I mean it was obvious to me that the selection of this person was critical to the future of the council, politically and otherwise, and that's why I opted for a panel which was a departure from my normal procedure.*

Mr Montague also explained that:

> *I formed the interview panel so that they … could be, they would have ownership of the process and that if this person felt the same level of pressure that had been, that Mr Occhiuzzi had been subjected to, they would have to accept some responsibility for that because they supported his appointment. That's what I was about. I didn't want them to be able to snipe at*

me later, or the Mayor or anybody else and say, look, we didn't want him in the first place.

While the Commission is satisfied that no particular councillor exerted pressure on Mr Montague with a view to being included in the interview panel, it is evident that Mr Montague's decision to include Mr Hawatt and Mr Azzi in particular was because of the pressure of the political circumstances at the Council at the time, as Mr Montague perceived them.

When he was asked a series of questions about what he would have done differently if he had his time again, Mr Montague gave the following answer:

Well, what I'm trying to ascertain is, in what way would not having had the interview panel convened with Hawatt and Azzi as members of it, have changed the outcome? … I probably would have recommended either Karen Jones or [Simon] *Manoski to be appointed to the role. Now, I'm not saying that would have changed anything because as you're alluding, the councillors wanted Stavis, they would have overrode me anyway when that report went to council, even though, as I said, under the Act I believe I have the authority to make the appointment and just serve it up to them, but again a risky strategy. You know, general managers are not indispensable and naturally I had, I had a thought for my own career, if you like, even though I was retiring within a couple of years then. So I suppose to some extent I wouldn't have had to deal with all of that angst around … the interviews and the interview day itself, which was very difficult, very difficult indeed.*

It was submitted for Mr Montague that it would be an error to infer from this evidence that he acted in fear of reprisal from Mr Hawatt and Mr Azzi, and that it is more likely that what was intended to be conveyed was his concern that further instability and conflict could affect his career prospects. The latter interpretation is not supported by the words Mr Montague used. However, it is not sufficiently clear from this answer at which part of the recruitment process he had a thought for his own career.

The Commission finds that the evidence does not reach the level of fear of reprisals upon Mr Montague's own employment if he did not involve Mr Hawatt or Mr Azzi in the interview panel. However, the situation at Council in the planning and developments area leading up to the recruitment of the new director can fairly be described as "pressure" stemming in part from the demands of Mr Hawatt and Mr Azzi. The Commission is satisfied that Mr Montague's purpose in forming the panel was a political response to that source of pressure.

Contact with candidates before the interviews

The Commission examined the extent to which other interests influenced the identification and selection of Mr Stavis for the position of director of city planning. This was of concern because it appeared that before and during the recruitment process, Mr Stavis met with people who had, from time-to-time, financial interests in development in the Canterbury local government area and personal relationships with members of the selection panel.

Not only was there a very real possibility of a significant conflict of interest infecting the selection process, but a real possibility that a director selected in those circumstances would feel a sense of obligation to the people who helped them get there.

How did Mr Stavis hear about the position?

Mr Stavis told the Commission that he heard about the position from Nick Katris, an architect and (at the time), councillor at the former Kogarah City Council. His version was that, during a telephone conversation with Mr Katris about another matter, Mr Katris made Mr Stavis aware of the position at the Council and encouraged him to apply.

Mr Katris gave evidence to the contrary. He said that he was contacted by Mr Stavis who asked if he knew anybody who "could assist him to gain further knowledge to apply for the job". Mr Katris referred him to Mr Vasil, a real estate agent operating in the Canterbury area. Mr Katris told the Commission that Mr Vasil had "a reputation in the local area as being the go-to person if you wanted to know what was going on with regards to development and development assessment and Canterbury Council". Mr Vasil's evidence was consistent with Mr Katris' evidence.

Mr Katris also told the Commission that Mr Stavis asked him for a reference, which he declined to provide because he "didn't know him well enough to be able to vouch for him". Mr Stavis did not remember anything like this being said during the conversation.

Mr Katris' version was not challenged on cross-examination, and the Commission is satisfied that he was a truthful witness. In accepting Mr Katris' evidence, the Commission must also reject Mr Stavis' evidence. This leaves open the question of how Mr Stavis found out about the position and made the decision to apply. The Commission is not able to resolve this issue on the evidence before it.

A meeting with Mr Khouri and Mr Vasil

On 26 October 2014, Mr Stavis met with Mr Khouri and Mr Vasil at a coffee shop and discussed his interest in applying for the position of director of city planning at the Council.

The Commission is satisfied that this meeting occurred as a result of Mr Katris' reference to Mr Vasil, for the purpose of Mr Vasil sharing his knowledge of planning issues in the local area. How Mr Khouri came to be there is less clear.

Mr Stavis told the Commission that he was expecting to meet Mr Vasil, but arrived at the coffee shop to see both Mr Vasil and Mr Khouri. To Mr Khouri, it was a coincidence that he was there at the time that Mr Vasil had arranged to meet Mr Stavis. Mr Vasil could not recall why Mr Khouri attended. He told the Commission this was the first time that he had met Mr Khouri.

Mr Stavis described the meeting as a "mini-interview", although he also said that it was "pretty much a general discussion and it, it wasn't a very long meeting". He said that Mr Vasil and Mr Khouri told him that the general manager wanted them to put "feelers out" for potential candidates for the position of director of city planning. Mr Stavis said they had a general discussion for about 15 minutes in which he indicated that he was a "solutions kind of person" as opposed to someone who would just refuse applications when they were non-compliant. He said that at the end of the meeting, he was encouraged to apply for the position.

Mr Vasil told the Commission that he did not remember Mr Stavis saying anything like he was a "solutions kind of guy". He also rejected the proposition that he and Mr Khouri interviewed Mr Stavis for the position.

Mr Khouri told the Commission that he took the opportunity to ask more questions, and that "unfortunately" it may have sounded like an interview, although he said that this was not his intention. He asked what clients Mr Stavis worked with in the private sector because this was what Mr Montague wanted to know. In those circumstances, it is not surprising that Mr Stavis described the meeting as an interview, although, in making this comment, the Commission finds that the evidence indicates it was more likely that Mr Khouri was asking the questions than Mr Vasil.

As outlined above, Mr Khouri had relationships with each of Mr Montague, Mr Hawatt and Mr Azzi.

Apart from being a local real estate agent with an interest in planning, between 2014 and 2016, Mr Vasil had a friendship with Mr Hawatt, and was well known to Mr Montague. During that period, Mr Vasil also occasionally went to Mr Azzi's house, and, on a few occasions, Mr Azzi came to his office.

Both Mr Vasil and Mr Khouri had interests in properties within the Council area from 2014 to 2016, although those interests were different in nature. Mr Vasil described himself as an investor, who owned some property in the Council area, and lodged a development application every few years. By August 2014, Mr Khouri had invested money in the Doorsmart development (see chapter 9) and, from time-to-time, acted as a lobbyist for developers. Mr Khouri accepted that he was interested in who was to be appointed as director of city planning because he acted for people who had properties in the area.

In the course of giving evidence on this topic, Mr Vasil was asked a series of questions about what happened after the meeting, and his purpose and Mr Khouri's purpose in meeting with Mr Stavis. In particular, he was asked some questions about what he knew at the time of meeting Mr Stavis, and then he gave the following evidence:

[Counsel Assisting]: And so you knew that if a person was appointed who was interested in achieving the developers' goals that that would be to the advantage of developers and the advantage of development in the local government area didn't you?

[Mr Vasil]: No, because I have no interest in developers and developments. I'm only an investor and sometimes I lodge a DA every few years. It's of no interest to me.

The Commission was invited by Counsel Assisting to consider whether this was false or misleading evidence, and, in doing so, to have regard to attempts by Mr Vasil (among others) to persuade Mr Demian to enter into an agency agreement involving a commission payment in which Mr Vasil would share (see chapter 7).

Given that the context of the questioning relates to events in 2014, it is arguable that Mr Vasil's answer was directed to 2014 only. On the other hand, it was expressed as a general aside that was non-responsive to Counsel Assisting's question, and not limited in its terms to his state of mind at the time. It was evidence which indicated that the Commission should be cautious in its approach to Mr Vasil's evidence, but the Commission is not satisfied that it was false and misleading in a material respect such that consideration should be given to seeking the opinion of the DPP in respect to an offence of giving false or misleading evidence to the Commission.

Contact following the meeting

Mr Vasil told the Commission that there may have been some contact between himself and Mr Stavis after the meeting at the coffee shop and before he (Mr Vasil) went overseas on 6 November 2014. He said that Mr Stavis rang him, maybe half a dozen times as "follow up of what discussions we had in terms of him trying to understand what was going on", and that he spoke to Mr Stavis about issues with the Council's DCP. The call charge records available to the Commission show three telephone calls took place between the two men during this period, with the contact being initiated by Mr Stavis.

This contact between Mr Stavis and Mr Vasil was surrounded by contact between Mr Vasil and, variously, Mr Khouri and Mr Hawatt. While there may have been a number of matters that they discussed, it is likely that the conversations between Mr Vasil and Mr Hawatt also included the information that Mr Vasil had been approached by Mr Stavis, given Mr Hawatt's role on Council, known interest in planning and the relationship between Mr Vasil and Mr Hawatt.

Mr Vasil told the Commission that he returned to Sydney on 2 December 2015. He could not recall having discussions with any councillors about Mr Stavis before he was appointed on 8 December, but said that it was possible he had such conversations with Mr Hawatt and Mr Azzi.

Mr Khouri told the Commission that he had not had any contact with Mr Stavis prior to meeting him with Mr Vasil. He said that, with the exception of one call after the meeting in which Mr Stavis indicated he was interested in the job, from his memory, the next contact he had with Mr Stavis was after Mr Stavis had been offered the position of director of city planning on 8 December 2014. This version is contradicted by call charge records obtained by the Commission, which indicate that on:

- 5 November 2014, Mr Stavis called Mr Khouri and the line was open for 1 minute and 46 seconds
- 6 November 2014, Mr Stavis and Mr Khouri exchanged a number of text messages, and at 8.10 pm, Mr Stavis called Mr Khouri and the line was open for 2 minutes and 56 seconds
- 10, 11 and 12 November 2014, Mr Stavis and Mr Khouri exchanged a number of text messages
- 13 November 2014 at 4.33 pm, Mr Stavis called Mr Khouri and the line was open for 29 seconds
- 14 November 2014 at 8 pm, Mr Stavis called Mr Khouri and the line was open for 29 seconds
- 17 November 2014, Mr Stavis and Mr Khouri exchanged a number of text messages, all after the scheduled time of Mr Stavis' interview, which took place at 2.30 pm.

Although he said that he could not remember the content of his communications, Mr Khouri sought to explain this contact by telling the Commission that Mr Stavis saw a bit of comfort in him. He denied that he had been concealing the level of his contact with Mr Stavis from the Commission. Mr Khouri denied that he was a backer for Mr Stavis in his application for the position of director of city planning. He said that he was only being used as a facilitator between different members of the Council.

The Commission was invited by Counsel Assisting to consider whether Mr Khouri's evidence about not having contact with Mr Stavis was false and misleading evidence. For Mr Khouri, it was submitted that the evidence was not contradicted but corrected once he had the opportunity of seeing the call charge records. The Commission does not accept this submission, given the extent of the contact involved with a person otherwise unknown to Mr Khouri, and considers that his evidence on this issue was false or misleading. However, the Commission is not satisfied that the issue was a material particular, such that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of Mr Khouri for an offence against s 87 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

When giving evidence to the Commission, Mr Stavis explained his contacts with Mr Khouri at this time as "it's likely that I thought he could assist me", and that maybe it would assist the merits of his application (although he could not explain how). He accepted that he thought Mr Khouri and Mr Vasil could have some influence in the recruitment process, by way of their relationships on the Council.

Marwan Chanine and Ziad Chanine

By September 2014, there was evidence that Mr Khouri shared a financial interest in the site for development in the Canterbury local government area with Marwan Chanine and other business partners (see chapter 9). Marwan Chanine accepted that there was a need to persuade the decision-makers at the Council to avoid the strict application of controls on the site. Mr Stavis had developed a relationship with the Chanine brothers when working at Strathfield Municipal Council, and did some paid consultancy work for them while he was at City of Botany Bay Council. He had some meetings with either Marwan Chanine or Ziad Chanine in October 2015 and February 2016, which overlapped with the process of submitting his application to the Council. There is no evidence that these meetings had any effect on the recruitment process.

However, it was of some significance that Marwan Chanine and Ziad Chanine were former clients of Mr Stavis, given his role in the assessment of their "high risk, high reward" development in Canterbury (see chapter 9).

Formation of the shortlist

In assessing the applications received for the position of director of city planning, Ms Carpenter determined that Mr Stavis did not meet the criteria to be shortlisted. She told Mr Montague as much, but Mr Montague told her that he wanted Mr Stavis to be included. This was because of his conversations with Mr Khouri. As a result, Ms Carpenter included Mr Stavis on the shortlist.

In her shortlist report to the interview panel, Ms Carpenter stated that Mr Stavis "brings 23 years of experience in planning and is commended to you as a candidate for the role of Director, City Planning with Canterbury City Council". Some issue was made of this by Mr Montague during the Commission's inquiry, to the effect that Ms Carpenter had recommended Mr Stavis as a candidate. However, words to this effect were used for each candidate who was to be interviewed. This was a standard formula used by Ms Carpenter to advise that the person who is coming through is a candidate for the role.

It was submitted for Mr Montague that, until he received Ms Carpenter's letter of 12 December 2014, he thought that Ms Carpenter recommended Mr Stavis as a candidate. In those submissions, Ms Carpenter's objections to Mr Stavis were described as "wan". The Commission cannot accept either submission in light of the evidence of Ms Carpenter that she told Mr Montague that Mr Stavis did not even meet the criteria to be shortlisted on two occasions before the interviews, and in light of a very strongly worded email she sent on 26 November 2014 after the interviews comparing the strengths of the candidates which in no uncertain terms conveyed that she did not recommend Mr Stavis for the position.

The Commission also considered whether Mr Hawatt and Mr Azzi told Mr Montague that they wanted Mr Stavis to be interviewed. On 12 December 2014, Ms Carpenter wrote to Mr Montague indicating her surprise and concern "when you indicated that councillors on the interview panel had insisted that Spiro was to be a shortlisted candidate". Mr Montague responded to Ms Carpenter's letter on 15 December 2014. Not only did he not refute that statement, but he wrote that:

> *Your comments are very concerning and call into question whether Mr Stavis has the experience and background to successfully undertake such a senior role within our organisation.*
>
> *I am particularly concerned about your comments relating to the influence exerted by Councillors in the recruitment process.*

Mr Montague told the Commission at its public inquiry that Mr Hawatt and Mr Azzi had made some comments to him which indicated that they were sympathetic to Mr Stavis' application before the interviews, although they did not insist on him being shortlisted.

Submissions for Mr Montague were that he did not agree with the allegations in Ms Carpenter's letter but did not respond because he accepted the spirit of what she said. He said that he did not remember saying that the councillors had influenced the recruitment process. Ms Carpenter confirmed in her evidence before the Commission that Mr Montague had said to her that the councillors on the interview panel had insisted that Mr Stavis was to be a shortlisted candidate.

It was submitted that Ms Carpenter's evidence is not supported, and reliance should be placed on a file note made later by an investigator from the Office of Local Government of an interview with Mr Montague about these events. In that note, the investigator recorded that Mr Montague told him both that there was a view by the two councillors that Mr Stavis should be interviewed and that he was the one who insisted that Mr Stavis be interviewed, not the councillors.

The evidence of Ms Carpenter and of the file note of the Office of Local Government investigator satisfies the Commission that Mr Montague told each of those people that Mr Hawatt and Mr Azzi wanted Mr Stavis to be shortlisted; although his position in the interview with the investigator appeared to be contradictory. The Commission does not consider this to be sufficiently reliable as evidence of what Mr Hawatt and Mr Azzi actually did or said, particularly in light of Mr Montague's evidence in the public inquiry.

It was submitted for Mr Hawatt that the Commission's failure to call the former Office of Local Government investigators was unfair to him, in that it deprived him of an opportunity to adduce exculpatory evidence. The Commission does not accept this submission. Neither of the investigators involved in the interview with Mr Montague was in a position to confirm the truth or otherwise of what Mr Montague said about events he experienced, and could not possibly have assisted Mr Hawatt to establish any real fact in issue in this investigation. The Commission does not suggest that the material recorded in the file note was incorrect insofar as it purported to be a record of what Mr Montague said. Rather, the note is evidence of a version of events given by Mr Montague at a particular point in time.

In his evidence to the Commission, Mr Montague accepted that Mr Hawatt and Mr Azzi wanted Mr Stavis to be interviewed. However, he said that this was more of a feeling that he had, and "there were certainly comments made that indicated to me they, they were sympathetic". Mr Hawatt and Mr Azzi denied telling Mr Montague that they wanted Mr Stavis to be on the shortlist. Given the equivocal nature of the evidence, the Commission does not find that Mr Hawatt or Mr Azzi unduly influenced Mr Montague in the inclusion of Mr Stavis on the shortlist.

The Commission is satisfied that Mr Montague included Mr Stavis on the shortlist because of the suggestions from Mr Khouri, and out of "loyalty" to that relationship. It was submitted for Mr Montague that this conduct was simply decency, and not partiality. Further, it was submitted that the conclusion that Mr Montague included Mr Stavis as a demonstration of partiality as the result of undue influence by Mr Khouri is unavailable because there was no reasonable basis for concluding that Mr Montague was ever unwilling to interview Mr Stavis. It was submitted that Mr Montague was not obligated to take Ms Carpenter's advice, and that there is no evidentiary basis to assert that Mr Montague's failure to take her advice was the result of the influence of Mr Khouri.

In considering whether conduct is partial, the Commission will have regard to whether what was done was done for a purpose which is extraneous to the power being exercised; that is, for an improper purpose. As Mahoney JA observed in *Greiner v ICAC* (1992) 28 NSWLR 125 at 160:

> *Public power may be misused in a way which will involve a criminal act: see, eg, s 8(2)(b) (bribery). But the proscription of partiality seeks to deal with matters of a more subtle kind. Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly the way in which public power is exercised, for example, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve. This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is to this that "partial" and similar terms in the* [ICAC Act] *are essentially directed.*

In the word "partial" as used in s 8 of the ICAC Act, Mahoney JA stated:

> *…it involves, in my opinion, at least five elements. First, it is used in a context in which two or more persons or interests are in contest, in the sense of having competing claims. In the present case, those claims were for the appointment to a position. Secondly, it indicates that a preference or advantage has been given to one of those persons or interests which has not been given to another. Thirdly, for the term to be applicable, the advantage must be given in circumstances where there was a duty or at least an expectation that no one would be advantaged in a particular way over the others but, in the relevant sense, all would be treated equally. Fourthly, what was done in preferring one over the other was done for that purpose, that is, the purpose of giving a preference or advantage to that one. And, finally, the preference was given not for a purpose for which, in the exercise of the power in question, it was required, allowed, or expected that preference could be given, but for a purpose which was, in the sense to which I have referred, extraneous to that power. I do not intend, by isolating these elements, to formulate a set of necessary and sufficient conditions of "partiality" so as to constitute, in the fashion of J S Mill, a definition. But these elements are, in my opinion, a sufficient indication of what is involved in partiality of the present kind.*

The reasoning set out above indicates that there is no need to establish that Mr Montague was obliged to take Ms Carpenter's advice, or that Mr Montague was unwilling to interview Mr Stavis. Rather, Ms Carpenter's advice that Mr Stavis did not even meet the selection criteria for the position, and would not ordinarily be shortlisted on that basis, provides the Commission with evidence of how he would have been treated had he not had the particular advantage of Mr Khouri mentioning his name to Mr Montague.

The Commission is satisfied that in the circumstances:

- candidates who applied had competing claims for the appointment to a position
- a preference or advantage was given to Mr Stavis that was not given to any other candidate who did not meet the selection criteria. Ms Carpenter's evidence confirms that she would have included in the shortlist for Mr Montague's consideration candidates who met the selection criteria
- the advantage was given in circumstances where there was a duty or expectation that all would be treated equally. Not only is such a duty or expectation inherent in the exercise of recruiting for the public service, but it is inherent in the particular legislative provision, which gave Mr Montague power to appoint and required that it be done on merit

- that the conduct was done for the purpose of giving Mr Stavis a preference or advantage is evident from the circumstances. By insisting Mr Stavis be shortlisted, Mr Montague was intending that he be given the advantage of an opportunity to be interviewed. This occurred in circumstances which, the Commission is satisfied, had Mr Montague not felt that loyalty to Mr Khouri and put his name on the list for that reason, Mr Stavis would not have been shortlisted
- that the preference was given not for a purpose for which it was required, allowed or expected that preference could be given, but for a purpose which was extraneous to the power. The shortlist of candidates was a step in the exercise of Mr Montague's power to appoint senior staff on merit. It was extraneous to that power that considerations of loyalty or obligation (even by way of decency) should come into play, and that they should be permitted to give a candidate an advantage that they would not otherwise have enjoyed.

Contact between Mr Stavis and Mr Montague before the interviews

At 7.30 pm, on 12 November 2014, Mr Montague called Mr Stavis on his mobile telephone. Mr Stavis returned the call shortly afterwards, and they spoke for one minute and 53 seconds. The telephone call was preceded by a number of telephone contacts on the same day between Mr Montague and Mr Khouri. About half an hour after the telephone call with Mr Montague, Mr Stavis sent Mr Khouri a text message. The Commission is not able to determine on the evidence before it what the contact between Mr Montague and Mr Stavis was about. However, it is likely that Mr Montague called Mr Stavis because of his contact with Mr Khouri. The Commission is also satisfied that Mr Montague did not have a conversation with any other candidate before 17 November 2014.

The photographs of the interview questions

On 11 November 2014, Ms Carpenter provided Mr Montague with draft interview questions in a document titled "suggested interview questions". With some amendments from Mr Montague, these questions were included in a ring-bound booklet prepared for the interviews, along with shortlist reports for the candidates.

On or before 16 November 2014, the booklet containing the interview questions was distributed to the interview panel members, being Mr Montague, Mr Robson, Mr Hawatt and Mr Azzi.

On 16 November 2014, the day before the interviews were scheduled to occur, Mr Hawatt and Mr Azzi met with Mr Stavis at a café in Marrickville. Not only did this meeting involve two members of the interview panel with a candidate and no other panel members, but Mr Stavis walked away with photographs of the "suggested interview questions".

No one was able to give the Commission a coherent explanation of how this meeting was organised, or by whom.

Mr Azzi told the Commission that Mr Hawatt had taken him to Marrickville to see the design of a new building and to have coffee there. He did not know that they were going to meet someone.

Mr Hawatt told the Commission that a male person had called him and suggested that they meet with Mr Stavis, and that he agreed to attend the meeting out of respect for the person who called. He said that it could have been Mr Khouri who organised it, and could not nominate anyone apart from Mr Khouri or Mr Vasil who could have done so. He said that he had arranged to meet Mr Stavis, and that Mr Azzi would have known this. Mr Stavis said that he attended the meeting because he was asked to attend, he thought by Mr Hawatt, but could not say who put them in touch.

Mr Vasil was overseas at the time, so it is unlikely that he was the organiser. Call charge records available to the Commission show that there was contact between Mr Hawatt and Mr Khouri on 13 November 2014. Mr Khouri denied speaking to Mr Hawatt about filling the director of city planning position. In circumstances where the Commission was not able to test Mr Khouri's evidence in light of Mr Hawatt's evidence because he was overseas, the Commission is not able to make a finding about who put Mr Hawatt in touch with Mr Stavis.

Mr Stavis told the Commission that, similarly to the meeting with Mr Vasil and Mr Khouri, the meeting with Mr Hawatt and Mr Azzi was like a job interview. Mr Hawatt and Mr Azzi asked about what kind of planner he was, gave him some pointers for the interview, and Mr Hawatt showed him the "suggested interview questions".

Mr Stavis said that he asked whether he could photograph the questions, and Mr Hawatt and Mr Azzi said that he could. Mr Stavis used his mobile telephone to take three pictures of the interview questions, which, between them, comprised the complete list of questions.

Mr Hawatt and Mr Azzi denied showing Mr Stavis the interview questions or allowing him to photograph them.

Mr Hawatt said that he had some papers with him that included the papers for the meeting the following day,

being the interview panel. Mr Azzi told the Commission he did not have any papers with him at the meeting, but saw that Mr Hawatt had a folder with him (although he did not think it was a ring-bound folder). On all of the evidence, the Commission is satisfied that the bundle of documents relating to the interview panel was at the meeting on 16 November 2014 because Mr Hawatt took them with him.

Mr Hawatt's version of the meeting was that he and Mr Azzi saw Mr Stavis in front of the coffee shop, after they had a look at the new building in Marrickville. He said that they had a quick chat about Mr Stavis' background and what he wanted to do in the Council. He said that they indicated to Mr Stavis that they could not give him a commitment to support him.

Mr Hawatt said that he and Mr Azzi then went for a walk together to the corner of the street and together agreed that this was something they should not be talking to Mr Stavis about. Mr Stavis said that this "absolutely" did not happen. Mr Stavis also strenuously denied that he took it upon himself to photograph some of the documents that he had seen Mr Hawatt carrying with him while Mr Hawatt and Mr Azzi were absent from the table.

Mr Azzi's version of the meeting was that, while he and Mr Hawatt were at the café, a man approached them, effectively out of the blue, introduced himself as Spiro Stavis, and said that he was applying for a job in the Council. Mr Azzi said that he did not ask Mr Stavis any questions, but he did recognise his name from the list of interview candidates. Mr Azzi said that he did not want to listen to the conversation or say anything because he did not feel comfortable. Mr Azzi said that he told Mr Hawatt he wanted to go, and that he (Mr Azzi) left a short time later. Mr Azzi did not say anything about walking away from the table with Mr Hawatt to the corner for a few minutes and having a discussion in which they both agreed that they should not be having a meeting with Mr Stavis.

Mr Azzi's version in the Commission's public inquiry differed from the version he told the Commission in his earlier compulsory examination in December 2016. In that examination, he said that he did not know why he and Mr Hawatt went to Marrickville. In his compulsory examination, Mr Azzi also said that he cut Mr Stavis short when he started to talk about the job, and told Mr Stavis "I can't discuss these issues here". He did not say anything about being invited to see the new building.

Mr Azzi said that he thought the version he gave in his compulsory examination was more likely to be true, because it had been given closer to the events concerned. To the extent that they differed, Mr Azzi said that his memory had come back.

Although each person gave a different account of the meeting, the significant dispute is whether Mr Hawatt and Mr Azzi gave Mr Stavis access to and permission to photograph the interview questions. In the context, this is a serious allegation, and, as with all of the matters considered in this report, the Commission has had regard to the principles in Briginshaw v Briginshaw (1938) HCA 34; 60 CLR 336. The Commission has also had regard to submissions about Mr Stavis' credit, and has taken particular care in weighing his evidence. The Commission is not of the view that Mr Stavis' credibility is so diminished that his evidence cannot be accepted on any point, nor is his credit such that the versions of Mr Hawatt and Mr Azzi would be preferred over his.

During the public inquiry, it was put to Mr Stavis that it was clear that the photographs were taken in a hurry. He denied that this was the case, explaining that he was "not a very good photo-taker" and it did not surprise him that it took "three goes to get all those". In each photograph, the relevant portion of the text is in focus and centred, and the three photographs together clearly capture the complete list of questions. The booklet shown in the photographs is opened completely to the page of the questions and laid flat on the table. There is nothing in the photographs that supports any inference of haste or suggest that they were taken covertly.

Mr Hawatt also told the Commission that he had no intention of asking the questions in the list at the interview, with the implication being that he had no need to show Mr Stavis the questions. The Commission does not consider that anything turns on this. Mr Hawatt was only one member of the panel, and having access to the questions would undoubtedly assist Mr Stavis to prepare for the interview.

It was also submitted by Mr Hawatt that, if he wanted to give Mr Stavis the interview questions, it would have made more sense to have given him a photocopy. This submission has no grounding in the evidence, and is speculative. The possibility that Mr Hawatt could have given Mr Stavis a photocopy was not explored with him during the public inquiry. Mr Stavis' version was that he asked to take a copy on the spot. It was not alleged that Mr Hawatt planned to give him a copy before he attended the meeting.

If Mr Hawatt's evidence was to be accepted, Mr Stavis must have taken the photographs when Mr Hawatt and Mr Azzi went for a "private walk" away from the table. It was submitted for Mr Hawatt that Mr Stavis had both opportunity, and motive, in that Mr Stavis had financial reasons he wanted the job at the time. Mr Hawatt said that he and Mr Azzi were away from the table for five to seven minutes. This means that Mr Hawatt must have left the documents, which he had said he was not

comfortable leaving in his car, on a table at a café with the candidate for the job to which the papers related. Mr Hawatt said that he could not recall leaving the papers on the table, as the particular meeting was "very vague". It also means that, in the time that Mr Hawatt and Mr Azzi were away, Mr Stavis would have had to open the folder prepared for the interviews, locate the document, take the photographs and put everything back, all the while not knowing how long they would be absent.

Mr Hawatt's evidence about this meeting is generally difficult to accept. He told the Commission both that he had no recollection of the meeting and he gave specific details to the Commission in his evidence about the meeting. It was submitted for Mr Hawatt that his account of the meeting was only mildly inconsistent with Mr Azzi's, and only on small and less important issues. However, Mr Hawatt told the Commission that he had read Mr Azzi's evidence about the meeting before giving his evidence and then "sort of remembered a few things from him". As outlined above, Mr Azzi gave inconsistent evidence about this meeting on different occasions before the Commission.

It was also submitted for Mr Hawatt that all of the evidence suggests that Mr Stavis was not his first choice, and that it would be illogical for him to provide a candidate with access to the questions who was not his preferred candidate. The Commission will consider this issue later in the report, but it is sufficient to say here that it is not satisfied this was the case. Further, Mr Hawatt and Mr Azzi did not meet with any other candidate prior to the interviews. Mr Stavis had already had an advantage by the fact of the meeting alone. It is not illogical in those circumstances for Mr Hawatt to provide him with access to the interview questions.

Mr Hawatt's reasons for bringing the documents to the meeting are also difficult to accept. He was asked why he did not put them in the boot of his car if he was concerned about security of the documents, and he said "I took it with me just in case I needed it, and safer". When asked why he would need it, he said "just in case I want to verify if, you know, just want to have a quick look to see if it's the same person, you know, like, I just wanted to have a look, but I didn't sort of go through it with him because we decided not, not to move forward". It was submitted for Mr Hawatt that the Commission could accept that, in some circumstances, leaving documents in a car boot may not make them safer from the risk of threat, as a car boot can be easily opened once a person enters a vehicle.

Mr Hawatt submitted that his evidence that in hindsight it was unwise for him to meet Mr Stavis prior to the interview is a candid and transparent response that goes to his credit. The Commission does not accept this submission.

The Commission considers Mr Hawatt's and Mr Azzi's evidence about the meeting at the Marrickville café to be implausible and inconsistent. By contrast, Mr Stavis' evidence on this topic was internally consistent and, in the Commission's view, credible.

The Commission accepts Mr Stavis' evidence that both Mr Hawatt and Mr Azzi were present when Mr Stavis took the photographs of the interview questions, and that they each allowed him to take those photographs. In making this finding, the Commission observes that there were differences in their conduct, which include that:

- Mr Azzi attended the meeting at the request of Mr Hawatt
- the interview questions were brought to the meeting by Mr Hawatt.

In those circumstances, the Commission accepts Mr Stavis' account of the meeting, including that he talked to Mr Hawatt and Mr Azzi about what kind of planner he was, and that they said that they had heard good things about him. Mr Stavis generally described his own approach to planning as solutions-focused. He said that he thought from his conversations with Mr Hawatt before his employment that this was why Mr Hawatt was interested in him.

The Commission can also be satisfied, because it is consistent with all of the evidence, that Mr Hawatt and Mr Azzi did not meet with any other candidate prior to the interviews. Further, none of the other candidates were provided with the questions before the interview.

Provision of the interview questions in advance to one candidate and not others would clearly give that candidate an advantage in the interview process over all of the other candidates.

By participating in the meeting and taking photographs of the interview questions, Mr Stavis also left himself in a compromised position because he had, in effect, "cheated" the process. The Commission also considers that this advantage generated, or at least contributed to, a sense of obligation on Mr Stavis' side towards Mr Hawatt and Mr Azzi, which had consequences for how he went on to do his job as director of city planning. Mr Stavis denied that he felt obligated to either Mr Hawatt or Mr Azzi for his role in him obtaining the job, but said that he was told by Mr Montague to look after the councillors, including in particular Mr Hawatt and Mr Azzi. This issue will be considered later in this report.

The interviews

On 17 November 2014, interviews for the position of director of city planning of the Council were conducted.

Ms Carpenter was present as an observer. Mr Stavis was the last candidate interviewed.

Neither Mr Hawatt nor Mr Azzi disclosed to the panel that they had met with Mr Stavis about the position. Mr Hawatt suggested to the Commission that he was not obliged to make this disclosure because he did not know Mr Stavis. It was submitted for Mr Hawatt that, in the circumstances, there was no need for Mr Hawatt to disclose an interest in Mr Stavis because he did not have a relationship with Mr Stavis such that would require him to make a conflict of interest disclosure.

The Commission does not accept that submission. Meeting with any of the candidates outside the interview panel, particularly in circumstances where their interest in the job was discussed, was a matter that ought to have been disclosed to the interview panel. Further, if either Mr Hawatt or Mr Azzi had disclosed that they had shown Mr Stavis the interview questions before the interview, Mr Montague said that he would have disbanded the panel.

Ms Carpenter told the Commission that:

> *…it was probably one of the more dysfunctional interview processes I've ever been through. The councillors chose not to turn off mobile phones and so they were interrupted by messages and electronic, you know, emails and things coming in, which some of them answered. They, very quickly, departed from the set questions. So, there had been an agreement on who would ask what questions right at the beginning when we first convened, that just went out the window. They were, they didn't seem to be particularly interested in finding out about the, the experience of the candidates. They seemed much more interested in whether or not the candidates would do what the general manager said and that was a question that came up a number of times, "Will you do what the general manager tells you to do?"*

Ms Carpenter said that it was either Mr Hawatt or Mr Azzi who was asking that question:

> *…because both of them became quite aggressive to some, to some of the candidates, not to all of the candidates. So the first couple of interviews were, were quite adversarial as opposed to you know, proper interview. And certainly, that largely came from those two councillors.*

Both Mr Hawatt and Mr Azzi denied that they were rude or aggressive to any of the candidates on the day. Mr Hawatt denied asking the question about doing what the general manager asked. Mr Azzi said that he asked a similar question, but it was more along the lines of:

> *…if council has a resolution and it's been passed through you as a director via the general manager … and you were, you were not happy with the council resolution but it's lawful, what do you do?*

Mr Azzi denied that he was looking for a director of city planning who would do what he was told even if he disagreed with it.

Ms Carpenter's recollection of the interview was not challenged on cross-examination, and was consistent with versions given by two other interview candidates. Their versions were also not challenged on cross-examination. The Commission is of the view that Ms Carpenter is a reliable and credible witness. Where there are inconsistencies, the Commission prefers Ms Carpenter's evidence about what occurred on the day of the interviews to the evidence of Mr Hawatt, Mr Azzi and Mr Montague.

Ms Carpenter said that Mr Robson seemed disengaged from the process and remembered that he closed his eyes for a lot of the time. In his evidence to the Commission, Mr Robson accepted that he may have closed his eyes if it had been towards the end of the day. He gave evidence that was consistent with Ms Carpenter about the treatment of other candidates. Mr Robson also noticed that Mr Stavis:

> *…was treated a lot more gently than the previous candidates. The questions were such that he could provide a response … it was certainly not as aggressive as the … previous applicants.*

Ms Carpenter said that a candidate, Karen Jones, in particular was treated "quite poorly", with "a very adversarial attitude to questions, a disregard, disrespect would be how I would describe it … coming from Hawatt and, and Azzi". Ms Carpenter said that Mr Stavis interviewed favourably in comparison with other candidates, but that this was because the questioning was not as robust. She said that there was not the "same kind of aggression or same kind of hostility towards him as there had been to other candidates".

Mr Montague gave evidence that supported Ms Carpenter's assessment of Mr Hawatt's and Mr Azzi's behaviour at the interviews, including in particular to Ms Jones:

> *I thought they were unnecessarily aggressive and argumentative with her, and that was the tenor, tenor of the whole interview process. They, they didn't distinguish themselves through the interview process at all. They, they, they didn't conduct themselves in an appropriate manner in my opinion, and I was, I regretted that.*

Assessment forms that Ms Carpenter had provided were not used or used inappropriately. She said that, as the councillors moved away from the suggested questions, "there was no way they could indicate whether or not they were assessing those particular questions because they hadn't asked them".

The Commission received conflicting evidence as to how candidates were ranked following the interviews. After the interviews had finished, at about 4 pm, the panel stayed to discuss the candidates.

Ms Carpenter said that, following the interviews, Mr Hawatt and Mr Azzi indicated verbally that they supported Mr Stavis, and that Mr Montague preferred Ms Jones and Mr Manoski. Mr Robson gave evidence that was consistent with that of Ms Carpenter. Ms Carpenter's evidence on this point was not challenged on cross-examination.

Mr Robson was of the view that:

> *Karen Jones performed well because she was handling the aggression of Azzi and Hawatt in a, well, the questioning was robust and she handled herself well and didn't take any backward steps, as I'd put it that way.*

Ms Carpenter said that she thought Ms Jones was a strong candidate, taking into account her interview performance and her curriculum vitae, and that there was nothing that indicated that she could not collaborate effectively with Council.

Mr Azzi told the Commission that he indicated that his preference was Mr Manoski, followed by Mr Stavis. His evidence on this point in the public inquiry was consistent. Mr Hawatt said his preference was the same. Mr Robson was asked whether either Mr Azzi or Mr Hawatt said that Mr Manoski might be worth employing, and he said that he could not recall that.

Mr Hawatt also told the Commission that Mr Azzi said that he didn't want "the Greek", being Mr Stavis. It was submitted for Mr Azzi that this remark was consistent with his support of Mr Manoski. Mr Montague said that Mr Azzi could have said this, but he did not recall it. The investigator of the former Office of Local Government recorded on 17 March 2015 in his file note that Mr Montague told him that Mr Azzi said to him he did not want a woman and did not want a Greek. However, the value of this evidence in terms of proving what Mr Hawatt and Mr Azzi actually said and did, as has been discussed, is limited. For the reasons outlined elsewhere, this value would not be improved by calling the investigator of the former Office of Local Government.

In the Commission's public inquiry, Mr Montague denied that Mr Azzi told him that he did not want a Greek. Later in his evidence, he said that the word Greek was mentioned by Mr Azzi but he could not say whether it was specifically in relation to Mr Stavis. Mr Azzi also told the Commission that he could not recall saying anything to that effect to Mr Montague, but he said he may have said that he did not want a local to have the job. In all of the circumstances, the Commission cannot be satisfied that, following the interviews, Mr Azzi said that he did not want "the Greek" and meant that he did not want Mr Stavis to be appointed to the position.

Mr Azzi also denied saying that he did not want a woman appointed, and that Mr Hawatt and Mr Azzi indicated that they did not want a "greenie" from Leichhardt Council. There is stronger evidence that, following the interview panel, Mr Azzi indicated that they did not want to work with a woman. Mr Montague told the Commission's public inquiry that Mr Azzi definitely made it clear to him that he did not want to employ a woman. Mr Montague reported this to Ms Carpenter as a reason for not offering the position to Ms Jones. Mr Robson formed the view, from the way that Mr Hawatt and Mr Azzi treated the female candidates, that they did not want a woman. He also confirmed in his evidence to the Commission that Mr Hawatt and Mr Azzi did not want a "greenie" from Leichhardt. This is corroborated, for Mr Hawatt at any rate, by a conversation lawfully intercepted by the Commission in December 2015, where Mr Hawatt spoke disparagingly about Leichhardt Council and about Ms Jones' candidacy. The Commission is satisfied that the concern about being a "greenie" signified that she would be unwilling to provide "solutions" to non-compliant development applications.

It was submitted that Mr Hawatt's and Mr Azzi's evidence in the Commission's public inquiry, that they expressed a preference for Mr Manoski and did not push hard for Mr Stavis, was corroborated by:

- the March 2015 file note from the former Office of Local Government, which recorded Mr Montague's version at that point in time (the document records that Mr Montague said "they [the councillors] didn't push hard for Spiro" and that Mr Azzi and Mr Hawatt were happy for Mr Montague to offer the job to Mr Manoski but a job needed to be found for Mr Stavis)
- a code of conduct complaint prepared on behalf of Mr Hawatt, and signed by Mr Hawatt, Mr Azzi and other councillors in January 2015.

The Commission is not satisfied that the matters recorded in the March 2015 file note corroborate Mr Hawatt's and Mr Azzi's evidence that they expressed a preference for Mr Manoski following the interviews. Whether or not Mr Montague, in March 2015, was of the view that they

"pushed hard" for Mr Stavis, or chose to express that view to an Office of Local Government investigator, does not in any way indicate that Mr Hawatt and Mr Azzi expressed their preference for Mr Manoski following the interviews, such that it would be preferred to the evidence of Ms Carpenter and Mr Robson.

Further, although the document records that Mr Hawatt and Mr Azzi were happy for Mr Montague to offer the job to Mr Manoski, this cannot be separated from the assertion that they also said "but a job needed to be found for Spiro". This does not corroborate the evidence of Mr Hawatt and Mr Azzi that they expressed a preference for Mr Manoski. Further, and as will be clear, there is conflicting evidence about when a conversation along these lines took place.

The code of conduct complaint was a document created in January 2015 and, as will become clear, was prepared for use as a weapon in "the war" that followed. The Commission can give its contents only limited weight. It is sufficient to note here that it does not provide independent corroboration of Mr Hawatt's and Mr Azzi's evidence because Mr Hawatt provided the information used to draft it.

Given the above, the Commission does not accept that the assertion by Mr Hawatt and Mr Azzi, that Mr Stavis was not their preferred candidate, is corroborated, and prefers the unchallenged and reliable evidence of Ms Carpenter, which is corroborated by Mr Robson. Further, that Mr Hawatt and Mr Azzi supported Mr Stavis' candidacy is corroborated to an extent by the messages exchanged between Mr Hawatt and Mr Stavis after the interview. These will be set out in due course.

There was other evidence that went to this issue and, although the Commission considers it to be of more limited weight, it is set out below.

- Mr Montague said that Mr Azzi had a "clear preference to I thought, particularly … in the early stages to appoint Spiro Stavis". He also said that "Pierre Azzi and Michael Hawatt made it very clear in deeds and words that they, they were inclined to support Spiro Stavis". Further, he said that both the way that the interviews were conducted and the comments made by the councillors made it very clear to him that his preferred candidate "would not get the job". Although Mr Montague's evidence was that "after the interview panel and, and at the end of the panel [Mr Hawatt and Mr Azzi] said very little", it was palpable to him before the interviews, between the interviews and 8 December 2014 (the date of Mr Stavis' appointment), and after the appointment, that Mr Hawatt and Mr Azzi wanted Mr Stavis. However, later in his evidence, Mr Montague also said in relation to the post-interview discussion that:

  > *I seem to remember them, well, I think it was after the interviews, remember saying that they, they liked Manoski and that they probably wanted to put him on funnily enough, and that Stavis would be their second choice but they didn't want Karen Jones. So Manoski I thought loomed large in their minds because he was also quite impressive in interview. That's just a feeling I got, but they did say, I think it was Azzi* [who] *said, "Well, I, I'd prefer Manoski".*

- Mr Stavis told the Commission that Mr Hawatt had indicated a preference for his candidature.
- Mr Hawatt's notes, made during the interview panel, and found among his papers, recorded the word "no" against the name of each candidate, including Mr Manoski, but not Mr Stavis. Mr Hawatt said that this was just "scribble paper" and did not mean anything.
- The Commission also received evidence that Morris Iemma, former NSW premier, recalled that, in late 2014 or early 2015, he had a telephone call with Mr Azzi in which Mr Azzi told him that he and Mr Hawatt had concluded from the interview process that Mr Stavis was the preferred candidate. This evidence must, of course, be treated with caution, given that Mr Iemma was not called as a witness in the inquiry and the evidence is hearsay.
- Mr Khouri told the Commission that he knew from Mr Hawatt and Mr Azzi that they preferred Mr Manoski. However, given his role in these events and relationships with the participants, and that the evidence is hearsay, it must be treated with caution.

Having regard to all of the available evidence, the Commission finds that, following the interviews, Mr Hawatt and Mr Azzi expressed a preference for Mr Stavis. The Commission also accepts that Mr Hawatt and Mr Azzi were rude or aggressive to other candidates who were not Mr Stavis, and in particular to Ms Jones. It was submitted for Mr Montague that this conduct demonstrated the degree of difficulty that he faced in making the appointment. In light of its findings about the conduct of the interview panel, the Commission accepts that submission. However, to the extent that it goes to Mr Montague's decision-making, the Commission does not accept his submission that the behaviour of Mr Hawatt and Mr Azzi was enough to dissuade other

candidates from the job. Mr Montague did not give any evidence that he knew or believed this to be the case.

Offer of employment to Mr Stavis

Reference-checking

On the evening of 17 November 2014, Mr Montague emailed Ms Carpenter advising that:

> *Off the record, my choice is Karen. I am concerned, however, that she may be put off by the behaviour of the councillors at interview. I would be grateful if you could explain to her that she will be reporting to me not Council and not to take the interview too much to heart. By the way, my second choice would be Simon* [Manoski].

This email is consistent with the evidence the Commission received about the conduct of Mr Hawatt and Mr Azzi during the interviews.

Mr Montague did not retreat from Ms Jones being his choice of candidate following the interviews, having regard to her experience and because he thought it would be desirable to have a gender-balance on his management team.

Following the interviews, Ms Carpenter performed reference checks for Ms Jones, Mr Manoski and Mr Stavis, on the understanding that they were the preferred candidates, in that order.

Ms Carpenter assessed Mr Stavis' nominated referees to be of low value, given that none came from his most recent employers, both being local councils. Although Mr Stavis denied having had problems at those councils that caused him not to nominate a referee from either, when Ms Carpenter did contact those previous employers, the opinions expressed did not support Mr Stavis' candidacy for director of city planning.

Contacts following the interview

At 7.50 pm on 17 November 2014, Mr Hawatt rang Mr Stavis and the line was open for 24 seconds. Mr Hawatt said that he "wouldn't have called him for the sake of it. He must have asked for something". Mr Hawatt denied that he had a relationship with Mr Stavis where he was trying to promote him as the candidate for the position of director of city planning. This denial is contradicted to some extent by the text messages that followed.

On 18 November 2014, Mr Hawatt sent a text message to Gulian Vaccari, then mayor of Strathfield Council, asking "what do you know of Spiro Stavis?". Mr Vaccari replied, "he was with us for about 12 months until about 6 months ago. I think he was popular and seen as a can do sort of guy. The property owners I meet with speak well of him".

From 21 November 2014, Mr Stavis was in relatively frequent text message contact with Mr Hawatt. On that day, they had the following exchange:

> *Stavis: Hi mike, just so you know she still hasn't contacted my referees yet. Spiro*
>
> *Hawatt: If she does the wrong thing. She will not succeed.*
>
> *Stavis: Cheers.*

This text message exchange confirms that, at this time, Mr Hawatt was favouring Mr Stavis for the position. The tenor of Mr Stavis' message indicates that he must have had an indication of this from Mr Hawatt before he sent the message.

On 24 November 2014, Mr Stavis advised Mr Hawatt that "she" still had not checked his references. Mr Hawatt said he would "keep an eye on this and find out why". Mr Stavis asked, "do you know when you will be meeting to finalise?". Mr Hawatt said, "No. This week definitely". Mr Stavis replied, "Thx Michael and sorry to keep bothering you, just anxious. Have a great day".

Later that evening, Mr Hawatt sent Mr Stavis a text message, "good!". On the following day, Mr Stavis wrote, "Hi Mike is it what I think?". Mr Hawatt replied, "Yes".

Mr Montague also sent a text message to Mr Stavis that evening asking Mr Stavis to "call me now if u can".

Each of the text message exchanges between Mr Hawatt and Mr Stavis is consistent with the conclusion that Mr Hawatt favoured Mr Stavis for the position, and had indicated to Mr Stavis as much.

It was submitted for Mr Hawatt that in his text message contact he was trying to appease Mr Stavis. It was also submitted that the decision about who was appointed was for the general manager. While it is true that the decision was the general manager's, the identity of Mr Hawatt's preferred candidate was in issue in the inquiry. The text messages he exchanged with Mr Stavis following the interviews tend to undermine Mr Hawatt's version that Mr Stavis was not his preferred candidate.

When asked in the public inquiry what he meant by "appeasing" Mr Stavis, he said "the guy is nervous and he's eager to, to hear whatever assurance, so I just tell him something just to make him happy. It doesn't mean they're going to do what he wants". The Commission does not accept this evidence. It is inconsistent with the words he used, not only in the messages above, but the messages

that followed as the events progressed. These are set out further below.

Counsel Assisting the Commission pointed to opportunities for Mr Hawatt and Mr Azzi to have spoken to Mr Montague about Mr Stavis' appointment, including immediately following the interviews, through telephone contacts, and in person. Mr Montague was on leave from around 18 November to 23 or 24 November. He could not recall meetings occurring but accepted that they could have.

Mr Hawatt and Mr Azzi asserted in the code of conduct complaint lodged against Mr Montague that there was a meeting approximately a week after the interviews (that is, around 24 or 25 November) in which the shortlisted candidates' reference checks were discussed. That there was a meeting or conversation around this time about the candidates is consistent with the messages exchanged between Mr Hawatt and Mr Stavis on 24 November. The Commission considers that the information asserted in the code of conduct complaint should be treated with caution, noting also that the reference checks for Mr Stavis were not provided until 26 November. However, it considers that there was sufficient opportunity following the interviews, and between Mr Montague returning from leave and his decision to appoint Mr Stavis, for Mr Hawatt and Mr Azzi to make their views known to him.

It is significant that Mr Hawatt and Mr Azzi did not meet or communicate with any other candidate apart from Mr Stavis. This conduct supports the inference that they lobbied Mr Montague for Mr Stavis.

Ms Carpenter provides advice to Mr Montague

On 25 November 2014, Mr Montague emailed Ms Carpenter and asked for her "gut feeling on the Director". Ms Carpenter replied that:

> *My gut feeling is that Karen is leading the pack and Simon is coming in second. Both really good. Spiro – okay but hasn't managed at this level at all. I think you would get internal resistance at the least. Also I just realised that one of his referees has not yet responded so will follow up this afternoon.*

On 26 November 2014, once the reference checks had been completed, Ms Carpenter informed Mr Montague of her views of the comparative strengths of "the two candidates you are considering", being Mr Stavis and Ms Jones, by email.

Among Ms Jones' strengths, Ms Carpenter noted that she was "politically astute" and, at another council, she had "transformed the processes to reduce DA processing times by 40%". In relation to Mr Stavis, Ms Carpenter noted that he had a "strong customer focus" and "strong technical skills" but that he had never managed a change process nor carried out organisational performance management processes, and that "in relation to applications at council he could move from independent consultant to strong advocate on behalf of his clients".

Ms Carpenter concluded by stating:

> *Jim, it would seem to me that there is no real comparison. Given Spiro's lack of management and organisational experience it would be a very surprising move to appoint him. It would fly in the face of a merit selection process as set out in the 1993 Act and I think it would open Council to questions from the Office of Local Government, particularly since the Planning role is such a sensitive one. My concern also, is that in appointing Spiro, you would set him up for failure, even before he starts. He will be dealing with entrenched and difficult staff and has no experience in this. It is much easier to identify problems from the outside and articulate these than get in there and have the experience to know what to do to make the changes.*
>
> *I hope this helps your decision making. The Act is very clear about where decision-making sits in relation to the appointment of Executive staff – it is with the General Manager.*

More meetings with the candidates

On 26 November 2014, Mr Hawatt sent a message to Mr Stavis asking if the general manager had coffee with him that day. Mr Stavis replied that he had just finished having coffee, and it "went well I think, fingers crossed". Mr Hawatt replied "good".

Mr Stavis told the Commission that he met Mr Montague at a café, for what Mr Stavis also described as a "mini-interview". Mr Montague told the Commission that, during this meeting, he emphasised that he expected loyalty from the director of city planning. Mr Montague explained to the Commission that, by this, he meant loyalty to him as general manager, although he accepted that this was misconceived as employees of Council owed a duty to Council, and, through Council, to the ratepayers. He said he also discussed the need to shorten development application processing times and raised a concern about inconsistent advice being given to applicants at the counter of the planning division.

Consistent with Mr Montague's approach to recordkeeping in relation to this recruitment, generally, no record was made of this meeting with Mr Stavis. The failure to keep records left the recruitment process vulnerable to criticism, and to a risk of a perception that

the process was conducive to improper considerations and influences being taken into account. The Commission has obtained the email records and SMS contact relied on in this chapter through other means, and not from any file of those contacts kept at the Council.

Mr Montague also had a private meeting with Ms Jones, and attempted to have such a meeting with Mr Manoski, but he was overseas.

It is not clear what happened to Mr Manoski's candidature. Mr Manoski told the Commission that he had an overseas holiday scheduled for a week or two after the interview process. Before he left, Mr Manoski said that he received a telephone call from Ms Carpenter advising that he was not successful. While he was away, he received a telephone message from Ms Carpenter advising that he was now being considered as a preferred candidate. He also received a telephone message from Mr Montague while he was overseas, asking that he call. When Mr Manoski returned, he tried to call Mr Montague but was not able to get through. Later, Mr Manoski learned that Mr Stavis had been successful. Mr Montague suggested that one of the reasons he did not appoint Mr Manoski was that he was uncontactable.

Mr Stavis' evidence about how many occasions he met with Mr Montague, and with Mr Hawatt and Mr Azzi, outside the interview process must be treated with caution by the Commission unless supported by contemporaneous records. This is because Mr Stavis gave conflicting accounts of the number and timing of some of these meetings. The Commission accepts that there was a meeting on 26 November 2014 because this is supported by Mr Stavis' text message to Mr Hawatt and is consistent with evidence given by Mr Montague.

At 8.50 pm on 1 December 2014, Mr Hawatt sent a text message to Mr Stavis asking if they could "catch up" that night. They arranged to meet the following day "at Pierre Roselands", being the suburb in which Mr Azzi lived. None of Mr Hawatt, Mr Azzi or Mr Stavis could recall this meeting. However, on the following day, 3 December 2014, Mr Stavis wrote to Mr Hawatt:

> *Hi Michael, I didn't sleep last night thinking about all this. I really really want this job but I'm ok to compromise as discussed. I want to help make change in the dept.*
>
> *Sorry to rant but just frustrated. Cheers. Spiro*

Mr Hawatt replied to Mr Stavis that "everyone is frustrated with the inaction of planning and the games being played". Mr Stavis replied, "Ok. Pls let me know what happens after you guys speak with him". The Commission finds this to be a reference to a conversation that Mr Stavis understood would occur between Mr Hawatt, Mr Azzi ("you guys") and Mr Montague ("him"). The Commission accepts from these communications that Mr Stavis must have spoken about the director of city planning position to Mr Hawatt on 2 December 2014.

Mr Stavis' text message contact also communicated to Mr Hawatt his anxiety to get the job; a matter of which Mr Hawatt was aware.

The offer

On 4 December 2014, Mr Stavis reported to Mr Hawatt, "Hi mike, just so u know he rang me before yr meeting and pretty much said I have it. Bechara confirmed shortly thereafter. Call if you want". Mr Hawatt told Mr Stavis, "we know". Mr Stavis' text message indicates that he knew that Mr Khouri was known to Mr Hawatt and Mr Azzi.

Mr Khouri told the Commission that he did call Mr Stavis to let him know that he got the job, and he did this because Mr Montague had asked him to. Mr Montague told the Commission that he wanted to get Mr Khouri off his back because Mr Khouri kept ringing him to find out what was going on.

On the following day, Mr Stavis sent Mr Hawatt a text message:

> *He just offered me the job, waiting for paperwork to come through before I announce. Thx for everything. cheers*

Mr Hawatt replied:

> *Finally we achieved results. Congratulations on your appointment. You have much work to do to fix the serious problems facing planning.*

Mr Hawatt's text message was plainly a reference to him and Mr Azzi having campaigned for Mr Stavis' appointment. Mr Hawatt told the Commission that his text message was a reference to the recruitment dragging on, including getting references double-checked. However, his explanation was premised on his evidence that he preferred Mr Manoski to Mr Stavis. For the reasons outlined above, the Commission does not accept that evidence.

On 8 December 2014, Mr Montague wrote to Mr Stavis offering him the position of director of city planning. On the same day, Mr Stavis resigned from his position at Botany Bay Council, and on the following day accepted Mr Montague's offer in writing. Mr Montague failed to consult with the council before he made the appointment, as required by s 337 of the LGA.

On 11 December 2014, Mr Stavis' appointment was reported to the Council in the context of a report about the remuneration of the directors.

On 12 December 2014, Ms Carpenter wrote to Mr Montague expressing her concerns about the recruitment process. Ms Carpenter sent the letter to Mr Montague under a covering email in which she stated:

> *…further to our conversation of yesterday, please find attached my letter of concern in relation to the appointment of Spiro Stavis as Director City Planning. Let me know if you need any changes made to it.*

She sent the letter because she was very concerned that Mr Stavis' appointment was not a merit-based appointment. She was also concerned with protecting her professional reputation. The Commission accepts that Ms Carpenter also had a conversation with Mr Montague on the previous day, consistent with her letter.

In the letter of 12 December 2014, Ms Carpenter noted that Mr Stavis was not included in the original shortlist for the role because:

> *…in comparison to other candidates his experience in technical matters of planning was reasonable but not exceptional. He also had a significant lack of experience in managing large teams (his largest organisational team appears to have been five), in implementing change initiatives, and in implementing innovative improvement processes.*

Ms Carpenter wrote, "I was subsequently surprised and concerned when you indicated that councillors on the interview panel had insisted that Spiro was to be a shortlisted candidate". She stated:

> *I am deeply dismayed that Councillors have in my view, unduly influenced the recruitment process and have appointed Mr Stavis to the role of Director Planning. Under any circumstances this cannot be considered a merit-based appointment.*

Ms Carpenter also noted that:

> *…the interview process itself was not robust, many relevant questions remained unasked, with the main concern of Councillors involved appearing to be whether the candidate "would follow instructions from the General Manager".*

Ms Carpenter added, "I share your concern in this matter". She told the Commission that, in his dealings with her, Mr Montague was clear about the fact that there were other candidates who had stronger claims to the role than Mr Stavis, and mentioned Ms Jones and Mr Manoski.

On 15 December 2014, Mr Montague replied to Ms Carpenter to the effect that her comments were "very concerning" and called into question "whether Mr Stavis has the experience and background to successfully undertake such a senior role within our organisation". Mr Montague noted that he was "particularly concerned about [her] comments relating to the influence exerted by Councillors in the recruitment process". Mr Montague asked Ms Carpenter to undertake further reference checks with Mr Stavis' previous local government employers.

Mr Montague told the Commission that he asked for reference checks because he had heard "scuttlebutt" about Mr Stavis from Council staff. It is likely that, by this time, Mr Montague had heard that Mr Stavis had applied in the previous year, unsuccessfully, for a job as team leader in the development assessment team at the Council.

Mr Montague's purpose in making the offer

It is true that there is no evidence that Mr Montague was aware of the contacts Mr Stavis had with Mr Khouri and Mr Vasil, or with Mr Hawatt or Mr Azzi, prior to the interviews. Further, it is true that Mr Montague did not know that Mr Hawatt and Mr Azzi had disclosed the interview questions to Mr Stavis in advance. It was submitted for Mr Montague that the fact of the meeting on 16 November 2014, which was concealed from Mr Montague, establishes that Mr Montague was not part of any collusive conduct to advantage Mr Stavis, or that there was an existing plan to advantage Mr Stavis' application process. That is not the allegation.

When considering whether conduct is partial, the Commission will consider whether a public power was exercised to give someone an advantage for an improper purpose. This does not require proof that Mr Montague was subjected to conduct so oppressive as to constitute harassment, or a threat to his employment. Nor does it require objective proof of the merits of individual candidates. Rather, it focuses on Mr Montague's state of mind and his purpose in exercising his power to appoint.

The evidence that Mr Montague believed another candidate to be the best for the job is set out elsewhere. Mr Montague gave evidence that he would have appointed Ms Jones, or sought to appoint her, but for the involvement of Mr Hawatt and Mr Azzi in the process.

Mr Montague pointed to a number of factors that he said went to that decision, including:

- Mr Azzi said that Mr Montague's preferred candidate would not get the job

- Mr Montague felt under pressure during that period of time more than he ever had in his career at Canterbury (this pressure came from Mr Azzi and to a lesser extent Mr Hawatt)
- in particular, Mr Azzi said that he would not accept a woman, a "greenie" or someone from Leichhardt
- if he had appointed his preferred candidate, the councillors would have made her life hell on Earth, and possibly his own.

It was submitted for Mr Montague that "the form that the pressure took was never explored in the evidence". The Commission does not accept this submission. The Commission is satisfied that there is evidence of the circumstances leading up to the appointment of Mr Stavis, including the circumstances leading to Mr Occhiuzzi's resignation, as they were known to Mr Montague, which leads to the conclusion that there was pressure from Mr Hawatt and Mr Azzi about how planning and development was handled at Canterbury. Further, there is particular evidence of their conduct at the interviews, and their support for Mr Stavis, and lack of support for Ms Jones, following the interviews. There is evidence that indicates all of these circumstances contributed to the pressure Mr Montague felt in making the decision.

At the public inquiry, Mr Montague said that, in those circumstances, and taking into account the interviews, he thought Mr Stavis "could do the job" and "was worth a try". In saying this, he rejected the proposition that he was making the decision because of the pressures being placed on him by the two councillors, although, he said, that was part of it.

The Commission has available a number of contemporaneous statements by Mr Montague, which go to his state of mind, and tend to contradict that evidence:

- as an explanation for making the appointment, Mr Montague told Ms Carpenter that the councillors did not want to work with a woman
- on 15 December 2014, Matthew Stewart (general manager of Bankstown City Council) and Mr Montague had a conversation following a meeting with the former Office of Local Government, in which Mr Montague "was expressing frustration that, through his recruitment process for the director of planning, that councillors Hawatt and Azzi were favouring Mr Stavis and he did not favour Mr Stavis"
- on 16 December 2014, Mr Montague wrote to Council's solicitor, "against my advice it was decided to appoint Mr Spiro Stavis, who was not in my opinion the best candidate"
- on 17 December 2014, Mr Montague wrote to Mr Hawatt by SMS, "I never wanted Spiro in the first place and I allowed myself to be compromised. It won't happen again".

It was submitted for Mr Montague that it would be wrong to treat these statements, which were also described as "grumbling", as contemporaneous with Mr Montague's decision to offer the position to Mr Stavis, and as evidence of his state of mind prior to 8 December 2014, because they all occurred after he was contacted by Ms Carpenter on 11 and 12 December. It was submitted for Mr Montague that this was the first occasion when he began to have doubts about Mr Stavis as a candidate. Some of the comments also post-date Mr Montague receiving adverse references from Mr Stavis' more recent employers. It was submitted that these matters impacted on his perception of what he had believed and when he had believed it. Of his email to Council's solicitors, Mr Montague's explanation was that he was having a bad day.

The Commission cannot accept these submissions. In substance, the matters reported to Mr Montague in Ms Carpenter's letter were already known to Mr Montague, and included allegations sourced from Mr Montague. That Ms Carpenter had concerns about the appointment was very clear from her correspondence throughout. The Commission does not accept that this event, or the receipt of references adverse to Mr Stavis, caused such concern that (as was submitted) it impacted on Mr Montague's perception of what he believed and when he had believed it. The submissions do not concede that there was any dishonesty in these statements. The Commission is satisfied that, given their closeness in time, they provide the best evidence of Mr Montague's state of mind when he made the appointment.

In his report of 16 January 2015 to the Commission, Mr Montague also described his own conduct in offering the appointment to Mr Stavis as relenting "following protracted and extensive discussions amongst the panel members". To explain why he "relented", he said:

> *Because I was tired. I was completely exhausted with the pressure and with the nonsense that was going on. I thought it was the line of least resistance. I know, I knew I couldn't get Karen Jones up. I didn't want our friend Manoski after that, so he was the only game left in town, so I thought, right, I'll give him a chance, he interviewed okay, I'll try him on for 12 months. That was my logic, because the place was in chaos, the planning division was not functioning very smoothly at that point, you know, they were jockeying for power down there, so I thought I, I had to stem this. So, I thought put him on, give him a go, see how he goes, I can always, I, I don't have to renew his*

contract in 12 months' time. And by and large, I think Brian Robson, the mayor, supported that view.

It was submitted for Mr Montague that regard should be had to the pressure that came after 16 December 2014, and that he resisted that pressure. However, the circumstances before 8 December and after 16 December were very different, and the Commission is not satisfied that the evidence of how he acted after 16 December goes to Mr Montague's state of mind in making the appointment on 8 December.

The evidence of other witnesses about merit, including particularly that of Ms Carpenter, is relevant to the extent that it goes to what Mr Montague knew and believed at the time. Ms Carpenter's opinion is not irrelevant because it was communicated to Mr Montague, she was experienced and she was engaged by Mr Montague to perform this task. This is not to say that Mr Montague was bound to follow her recommendation. Further, it does not go to Mr Montague's state of mind in making the appointment that Mr Robson thought that it was open to him to appoint Mr Stavis.

What the Commission can accept, from all of the evidence, is that Mr Montague's preferred candidate was not Mr Stavis, but that he believed that his preferred candidate would not be accepted by Mr Hawatt and Mr Azzi. In those circumstances, he decided to give Mr Stavis the job over the candidate who he believed was the most meritorious. In considering whether the conduct was partial for the purposes of the ICAC Act, the question is whether the purpose for which he exercised the power to appoint Mr Stavis was improper.

Mr Montague said that his concern was that Mr Hawatt and Mr Azzi would "go after" his preferred candidate like they did with Mr Occhiuzzi, and they would pressure her in a way that was entirely inappropriate, and make her life hell.

It was submitted for Mr Montague that Mr Hawatt and Mr Azzi had a demonstrated capacity to intimidate staff, and that Mr Montague was concerned not to cause a fresh director to relive Mr Occhiuzzi's experience. It was also submitted that Mr Montague had no authority to rein-in Mr Hawatt and Mr Azzi. On this topic, Mr Montague said that, although improper or bullying behaviour could be reported and acted on, and councillors could be dismissed through the former Office of Local Government, the behaviour he was concerned with:

…wasn't that overt, it wasn't that obvious. I mean, in the council meetings it was fairly civilised but there were times when you could, you could tell, you could feel it, it was palpable that there was hostility, and the ability to rein in councillors who aren't behaving is … not an easy thing to do and most councils I think would seek to avoid having to do that.

The Commission cannot accept this. Mr Montague was charged with responsibility for adjudicating code of conduct complaints made in respect of any councillor. Further, the contract which he ultimately signed with Mr Stavis involved a commitment that he would take all necessary steps to ensure that his employee was not subject to direction by Council or a councillor as to the content of any advice or recommendation made by the employee.

It was submitted that Mr Montague was entitled to have regard to not only the likelihood of Council approving his choice but also the likely consequences. Having regard to the LGA, Mr Montague was entitled to (and required to) have regard to the results of consultation with Council as a collegiate body. The opinions of the councillors he included on the interview panel was not, in his mind, consultation. That Mr Montague thought that two members of the collegiate body of 10 would make the life of his preferred candidate "hell", and possibly his own life hell, for the reasons to which Mr Montague referred, cannot be an acceptable reason for the exercise of a power to recruit. To accept as much in this context would be to accept that, contrary to the code of conduct, the councillors would be permitted to attempt to influence the director in the exercise of their functions, or pressure the director in the performance of their work, and that Mr Montague was selecting someone who would not be an obstacle to that influence.

Further, if the submission is that he was entitled to have regard to his belief that two of the councillors would not work with his preferred candidate because she was a woman, this cannot be accepted because it would be to endorse conduct contrary to anti-discrimination legislation and the requirement that regard must be had to the equal opportunity provisions included in the LGA when appointing on merit.

In making this finding, the Commission observes that the appointment of senior staff in local government occurs in a particular context, where the legislation rests the power to appoint solely with the general manager, in consultation with the council as a collegiate body, and where the code of conduct is directed at preventing undue influence from particular councillors (as opposed to directions from Council as a whole) on the exercise of public functions by council staff. This can be distinguished from other situations where a recruitment panel is formed to appoint a person to public office and the opinions of those panel members as to the merit of candidates, on a proper basis, inform the selection process.

The Commission is satisfied that Mr Montague's conduct in appointing Mr Stavis was partial, in the sense that:

- candidates who applied and were interviewed had competing claims for the appointment to the position
- a preference or advantage was given to Mr Stavis but was not given to any other candidate, in that he was offered the position although he was not Mr Montague's preferred candidate
- the advantage was given in circumstances where there was a duty or expectation that all would be treated equally
- the power to appoint was exercised for the purpose of giving Mr Stavis the advantage of being appointed to the position because of pressure Mr Montague thought stemmed from the two councillors, absent any consultation with the remainder of the Council
- for the reasons set out above, that the preference was given not for a purpose for which it was required, allowed or expected that preference could be given, but for a purpose that was extraneous to the power.

That Mr Montague had an appreciation that this was the wrong reason is evident from his comments to others on 15, 16 and 17 December following the appointment.

Allegation of false and misleading evidence

It was submitted by Counsel Assisting that, in a compulsory examination, Mr Montague gave false and misleading evidence about the discussions with Mr Stavis, Mr Hawatt and Mr Azzi between the interview and making the offer, and that he concluded that Mr Stavis was the most meritorious candidate. It was also submitted that, in the Commission's public inquiry, Mr Montague gave false and misleading evidence when he denied being pressured to appoint Mr Stavis by Mr Hawatt and Mr Azzi.

The submissions rely on Mr Montague's own evidence to the contrary on each of these points. While the Commission has concerns about internal conflicts in Mr Montague's evidence, and has accordingly treated his evidence with caution, it is not satisfied that there is sufficient admissible evidence that could prove that on either occasion he gave evidence that was false or misleading to his knowledge.

On that basis, the Commission is not of the view that consideration should be given to obtaining the opinion of the DPP in respect of any offence under s 87 of the ICAC Act.

Withdrawal of offer of employment from Mr Stavis

At Mr Montague's request, Ms Carpenter proceeded to conduct reference checks with people who had previously managed Mr Stavis in his role at the Botany Bay and Strathfield councils. The two references were significantly adverse as far as they concerned Mr Stavis' work, although they were not directed to his honesty or integrity. On 16 December 2014, Ms Carpenter sent those reference checks to Mr Montague.

At 2.36 pm on that same day, after receiving the reference checks, Mr Montague sent a text message to Mr Hawatt stating "Hi Michael. We need to chat about Spiro. Please call me when convenient. Jim".

Later that evening, Mr Montague sought assistance from Council's solicitors to prepare a letter to Mr Stavis withdrawing the offer of employment.

On 17 December 2014, Mr Hawatt sent the following message to Mr Montague:

> *Pierre does not want to discuss the Director position any further. Its now up to you. I personally had enough with all the instability of how this council is run. Its like the blind leading the blind. The ones we are having big issues with are back in control. I am of the same opinion as Pierre. Its up to you. However, I do not want this council to be legally liable based on your judgment and then reversing it. This does not look good for the council or its reputation. Council endorsed your appointment of our new Planning Director. We do not want to be involved in any legal challenges or further cost to council for this change of mind.*

This text message supports an inference that there had been some communication between Mr Azzi and Mr Montague about the director position, and Mr Montague's decision to withdraw his offer to Mr Stavis.

Mr Montague replied on the same day, "our reputation is more at risk if the wrong person is appointed. I never wanted Spiro in the first place and I allowed myself to be compromised. It won't happen again". Mr Hawatt replied:

> *…how did you allow yourself to be compromised? We made a suggestion as a panel committee but the final call was yours. I don't understand why the last minute checks on Spiro which cannot be verified or the motives behind the negative reports on him? Why was this left so late after the appointment? I hope you are not being compromised now?*

On 18 December 2014, Council's solicitors wrote to Mr Stavis advising that the Council had decided to withdraw its offer of employment.

Threat to Mr Montague

Mr Montague told the Commission that, at some stage, Mr Azzi said to him of Mr Stavis, "If he doesn't get the job, find a job for him".

Although at a point in his evidence Mr Montague associated this statement with an allegation that Mr Azzi had also threatened his job, he also said that they were separate statements. Mr Montague said that Mr Azzi told him that he should get rid of Gillian Dawson, who was at the time manager of land use and environmental planning, and give her job to Mr Stavis. He said that he told Mr Azzi that it was not going to happen, and that he was not going to create jobs for people. It was submitted for Mr Montague that this, and other conduct in "the war" that followed, demonstrated his ability to stand firm in the face of pressure from Mr Azzi and Mr Hawatt. The Commission does not consider that Mr Montague's conduct after he decided to withdraw the offer from Mr Stavis detracts from its conclusions about his purpose in offering the position to Mr Stavis in the first place.

Mr Robson also told the Commission that, shortly after the interviews, Mr Montague said to him that Mr Azzi and Mr Hawatt had categorically rejected the possibility of employing Ms Jones, and that they wanted to employ Mr Stavis. Mr Robson reported that Mr Montague also said that Mr Azzi told him, "you hire him or it's your job". This was in the context of a conversation where Mr Montague asked if Mr Robson had the numbers on Council to guarantee his position if they moved against him.

Mr Azzi did not accept that he told Mr Montague to find Mr Stavis a job or it was his job. The state of the evidence on this point is too unreliable for the Commission to make a determination either way. Mr Montague also told the Commission that he did not know his position would be in jeopardy if he did not appoint Mr Stavis until 24 December 2014, and that "they never said they were going to sack me if I didn't give him the job". Although this may indicate a lack of concern from Mr Montague about the credibility of the threat at the time, his surprise on 24 December when they did move against him goes some way to undermining his account of the threat.

Mr Azzi did accept that he suggested to Mr Montague that he should find another job for Mr Stavis. He said that this conversation occurred at the end of December, and explained that he thought it was an option "to get away from this situation". By this he meant that instead of paying "compensation" to Mr Stavis, he should work at Council for the money.

The text messages exchanged between Mr Stavis and Mr Hawatt on 3 December 2014 following a meeting with Mr Stavis, Mr Hawatt and Mr Azzi suggest that something similar was considered between the three at that earlier date. Mr Stavis wrote to Mr Hawatt:

> *Hi Michael, I didn't sleep last night thinking about all this. I really really want this job but I'm ok to compromise as discussed. I want to help make change in the dept.*

When he was shown this text message, Mr Hawatt said that there was probably a discussion about Mr Stavis being employed as a planner if he was not employed as the director of city planning, and that this was "probably" the compromise to which Mr Stavis referred.

The text messages suggest that, before Mr Hawatt or Mr Azzi had the chance to talk to Mr Montague about this "compromise", Mr Montague told Mr Stavis he had the job. There is therefore insufficient evidence to determine whether a proposal for a compromise was put to Mr Montague at that time or, as Mr Azzi said, later in December 2014.

Mr Montague explains the decision

Mr Vasil's son, Con Vasiliades, was elected to the Council as a Liberal candidate in 2012. Mr Vasiliades' particular interests on Council were sporting facilities and sport generally in the Canterbury area.

On 18 December 2014, Council's solicitor wrote to Mr Stavis to withdraw the offer of employment. On the same day, councillors began to send text messages about Mr Montague's conduct. At 9.04 am, Mr Vasiliades sent Mr Hawatt a text message as follows:

> *I have a copy of the standard employment contract for the general manager and senior staff. He has to consult with council before employing or dismissing senior staff. We will meet as early as possible to work out what to do because if he his* [sic] *not in the correct emotional state to make rational decisions councillors will be liable for not taking imitate* [sic] *action. I will be getting legal advice today. To meet as early as possible.*

At 10.06 am, Mr Vasiliades sent a text to Mr Hawatt, "legal advice just came back we are responsible for the actions of the GM. need to act immediately".

The contents of the text messages did not make sense, given that Mr Vasiliades told the Commission that he relied on Mr Hawatt for the information he gained about what powers councillors had in relation to the hiring or firing of the general manager. Both Mr Vasil and Mr Vasiliades denied that these text messages were sourced from Mr Vasil.

When shown the messages, Mr Vasiliades said that Mr Hawatt "would have asked me to look this up".

He said that he would have consulted a solicitor known to him, possibly while that solicitor was having coffee outside his shop, as the basis for the message that he sent about legal advice.

It is also unusual in that Mr Vasiliades told the Commission that the first he heard of discussions about who should be employed as the director of city planning was through the memorandum of 23 December 2014, where Mr Stavis was mentioned. When taken to the inconsistency between his evidence and the text messages, Mr Vasiliades told the Commission that there was a lot going on at the time, and he did not have the best memory.

Mr Vasil told the Commission that he learnt of Mr Stavis' position when Mr Stavis came to him, distressed, with the letter withdrawing the offer of employment. Mr Vasil thought that Mr Stavis was getting a raw deal. He assisted Mr Stavis to find a solicitor. He also went to the first solicitor with Mr Stavis, but denied passing any information to Mr Vasiliades about the advice Mr Stavis received. Mr Stavis continued to provide Mr Vasil with correspondence that he received from his lawyer in relation to the employment dispute.

Mr Hawatt then sent a text message to Mr Montague:

> *Hi Jim. We are liable for your actions. I suggest you don't make anymore irrational decisions which might make council legally liable. You should call an extra ordinary meeting to discuss the appointment of the new director and your new decision. I am very concerned by whats happening on this matter.*

He forwarded this text message to all councillors, including Mr Azzi, adding "we have a serious issue that needs councils intervention before it's too late".

On 19 December 2014, Mr Hawatt exchanged messages with another councillor who indicated that she had asked for a written brief from the general manager and a copy of the panel report. Mr Hawatt replied that:

> *The issue is legal liability for breaking a contract and not verifying the info against Spiro Stavis. Its wrong that we treat people who have left their job to start work with us and then telling them we don't want you because someone does not like him from Strathfield. This however completely contradicts what I am told in writing from* [the] *Mayor of stratified* [sic]. *Which shows positive response. There is something smelly with this.*

Mr Hawatt added:

> *It's all a game as they don't want a Greek in this position. Jim wants 100% control and Brian* [Robson] *what ever Jim wants. Council comes after that.*

On the same day, Mr Robson sent a text message addressed to the councillors advising that as a result of a "further, deeper, reference check" and "after seeking legal advice" the general manager had decided to withdraw the offer. Mr Hawatt replied to all of the councillors:

> *It seems that Brian left out in consultation with council and legal liability for breaking a contract. Please note: that we have a responsibility to protect council from legal action. We can't just accept a legal comment without understanding the facts. The GM has an obligation to consult with us before he makes such legally liable decisions.*

Mr Hawatt also provided the councillors with a copy of the text message he had received from the mayor of Strathfield on 18 November about Mr Stavis being a "can do sort of guy", and the property owners speaking well of him.

On 20 December 2014, Mr Hawatt wrote to a Liberal Party colleague asking for "confidential input regarding the process to terminate a GM of council".

It was submitted for Mr Azzi that the evidence was that, between 17 and 23 December 2014, he lost all interest in the selection process, and played no part in what was occurring,. The Commission accepts that the evidence suggests that Mr Hawatt was leading the charge at this time.

On 23 December 2014, Mr Montague circulated a memorandum to the councillors outlining the reasons why he had withdrawn the offer to Mr Stavis and proposing to reopen applications for the position of the director of city planning. The memorandum noted:

- the importance of planning in local government, and the perceived failures of strategic planning within the Council
- the importance of the relationship between the directors and the general manager to the performance of Council
- that Mr Montague's and Mr Robson's preference was Ms Jones "based upon her extensive senior management experience in similar roles within local government and the NSW Department of Planning"
- "following extensive discussions amongst the panel members it was resolved that Mr Spiro Stavis be offered appointment for a period of twelve months"
- "Mr Stavis was not the most experienced person interviewed; he has not held a Director's position in the past and has limited experience in senior management roles and organisational change. His experience lies specifically in project

management and in developing responses to individual development proposals"

- concerns about Mr Stavis' appointment that were raised with Mr Montague, which were confirmed by independent sources
- it was Mr Montague's judgment "based upon long experience that any financial penalty we may face at this stage will be more than balanced against any organisational difficulties we would certainly have faced had he commenced in the role".

Mr Montague encouraged councillors with questions to contact him directly. Mr Montague also wrote that "it may be the case that we will need to offer Mr Stavis some minor form of monetary compensation for any inconvenience caused, however this is not yet known". It was submitted for Mr Azzi that this was an intentionally misleading statement, as Mr Montague must have known that a substantial financial liability had been incurred.

Mr Montague accepted in cross-examination that it had become apparent to him shortly before Christmas Eve in 2014 that there was a risk of exposure to significant liability by the Council, and that he believed the memorandum alluded to that liability. It was not put to him that he intentionally misled Council in the memorandum of 23 December, and the Commission cannot give weight to the submission that he did. There was no evidence that Mr Montague had received legal advice about whether a financial liability, significant or otherwise, had been incurred before 23 December.

At 5.21 pm on 23 December 2014, Mr Hawatt sent his email address to another person, who replied "Hi Michael have just sent you a draft motion". At 6.23 pm, Mr Stavis sent to Mr Vasil by email a copy of his correspondence with the general manager at Botany Bay Council in which he confirmed his resignation from the position on 8 December 2014.

Mr Hawatt's contact with the media

At 9.10 pm, also on 23 December 2014, a journalist from the *Sydney Morning Herald* sent her contact details to Mr Hawatt. Mr Hawatt sent her some information that was adverse to Mr Montague, and did so on a number of other occasions during the dispute that followed. Mr Hawatt also sent the journalist some information that was adverse to Mr Robson.

The Commission was invited to make a finding that this conduct was in breach of clause 3.18 and 3.19 of the Council's code of conduct.

Clause 3.18 provides that "you must at all times promote a positive image of Council and local government when dealing with the public". Clause 3.19 provides that "you must refrain from making any public statement which insults or makes personal reflections on or imputes improper motives to any other council official".

The Commission considers that Mr Hawatt's conduct in contacting a journalist did constitute making a public statement. Further, a number of Mr Hawatt's comments to the journalist made personal reflections on, or imputed improper motives to, Mr Montague and later, Mr Robson, who were council officials for the purpose of that part of the code of conduct. This is particularly in respect of:

- on 23 December 2014, an allegation that Mr Montague received substantial payment for participating in the Joint Regional Planning Panel but sent a staff member in his place, who was also paid by Council for attending
- on 16 January 2015, an allegation that Mr Robson had made a comment about attendance at a scheduled Council meeting of 27 January 2014, which "incites violence and will be used to intimidate the Councillors who are not supporting the GM"
- on 16 January 2015, in response to a comment from the journalist about Mr Montague, a comment, "God knows what else he has done? Once he goes I will call for a forensic audit into the financial affairs of this council"
- on 23 January 2015, allegations relating to the expenditure of public money to assist the Bulldogs Club and conduct by the general manager being "a blatant attempt … to drag this on to help the dogs with further financial help to a private and rich club"
- on 26 January 2015, an allegation in what was described as a "media release" that the general manager and the mayor had endorsed a union barbecue, which was "a cover to allow their union thugs to do their dirty work to prohibit Councillors from performing their civic duties".

The Commission is satisfied that these comments were in breach of clause 3.19 of the code of conduct. However, not all of the communications sent by Mr Hawatt to the journalist rose to this level, in the sense that they also imputed improper conduct to other people who were not Council officers.

Given the content of these messages, the Commission does not accept Mr Hawatt's denial that he was using the media in his campaign to have Mr Montague terminated as general manager.

"The war": attempts to terminate the employment of Mr Montague

"No reason" termination provisions

The contracts for the general manager and the director of city planning both contained clauses that provided that their employment could be terminated without reason, and on 38 weeks' written notice or alternatively by a termination payment equivalent to 38 weeks' pay. This is consistent with the *Standard Contracts of Employment* created by the former Department of Local Government. The effect of these provisions for general managers, who can be appointed and dismissed by a majority vote at Council, is considered in chapter 10.

Call for extraordinary general meeting

At 10.47 pm on 23 December 2014, Mr Stavis sent to Mr Hawatt:

> *Hi Michael. I'm sick to my stomach mate for what he's done to me. I know you're on my side but please, I need this job. Sorry for harping. Spiro.*

Mr Stavis told the Commission that the "he" referred to in his message to Mr Hawatt was Mr Montague.

At 11.05 am on 24 December 2014, Mr Hawatt advised the group of councillors, which came to be known as the "A-team", by SMS that he would be calling an extraordinary general meeting to move motions:

> *1. to terminate the employment of the general manager under clause 10.3.5 and 11.3. This is a simple resolution to pay him out (38 weeks) without reason.*
>
> *2. to determine our position re the employment of the new Director of Planning and his subsequent withdrawal by the GM.*

At 12.47 pm that day, Mr Vasiliades advised Mr Hawatt that the motion "has to be addressed to the Mayor". Mr Hawatt indicated that he would be coming to Earlwood in 10 minutes, which the Commission accepts was a reference to the Ray White real estate office at Earlwood, where Mr Vasil had an office. During "the war", meetings between some of the councillors about these issues were occasionally held at the real estate agency.

Mr Robson told the Commission that, on Christmas Eve in 2014, he received a telephone call at his home from Mr Azzi saying that he wanted to meet and was outside. Mr Robson went outside and was met by both Mr Hawatt and Mr Azzi. Mr Robson reported that Mr Hawatt and Mr Azzi told him that they wanted a meeting to fire the general manager. They then handed to Mr Robson a call notice dated 24 December 2014 signed by both Mr Hawatt and Mr Azzi. The notice, which was in evidence before the Commission, called for an extraordinary meeting to determine the following motions:

> *1. A. The general manager's (Jim Montague) contract of employment and the general manager's employment be terminated immediately under Clause 10.3.5 and 11.3 of the contract of employment.*
>
> *B. Council comply with the matters outlined in the confidential motion relating to the contract of employment and the deed of release.*
>
> *C. The general manager's office (which will fall vacant) be filled immediately by an acting general manager to be determined at the meeting.*
>
> *D. Pursuant to the office of local government guidelines and the local government ACT* [sic], *a selection panel be formed at the meeting for the purpose of interviewing and recommending to council a person to fill the position of general manager.*
>
> *2. We discuss our position in respect to the appointment of the new director of planning, Mr Stavis and the subsequent withdrawal of his appointment by the general manager and take the necessary actions.*

Mr Azzi told the Commission that he went with Mr Hawatt to see Mr Robson, and asked Mr Robson to call an extraordinary general meeting to discuss Mr Montague's memorandum of 23 December 2014 outlining the reasons for withdrawing the employment offer made to Mr Stavis. Mr Azzi said that Mr Robson refused to call such a meeting. Mr Azzi said that they then gave him the written call notice, prepared earlier, which did not call for a meeting to discuss the 23 December memorandum, but proposed the far more serious motion to terminate the general manager's employment. Mr Azzi claimed that the reason he did not give Mr Robson a call for a meeting to discuss the memorandum was because Mr Robson did not ask for one.

Mr Hawatt told the Commission that he and Mr Azzi went to Mr Robson's house on 24 December and asked him to call an extraordinary general meeting, but Mr Robson was very rude and refused to do so. Mr Hawatt said that it was then that he and Mr Azzi handed to Mr Robson the call notice.

Having regard to the contemporaneous evidence that movements to terminate Mr Montague's employment were already in train before 23 December 2014, the Commission does not accept that Mr Hawatt's and Mr Azzi's purpose in going to see Mr Robson was to call an extraordinary meeting to discuss Mr Montague's

memorandum of 23 December. If that had been the case, they could have handed Mr Robson a notice to this effect. They went to see Mr Robson with the call for a meeting to terminate Mr Montague's employment, signed by both of them, in their pocket. In all of the circumstances, the Commission accepts Mr Robson's version of the events of 24 December 2014.

Once he received the call notice, Mr Robson rang Mr Montague. Mr Montague described himself as being shell-shocked by what had happened, and said that "the world collapsed".

Mr Hawatt's and Mr Azzi's motivation

Mr Hawatt told the Commission that his concern was for the financial liability caused to Council by the breach of contract. Submissions in reply for Mr Hawatt were that:

- Mr Montague breached an employment contract and exposed Council to financial liabilities
- Mr Hawatt's conduct was motivated by poor decision-making by Mr Montague as well as his concern about the financial liability caused to the Council.

That this should lead to a move to terminate the general manager's employment, on terms that would result in a payment of 38 weeks' of his larger salary, does not follow. When it was put to Mr Hawatt that he proposed to take a course of action that, to his knowledge, would expose Council to a greater financial liability than that incurred for Mr Stavis, he said that they wanted to get some new blood and Mr Montague was close to retirement. He said that all of these factors came together with Mr Montague making "incorrect decisions". Mr Hawatt's conduct was also characterised in his submissions in reply as bravely standing up for what he thought was the best outcome for all concerned.

The Commission does not accept that this was Mr Hawatt's motivation, in the context where he did not make any attempt to verify the information relied on by Mr Montague, consider the financial liability that would be incurred by his actions to terminate Mr Montague's employment, or make any attempt (having regard to his relationship with Mr Stavis) to broker an alternative outcome such as a reduced amount of compensation.

It was also suggested that it could be argued that, by not taking proactive measures to terminate the employment of the general manager, Mr Hawatt would have partially exercised his functions. The Commission does not accept this submission because there do not appear to be any grounds on which such an argument could properly be made.

Mr Azzi told the Commission that he was motivated to act once he read the memorandum of 23 December 2014, which referred to the possibility of financial compensation for Mr Stavis. Mr Azzi knew that, if the motion were accepted, Mr Montague would be entitled to financial compensation, but said that he did not attempt to find out how much that might be. He said he was also motivated by Mr Montague's failure to consult with the Council when terminating Mr Stavis' employment. He also said that he was concerned about the failure to consult before Mr Montague made the offer. Again, that this should result in an attempt to terminate Mr Montague's employment does not follow. Nor does it follow from Mr Azzi's evidence that he wanted Mr Montague to explain why he was not prepared to honour his offer of employment to Mr Stavis, when that explanation had been provided by way of his memorandum of 23 December.

It was also submitted for Mr Azzi that there was no evidence establishing his reason to have Mr Stavis fill the position of director of city planning. The Commission does not accept this submission. Mr Azzi had joined with Mr Hawatt in the conduct leading up to, during, and following the interviews. He had also joined with Mr Hawatt in his interest in planning and development. That he then joined with Mr Hawatt in moving to terminate the general manager's employment, knowing of the meeting before the interviews and of the disclosure of the interview questions, goes to his motivation in so acting.

Reliance was placed by Mr Hawatt and Mr Azzi on the fact that other councillors indicated their support of the motion to terminate Mr Montague's employment. It was submitted for Mr Hawatt that, if the reasons and motivation for his conduct in attempting to dismiss the general manager exposed corrupt conduct, then this must apply to all of the councillors who joined in supporting the motion. It was submitted for Mr Azzi that, if a threat was made in the call notice, it was endorsed by other councillors and, having regard to the fact that it was not made clandestinely, it should not be interpreted as corrupt.

The Commission does not accept this position. Mr Hawatt, and Mr Azzi, were in a vastly different position from the other councillors. They had an undisclosed meeting with Mr Stavis prior to the interviews, they had disclosed to him the interview questions and allowed him to photograph them, they had supported him for the position and communicated as much to Mr Montague. Mr Hawatt, in particular, had a degree of personal communication with Mr Stavis, again undisclosed, which indicated his support. There was no evidence that any other councillor was involved in this conduct or, on that basis, shared the improper motivation of Mr Hawatt and Mr Azzi.

It was also submitted that, by calling for the extraordinary general meeting, Mr Azzi was doing no more than providing an opportunity for the whole council to consider terminating Mr Montague's employment. The Commission does not accept that submission. Putting the matter before the Council was a very serious and very public move and invited the Council to agree to that course of action. Such a function should not, and would not, have been exercised lightly. The call notice then became a matter that hung over Mr Montague's head, and was used in the attempts to negotiate that followed.

This is not to say that the "no reason" termination provisions under Mr Montague's employment contract could not be used lawfully. As Mahoney JA stated in *Greiner v ICAC* (1992) 28 NSWLR 125 at 160:

> *… the proscription of partiality seeks to deal with matters of a more subtle kind. Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly the way in which public power is exercised, for example, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve.*

This is an apt description of what occurred here. The Commission is satisfied that Mr Azzi and Mr Hawatt exercised their own public functions, being the public function of calling for an extraordinary general meeting to terminate the general manager's employment, because Mr Montague had become an obstacle to their goal of having Mr Stavis appointed as director of city planning.

Attempts to negotiate

On the afternoon of 24 December 2014, Mr Montague went to visit Mr Vasil to consult with him. Mr Montague was hoping that Mr Vasil would act as an intermediary between himself and Mr Hawatt and/or Mr Azzi. Mr Vasil went to see Mr Hawatt about these events, and tried to arrange for a meeting between Mr Hawatt and Mr Montague. He suggested that Mr Hawatt should discuss these matters with one of his senior colleagues.

Mr Montague also telephoned Mr Stavis and asked whether he was still available. He apologised for what had happened and told Mr Stavis that he was "collateral damage" and had been caught in the cross-fire.

Mr Montague's distress at the circumstances in which he found himself is evident from the fact that, at about 1.30 am on Christmas Day, Ms Carpenter received a text message from him to the effect of, "all hell is breaking loose, please ring me in the morning". She told the Commission that she called him on Christmas morning and found that he was very upset and distressed. She said he told her that his biggest regret was having councillors on the interview panel.

On 27 December 2014, Mr Montague met Mr Hawatt and Mr Azzi at the Canterbury Leagues Club. The meeting was preceded by some text messages regarding arrangements, including a message from Mr Azzi to Mr Hawatt about the possibility of meeting Mr Montague, which said "me you Jim first". Mr Azzi could not explain why he said this. Mr Hawatt replied, "OK but don't … say anything or make any commitment without consultations with our council colleagues". Mr Hawatt then conveyed to Mr Montague that the meeting was to be with "only" himself, Mr Azzi and Mr Montague. The meeting was scheduled for 4 pm.

It was submitted for Mr Hawatt that there was nothing sinister about the choice of location, given the nature of the personalities involved, and noting that Council offices are not available after hours. However, this was not an "after hours" meeting, but it was scheduled for 4 pm.

Mr Montague told the Commission that the meeting was civil but there were no pleasantries. He said that Mr Hawatt indicated that he had to leave, and outlined terms. Mr Montague said that Mr Azzi was "the muscle" – he did not say much apart from emphasising a couple of Mr Hawatt's points. In cross-examination, Mr Montague accepted that the discussions in relation to his entitlements may have been initiated by him and not by Mr Hawatt.

In a memorandum dated 12 January 2015, Mr Montague set out a detailed account of what occurred in that meeting, which was addressed to Mr Hawatt and Mr Azzi but not sent. In the memorandum, Mr Montague recorded that Mr Hawatt and Mr Azzi gave him two options:

1. that he retire in August 2015 and, in addition to his normal entitlements, he would be paid a termination package equivalent to 38 weeks' pay
2. as above, but Mr Montague would be given the opportunity to provide consultancy services to Council to assist finalisation of a number of key projects.

In addition to the above, Mr Montague would be required to assist Council in the appointment of a new general manager and director of city planning. Mr Montague told the Commission that he understood that the "normal entitlements" in the offer included his "no reason" termination payment, and that he was being offered an additional "38 weeks' pay" on top of that as a "sweetener" to leave. Mr Montague said that he considered the offer

and rejected it. He recorded his reasons for doing so in his unsent memorandum, which included that he did not believe that the offer was appropriate or lawful, and that it was essential that a fresh recruitment process be undertaken for the role of director of city planning.

Mr Azzi and Mr Hawatt gave different accounts from Mr Montague of what occurred at the meeting of 27 December 2014. Mr Hawatt said that Mr Montague was open to leaving the Council and laid out his own terms, which included that the retirement date would be August 2015 (a significant date for Mr Montague because it marked 50 years in local government). Mr Hawatt said that there had been a general discussion about money and that nothing was binding. He agreed that they discussed the possibility of Mr Montague taking on consultancy services for the Council. Mr Hawatt denied that he and Mr Azzi had offered Mr Montague an additional 38 weeks' pay on top of his entitlements as an enticement to leave and said that there had just been general discussions.

Mr Azzi denied being party to any offer of payment in the nature of a gratuity to Mr Montague. Mr Azzi said that most of the time in the meeting was a discussion with Mr Montague about "why he skipped the first preferred candidate", what was going on with Mr Stavis and how they could get out of the situation. Mr Azzi said that Mr Montague proposed that, if Mr Azzi and Mr Hawatt delayed the motion until August, he would leave. Mr Azzi said that he told Mr Montague it was his job to find a solution to the problem of compensation for Mr Stavis. Mr Azzi said he suggested that another job be found for Mr Stavis in the Council instead of paying compensation. Mr Azzi did not recall that he got an answer from Mr Montague at the time, and he did not recall Mr Hawatt saying anything except for asking some questions.

In considering which version of the meeting should be accepted, the Commission has had regard to the available records made during the same period, including those in the list that follows.

- The "Code of Conduct complaint" concerning Mr Montague, which Mr Hawatt was involved in drafting between 5 and 7 January 2015, and which set out the following version of events at the meeting of 27 December 2014:
  - the general manager advised he would reappoint Mr Stavis
  - the councillors advised the general manager they were concerned about his actions
  - due to his actions, the councillors advised the general manager he may consider his position at Council
  - the general manager advised he would appreciate being able to finish 50 years in local government at Council in August 2015
  - the general manager advised he wished to buy out his car
  - the general manager also advised there may be an issue with the mayor buying a new mayoral car and it being an Audi
  - the general manager advised he would call the councillors back with his position in regard to the terms and timing of his retirement.
- Mr Montague's unsent memorandum of 12 January 2015.
- An email sent to Mr Montague by Mr Hawatt on 13 January 2015, which set out "the following points as discussed":

  Without prejudice

  Hi Jim

  See the following points as discussed.

  1 legally binding contract for the GM to cease employment with Canterbury City Council at end of August 2015

  2 A gratuity payout of 20 weeks for 32 years of service to Canterbury.

  3 Either party may give notice at anytime for GM to leave with a payout of the balance value of the contract to be calculated from date of leaving to end of August.

  - *Mid June 2015 the process to appoint a new GM shall start with the formation of a panel of councillors to be appointed at the start of June.*
  - *Council to take appropriate steps to streamline the planning process to include a panel consisting of the Director of Planning and councillors to look at the major DA submissions for comments.*
  - *Council to conduct a full audit of the Il Buco* [see page 58] *and any other executive expense for the last 5 years and a report to come back to council with recommendations of the findings.*
  - *All executive expenditures must be budgeted for and itemized for approval by council and reported to council on a monthly basis.*
  - *Close Il Buco account.*

- *Honour the employment contract of Mr Stavis to avoid any legal action against this council.*

The above points 1 to 3 must be legally binding and withing [sic] *the act.*

The dot points to be used for a press release including the Department of Local Government.

The extraordinary meeting will be withdrawn.

Cr Michael Hawatt on behalf of a number of councillors.

As will be seen, this email followed a meeting between Mr Hawatt, Mr Montague and a property developer, Mr Demian, which was held on the same day. Although it has been cautious in considering what weight can be given to this email in determining the events of an earlier meeting, the Commission is satisfied that the offer recorded on 13 January 2015 was an evolution of the matters discussed at the meeting of 27 December 2014, including in relation to the quantum of the gratuity payment.

- Two documents handwritten by Mr Hawatt and seized from his residence under warrant, which are similar in content to the email of 13 January 2015. Both documents also refer to events that were made public on 12 January 2015. The Commission does not give those documents any weight in considering what occurred at the meeting of 27 December 2014 over and above the contents of the email of 13 January 2015.
- On 22 January 2015, Mr Montague prepared and sent a memorandum to all councillors in which he recorded an offer being made by Mr Hawatt and Mr Azzi, which is consistent with Mr Hawatt's email to Mr Montague of 13 January 2015.

Further to the above, Mr Robson told the Commission that, on 29 December 2014, Mr Montague told him about receiving the offer from Mr Hawatt and Mr Azzi. Mr Robson came to the view that it was a potentially corrupt offer and contacted the Commission to report the matter, but found that the Commission's offices were closed over the Christmas break. The information recorded in the draft memorandum is consistent with Mr Robson's recollection of the information Mr Montague told him on 29 December 2014. Although it was denied by Mr Montague, the Commission is of the view that, at some stage, Mr Montague did consider that there might be a tactical advantage to him in making the report to the Commission. This is apparent from the memorandum sent by Mr Montague to councillors on 22 January 2015, the contents of which are detailed later in this chapter.

As mentioned elsewhere in this report, the Commission has been cautious when weighing different versions of events given by witnesses each with credibility and/or reliability issues, and must consider whether those versions are consistent or inconsistent with reliable records made at the time.

The Commission has also been cautious about the weight that can be given to versions reduced to writing that appear to have been tools in a political war. This caution extends to the memoranda drafted by Mr Montague and the code of conduct complaint that Mr Hawatt was involved in drafting.

In contrast, the Commission gives weight to the email sent by Mr Hawatt on 13 January 2015, which is a reliable record. It is clear that Mr Hawatt did make an offer of a gratuity payment outside the terms of Mr Montague's contract, and offered that he and Mr Azzi would withdraw the call for the extraordinary meeting, in exchange for Mr Montague agreeing to leave at the end of August 2015 *and* (among other matters) Mr Montague honouring Mr Stavis' employment contract. Although the email of 13 January purported to be from Mr Hawatt on behalf of a number of councillors, Mr Robson made it clear to the Commission that Mr Hawatt and Mr Azzi had no authority to negotiate with Mr Montague in relation to these matters on behalf of the Council.

Mr Hawatt submitted that the meeting of 27 December 2014 was an informal discussion held between willing attendees, and that this is not conduct which could adversely affect the honest or impartial exercise of Mr Montague's functions. This cannot be accepted. Not only is it possible for willing attendees to engage in informal discussions that could adversely affect the honest or impartial exercise of their functions, but an offer of favourable terms on which to retire could undoubtedly have adversely affected the honest or impartial exercise of Mr Montague's functions in all of the circumstances.

It was put for Mr Hawatt that he made it clear that neither he nor Mr Azzi had any authority to make any offers in relation to Mr Montague's potential retirement entitlements. Such a statement was not in the email of 13 January 2015; rather, the email professed to be from Mr Hawatt "on behalf of a number of councillors". The email also referred to the offer being "legally binding and withing [sic] the act". This does not detract from the impropriety of the offer being made with the intention of enticing Mr Montague to exercise his functions to confirm the appointment of Mr Stavis.

In any event, the Commission accepts the submission of Counsel Assisting that the attempts at negotiations were an offer by Mr Hawatt to use his functions of voting on Council, and of dealing in respect of Council deliberations with other members of the Council, for the purpose of

achieving for Mr Stavis his appointment as director of city planning. In the circumstances where Mr Hawatt and Mr Azzi were driving the push to terminate Mr Montague, and had the ability to withdraw their call for the meeting, this was a serious offer.

Mr Vasil told the Commission that he had a conversation with Mr Montague during this period where he told him that he did not think "this guy" (Mr Hawatt) was backing off, and suggested that he (Mr Montague) speak to his wife and his family about what he wanted to do. He said that Mr Montague may have understood from this that Mr Vasil was saying he should resign. At some stage, Mr Montague did consider resigning and drafted a resignation letter indicating that his last day of service would be 13 February 2015. He did not do anything with the draft. He also told the former Office of Local Government that he had considered going, but that he was not prepared to leave under these circumstances.

On 5 January 2015, Mr Hawatt went to see a Liberal Party colleague, Kent Johns. Later that day, Mr Johns emailed Mr Hawatt attaching draft code of conduct complaints addressed to the former Office of Local Government and to the Hon Paul Toole MP, then minister for local government. The complaints concerned conduct by the general manager and the mayor, including their failure to call an extraordinary general meeting in accordance with the LGA. It appears that a copy was also sent to Mr Vasil. Mr Vasil denied involvement in production of the document. Mr Vasil explained that Mr Johns was passing a copy of the complaint through his son, who trained at Mr Vasil's gym, to give to Mr Hawatt. This is not consistent with text messages sent by Mr Hawatt to Mr Johns, advising that he could not read the second document due to a virus on Mr Johns' computer, and stating that Mr Vasil "is also having problems with this one". This message suggests that Mr Vasil was also sent an electronic copy, with which he was having trouble.

There was evidence that, during this period, a group of councillors referred to by Mr Hawatt as the "A-team", and including Mr Hawatt, Mr Azzi and Mr Vasiliades, met to discuss the employment termination of Mr Montague at Mr Vasil's real estate agency. According to Mr Vasiliades, Mr Vasil was "in and out" of these meetings, but not "part of the meeting". Mr Vasiliades could not recall Mr Vasil ever expressing an opinion about the sacking of Mr Montague. The Commission heard that the reason the councillors met at Mr Vasil's real estate agency was because Mr Vasiliades would be working in the gym nearby, and it was more convenient for him than for meeting on Council premises.

Around this time, Mr Hawatt also sent messages to other councillors encouraging them to stick together no matter what, and asking for their 100% commitment to support the motion at the extraordinary general meeting.

As the "war" intensified, between 6 and 11 January 2015, Mr Hawatt began to send more text messages to a journalist, which were adverse to Mr Montague and which specifically related to different steps being taken by the parties in the war.

On 7 January 2015, Mr Hawatt and Mr Azzi, along with members of the "A-team", signed the code of conduct complaint. It made a number of assertions, including that:

- the general manager met with Mr Hawatt and Mr Azzi a week after the interviews to discuss the shortlisted candidate reference checks, and it was decided that the most appropriate candidate was Mr Manoski
- about five days later, Mr Azzi and Mr Hawatt met with the general manager to discuss the next suitable candidate, and that they thought the next most suitable and qualified person was Mr Stavis but the general manager preferred Ms Jones.

The complaint also alleged a failure to provide coherent reasoning for withdrawal of the contract. The limited weight which can be given to this document has already been identified by the Commission.

On 12 January 2015, Mr Robson circulated to councillors notice of the extraordinary general meeting for the purpose of considering Mr Hawatt's and Mr Azzi's motion. The meeting was scheduled for 27 January 2015.

Also on 12 January 2015, the *Sydney Morning Herald* published an article titled "the King of Canterbury and his princely $50k lunch bills". The article reported that Mr Montague had regular lunches at a restaurant called "Il Buco" funded by Canterbury City ratepayers. The article also reported that Mr Robson attended some of the lunches. It was submitted for Mr Hawatt that this negative publicity was another factor in the war. Although Mr Hawatt said that Mr Montague had contacted him about the article before it was published, he thought this occurred on the Friday before. His messages with the journalist who wrote the article do not refer to that topic until 16 January 2015. The Commission is satisfied that "Il Buco" did not have anything to do with the call notice, or the events of December 2014.

At 8.50 am on 13 January 2015, Mr Montague received legal advice that a contract had been formed when Mr Stavis accepted the offer of employment, and that it could only be terminated by reference to its terms, including 38 weeks' pay for "no reason" termination.

On 13 January 2015, at around lunchtime, Mr Montague met with Mr Hawatt in an office used by Mr Hawatt for

his mortgage broking business. During the Commission's public inquiry, Mr Montague told the Commission that Mr Demian, a property developer, also attended. Mr Montague has not always given a consistent version of this event. In an interview with Commission investigators in November 2016, he said that he could not remember whether there was anyone else present. He was also asked whether any other people in the community contacted him about the offer, and he said that there were people who were concerned about what was happening but he did not want to name anybody.

According to Mr Montague's evidence in the public inquiry, at the meeting the conversation revolved around the offer that was made on 27 December 2014. Mr Demian denied attending such a meeting. He said that the records of his mobile telephone contact with Mr Hawatt and Mr Montague on 13 and 14 January 2015 were probably project related. Mr Demian denied generally getting involved in "the war". In light of the other information available, the Commission does not consider the evidence given by Mr Demian on this topic to be credible.

Mr Hawatt told the Commission that he did have some communications with Mr Demian about Mr Montague's employment, and that Mr Demian said that they should not sack Mr Montague. Mr Hawatt could not remember attending a meeting with Mr Montague and Mr Demian, but said that it was most likely that it did happen. He told the Commission that Mr Demian was one of a number of people who got involved in the dispute in support of Mr Montague.

There is compelling evidence which leads the Commission to find that this meeting did take place and that discussions were had at that meeting between Mr Hawatt and Mr Montague about the terms of the offer, namely:

- Mr Hawatt's email to Mr Montague on the same day (set out in full elsewhere in this chapter) set out points "as discussed"
- Mr Montague's reply on 14 January 2015 rejecting the offer, and thanking Mr Hawatt for his time "yesterday afternoon to discuss matters of common concern"
- Mr Hawatt responded to Mr Montague on 14 January 2015, referring to the meeting on 13 January with Mr Montague's "third-party contact".

The latter reply confirms another person was present at the meeting. Further, when relaying the content of that meeting to all councillors in a memorandum dated 22 January 2015, Mr Montague advised that there had been a witness to the offer.

Mr Montague's evidence, that it was Mr Demian, is supported by evidence that Mr Demian was in contact with both Mr Hawatt and Mr Montague at around that time. On 12 January 2015, there were five contacts or attempts at contact between Mr Demian and Mr Hawatt's mobile telephones. At 10.39 pm that evening, Mr Demian called Mr Montague and the line was open for seven seconds.

On 13 January 2015, there were 10 contacts or attempts at contact between Mr Demian and Mr Hawatt's mobile telephones. Mr Demian also called Mr Montague among these contacts and spoke to him for one minute and 11 seconds.

On 14 January 2015, there were four contacts or attempted contacts between Mr Demian and Mr Montague. The frequency of telephone contact over three days between Mr Demian and Mr Montague, and Mr Demian and Mr Hawatt, was unusual in the 2014 to 2016 period. That it was concentrated around the meeting on 13 January tends to support Mr Montague's evidence that Mr Demian attended. The Commission is satisfied that this evidence can be accepted.

At 6.39 pm on 13 January 2015, Mr Hawatt sent an email to Mr Montague, marked "without prejudice" setting out an offer for Mr Montague. The terms are set out elsewhere in this report. On 14 January 2015, Mr Montague replied:

> *Thanks for your time yesterday afternoon to discuss matters of common concern. Having discussed your offer, made on behalf of other unnamed councillors, with my family and our Mayor, Brian Robson, I have to advise that I cannot accept this or any other offer of this nature in the absence of a formal resolution of the full Council, following its consideration of a detailed report on the legal, practical and financial issues involved.*

Later that evening, Mr Hawatt replied:

> *Further to the meeting held in my office on 13 January 2015 with your third-party contact I confirm the following:*
>
> *1. Discussions were only held on a general basis and without the commitment of an offer.*
>
> *2. The points of discussion were relayed to you for consideration only before any formal resolution may have been considered by the elected body of council.*

The Commission does not consider that these points, relayed after the offer had been considered and rejected, change the nature of what was communicated to Mr Montague.

On 14 January 2015, Mr Montague invited the councillors to view information relating to the aborted appointment of Mr Stavis in his office. Only one councillor took him up on this and advised:

> *I have just finished reading the reports from the Consultant and the referees. There is no doubt in my mind that the General Manager has made the right decision. I would recommend everyone looking at these documents. They are certainly confidential. The authors of at least 2 have requested that (can't recall third) the reports remain confidential. There is no way that these documents could or should be duplicated for general consumption, even Crs. Make an appointment and look for yourself. It won't take long. Why do you need a personal copy??*

Resolution of dispute

On 16 January 2015, Council's solicitors wrote to Mr Stavis's solicitor that they were instructed to advise Mr Stavis not to attend work unless, and until, directed. This advice contained an implicit concession that there was a case for the existence of Mr Stavis' contract.

On 21 January 2015, Mr Hawatt received a resume from a potential candidate for the position of acting general manager. On 22 January 2015, Mr Montague circulated a memorandum to all councillors, which included:

- that Mr Hawatt and Mr Azzi had "made it clear that they wanted to proceed with Mr Stavis' appointment, despite the information we had received from external sources regarding his suitability for the Director's role"
- details of the offer alleged to have been made by Mr Hawatt and Mr Azzi on 27 December 2014, including "payment of an additional amount over my contract equivalent of twenty weeks' pay"
- the offer was conditional upon proceeding with Mr Stavis' appointment
- the offer was repeated by Mr Hawatt on 13 January 2015
- that Mr Montague had made a complaint to the Commission, and "any action arising from the consideration of matters in the Notice of Motion, whilst under review by the ICAC, would not only be premature but also an act of reprisal in these circumstances".

On 27 January 2015, Council convened for an extraordinary meeting to consider Mr Hawatt's and Mr Azzi's motion of 24 December 2014. The meeting was chaotic. The "formal" minutes of the meeting recorded a statement by Mr Robson to the effect that "the motion will be adjourned until the ICAC completes its work". According to various accounts, Mr Robson then tried to close the meeting and left the room, along with Mr Montague and other Council staff.

An alternate set of meeting minutes was prepared and signed by Mr Hawatt, Mr Azzi and some other councillors. The minutes purported to record that another person was appointed as acting general manager and that Mr Montague was requested to comply with s 10.1 of his contract (being a clause requiring Mr Montague to return all Council property in his possession). Prior to this meeting, Mr Hawatt had been involved in sourcing a candidate for the position of general manager.

No one seemed to be sure of the outcome of the meeting of 27 January 2015. Both the minister for local government and the acting chief executive of the former Office of Local Government communicated their concern about the events, and the uncertainty in which Council was left. The Council was warned by the minister that, if they did not address the issue of the employment of the general manager in a transparent matter by no later than 13 February 2015, he would consider the use of the intervention options available to him under the LGA.

On 30 January 2015, another person who was also a property developer in the local area sent Mr Hawatt a text message. The message asked whether he would be willing to leave Mr Montague alone in exchange for Mr Montague reviewing Mr Stavis' appointment until his term finishes. More text messages were sent, culminating in the following exchange on 31 January 2015:

> *Hawatt: Done*
>
> *Other person: There r people that protect there friends, thanx*
>
> *Hawatt: I hope he does not renege again.*
>
> *Other person: Dont worry*

This exchange suggests that some sort of agreement had been reached between Mr Hawatt and the other person in relation to Mr Montague's employment, and that Mr Montague had agreed. This is consistent with some, but not all, of the events which followed. It is also true that the offer made to Mr Hawatt was close to what ended up happening – Mr Montague employed Mr Stavis on a trial basis and Mr Hawatt and Mr Azzi left Mr Montague alone. However, the Commission is not able to conclude whether it was this exchange that led to that state of affairs. Mr Montague denied being party to any deal to protect his own position. Mr Hawatt said that his feelings towards Mr Montague "softened" after this exchange, although this does not appear to be supported by contemporaneous evidence that the war continued to be waged.

On 2 February 2015, Mr Montague had requested legal advice from Council's solicitors, stating that "based on your advice I am seriously considering honouring the original offer of employment". Council's solicitors provided Mr Montague with advice to the effect that "the probabilities are … that an employment relationship subsists between Council and Mr Stavis as from the agreed date of commencement namely 19 January 2015". Although the advice is dated 1 February 2015, given the correspondence, it must have been provided on 2 February 2015.

On 2 February 2015, Mr Montague prepared a memorandum, addressed to the mayor, regarding the appointment of Mr Stavis to the role of director of city planning. The memorandum stated that "following receipt of legal advice" Mr Montague intended to proceed with the appointment of Mr Stavis to the role of director of city planning. The memorandum was signed by both Mr Montague and Mr Robson. The Commission is not able to determine on what date the memorandum was signed.

At 6.27 pm on the same day, Mr Montague called Mr Stavis and spoke to him for one minute and 14 seconds. Mr Montague could not recall what he said, but believed that it was possible he confirmed his intention to honour the employment offer but doubted that he confirmed that Mr Stavis had the job or could start on a particular date in deference to Council.

In explaining his conduct in deciding to hire Mr Stavis in all of the circumstances, Mr Montague said that he took into account the following:

- the place was in chaos, and he wanted to return the Council to some level of normality
- it was a short-term appointment and he knew that he could review the contract down the track
- he saw no reason not to proceed, given what the Council had been through, and with the likely cost to terminate Mr Stavis' employment being a driving factor of the dispute, although he did not himself think that the cost was significant in the context of the Council's budget.

Although the issue of Mr Stavis' appointment appears to have been resolved by 2 February 2015, this is not entirely clear from the records made after 2 February. On 6 February 2015, Mr Montague exchanged emails with Mr Stavis' union representative, in which Mr Montague referred to the possibility of the appointment not going ahead, and agreed to pay Mr Stavis since his "notional commencement date of 19 January".

Also on 6 February 2015, Council's solicitor advised Mr Stavis' solicitor that payments of remuneration would be tendered to Mr Stavis with effect from 19 January 2015. However, Council's solicitor confirmed that "I am not yet able to advise you further with respect to the direction given for Mr Stavis not to attend work".

Certainly, the issue of whether Mr Montague's employment would be (or had been) terminated was still up in the air. Mr Robson wrote to the minister for local government on 9 February 2015, indicating that he was waiting for legal advice regarding Council's attempt to dismiss the general manager. On the same day, councillors, including Mr Azzi and Mr Hawatt, wrote to the minister advising that they had received legal advice indicating that, the meeting of 27 January, for which the alternate set of minutes was prepared, was valid. The councillors continued to correspond with the minister and the former Office of Local Government about this issue right up to the next council meeting of 13 February 2015.

On 11 February 2015, Mr Hawatt advised other councillors by SMS that they were "so close to removing him" and could "record in the minutes that we do not recognise Montague as GM at the start of each committee meeting".

Also on 11 February 2015, Mr Robson signed a new contract of employment for Mr Montague, to commence on 26 April 2015. Entry into this contract was supported by a Council resolution from August 2014, before "the war" had commenced.

On the same day, or shortly thereafter, a group of councillors met at Mr Vasil's office to "discuss our strategy" for the upcoming Council meeting of 13 February 2015.

On 13 February 2015, another extraordinary Council meeting was conducted, ostensibly to consider the motion that "a selection panel be formed for the purpose of interviewing and recommending to Council a person to fill the position of general manager". None of the motions moved that day passed, as they were either withdrawn or were ruled out of order by the mayor. It was submitted that this meeting demonstrated that the war was not brought to an end by Mr Montague's decision to offer the position to Mr Stavis as a "quid pro quo" for the cessation of hostilities, but that the war was concluded by Mr Robson procedurally outmanoeuvring the other councillors. The Commission is not able to draw this conclusion, having regard to the evidence that Mr Stavis' position was still uncertain.

On 16 February 2015, Mr Hawatt wrote to a Liberal Party colleague to advise that he would withdraw his candidature for the State seat of Lakemba, and indicated that he remained committed to the battle to remove the general manager.

On 18 February 2015, Mr Montague made arrangements to meet with Mr Hawatt and Mr Azzi. Mr Montague

indicated that it was better to meet at the Canterbury Leagues Club than the Lantern Club as "we might be seen at the Lantern Club". The Commission is satisfied that the meeting went ahead, but it is not able to determine what was discussed on that occasion in the absence of a reliable version or a reliable contemporaneous record.

During the period between January and February 2015, another pattern of contact emerged. Although there had been a number of text messages between Mr Hawatt and Mr Stavis in November and December 2014, in which Mr Stavis demonstrated his eagerness for the job, there were none in January or February 2015. During that time, Mr Stavis was in frequent contact with Mr Vasil in relation to what was happening with his job, and with "the war". In February 2015, Mr Stavis was in contact with Mr Vasil nearly daily.

In his evidence to the Commission, Mr Vasil denied being asked by Mr Hawatt or Mr Azzi to be a point of contact with Mr Stavis in relation to the ongoing issue about Mr Stavis' employment, and to keep them informed of his discussions. Mr Hawatt denied knowing about any particular role being played by Mr Vasil involving Mr Stavis during this period. Submissions for Mr Vasil were that the level of contact with Mr Stavis was consistent with the evidence of Mr Vasil and Mr Stavis that Mr Vasil was providing emotional support to Mr Stavis.

The evidence which shows that Mr Vasil had contact with Mr Stavis, Mr Hawatt and Mr Azzi and about the events and the pattern of the call charge records of communications between them is sufficient for the Commission to be satisfied that Mr Vasil played the role of conduit between Mr Stavis, on the one hand, and Mr Hawatt and Mr Azzi, on the other.

After 18 February and by 26 February, matters appear to have been resolved between Mr Montague and Mr Hawatt. That evening, on recommendation of the general manager, the Council met and resolved that "the appointment of Mr Spiro Stavis as Director City Planning for a period of twelve (12) months from 19 January 2015 be confirmed". The Commission received submissions that the hostilities against Mr Montague continued after Mr Stavis' appointment was determined. Against the chronology outlined above, the Commission is not satisfied that this is the case.

Mr Stavis physically commenced work on Monday, 2 March 2015. Mr Montague advised the councillors on 3 March 2015 and requested that, "as in the past, I would be grateful if I am copied in to all emails forwarded to Spiro".

After Ms Carpenter found out that Mr Stavis had started work, she called Mr Montague and asked him what was going on. She recalled that Mr Montague said words to the effect of "I've done the deal" and "I've been able to resolve the issue by giving the councillors what they wanted, which was the appointment of Spiro Stavis to the role of director of planning". Mr Montague accepted that he had said words to that effect to Ms Carpenter; although he preferred the word "accommodation" to the word "deal".

The "solutions-based" approach

The Commission received evidence that Mr Stavis had a "solutions-based" approach to issues of planning and development, and submissions concerning the propriety or otherwise of this approach. Mr Stavis described the approach as being facilitative, accepting that this included trying to find ways around development controls, rather than "just refusing applications". It was submitted for Mr Stavis that the "solutions-based" approach really described negotiating a version of a development application that the Council would accept and approve. It was submitted that this was not prohibited by statute, and the relationship between a developer and the Council is not necessarily adversarial.

However, there was also evidence that, when it was used in respect of the events considered by the Commission, the concept meant flexibility in the application of planning standards and finding solutions for developers when their projects were facing difficulties, which generally occurred when they were non-compliant with existing planning standards.

The Commission has not made any adverse findings on the basis of there being a solutions-based approach to issues of planning and development. However, it is appropriate to sound a note of caution about the risks of this approach. In doing so, it has also had regard to submissions from the Department of Planning, Industry and Environment, which make the point that "solutions-driven" could be used to describe an approach that was lawful in every respect or as a euphemism for "unduly close involvement by decision-makers in the subject matter of their decision". It is the latter with which the Commission is concerned. This is of particular concern in a system, where, as was submitted for Mr Stavis, there is a significant discretion afforded under the EPA Act. Should planners employed by a consent authority adopt the role of assisting a person to achieve their development goals, there is a real risk of this interest conflicting with the obligation to assess an application impartially.

This can be distinguished from councils providing the applicant with feedback, or an interim assessment, of their application and its deficiencies. There were a number of examples of this in evidence before the Commission, including preliminary assessment letters sent by the Council to the applicant.

In this investigation, it was of concern to the Commission, and the subject of findings in this report, that there was evidence that:

- Mr Stavis received direct approaches from two councillors, Mr Hawatt and Mr Azzi, sometimes described as "representations", about the assessment functions being exercised by Council staff in respect of particular applications
- these approaches occurred in circumstances where the code of conduct clearly stated that only the Council as a collegiate body could direct staff and that individual councillors should not influence or attempt to influence staff in the exercise of their functions
- the councillors who approached Mr Stavis directly to make "representations" on behalf of development applicants were involved in ensuring that he be appointed to the Council, in circumstances where they had undisclosed contacts with Mr Stavis in support of his application
- some of the applicants "represented" had close relationships with those two councillors, which were not disclosed in the appropriate forum
- Mr Stavis felt pressured by those approaches
- Mr Stavis became intimately involved in the assessment of the different proposals, to the exclusion of the staff with carriage of the assessment functions or planning proposals, and edited plans provided by applicants to indicate the changes required to get the development over the line.

In that context, the Commission was concerned with the risk of undue influence on a solutions-focused planner. These circumstances also raised for the Commission a concern about public confidence in the planning system and in local government.

Influence of Mr Hawatt and Mr Azzi after "the war"

Meeting of 5 March 2015

Although he kept his job, Mr Montague described himself in his evidence to the Commission as being "pretty battered and bruised" by the experience. The Commission received submissions to the effect that it was really Mr Robson and Mr Montague who won. In one respect, this is correct because Mr Montague's employment was not terminated. In another respect, the Commission is satisfied that the conduct of the parties thereafter suggests that Mr Hawatt, with the support of Mr Azzi, had a degree of influence over Mr Montague.

Mr Hawatt denied that Mr Montague became obliged to him for remaining general manager, stating that this would be to underestimate the intelligence of Mr Montague and that he was an independent-minded general manager. He also said of Mr Montague that "you could never try to twist his arm to do anything he doesn't want to do".

A lawfully intercepted telephone call made in December 2015 suggests that Mr Hawatt held a different opinion at the time. In the context of discussions about what a good appointment Mr Stavis had been, Mr Hawatt said of Mr Montague, "no I think – I think we taught him a lesson".

Further, the degree of influence held by Mr Hawatt is demonstrated by a meeting that occurred outside Council premises with Mr Stavis and the general manager. On the afternoon of 5 March 2015, Mr Hawatt organised a meeting at the Canterbury Leagues Club. An invitation was extended to a select group of councillors; Mr Hawatt described them as the "A-team" councillors. Mr Montague also attended. Mr Hawatt said that the purpose of the meeting was to introduce Mr Stavis to the other councillors and a general discussion about the issues that those councillors had.

Mr Montague's own evidence about the meeting supports the inference that Mr Hawatt, joined by Mr Azzi, had influence after "the war":

> *Well, they had their tail up now. They'd achieved what they wanted in appointing Stavis. Michael saw it as a green light to get the things that he wanted to be reviewed reviewed through a process, I suppose, over time in the rest of the, the remainder of the term.*

On the day before the meeting, Mr Hawatt used Mr Vasiliades' email address to send to himself an email addressed to Mr Stavis with a list of urban planning issues to discuss on the following evening. Mr Hawatt then sent to Mr Stavis from his home email address a list of planning issues "of concern" to discuss with him the following day. The issues included timeliness of responding to Council resolutions and reviewing the Council's DCP controls.

Mr Stavis told the Commission that he attended the meeting because Mr Montague told him that he wanted to introduce him to councillors, and assumed that Mr Montague organised the meeting.

Mr Hawatt denied that, by calling this meeting and placing that list of issues before Mr Stavis, he was seeking to set Mr Stavis' "work plan" at the Council. He also denied that there was anything wrong with organising the meeting. He described it as an "unofficial meeting" where nothing was voted on. That it was unofficial and did not involve

the whole Council illustrates why it was improper. It was not a meeting of the CDC, which would be the ordinary forum for the Council to provide direction to its planning staff. This would have enabled other councillors to be present and for the public to be aware of the agenda and attend. It was not a councillor workshop, to which all other councillors would be invited. There was no report of the meeting to the full Council. Mr Hawatt invited only the councillors who he perceived to support him. Mr Hawatt did not accept that the effect of having the meeting on 5 March was to influence the work of Mr Stavis without interference from other councillors.

Mr Montague said of the meeting that Mr Hawatt "just wanted to make it abundantly clear to Spiro that this is what their agenda was for the Council area". He also said that "this particular meeting … was designed to impress on, on Spiro Stavis what was expected of him as far as the group was concerned". Mr Montague said that the meeting was on his own time, and he saw himself as more of an observer at the meeting. He said that he was not really interested in the meeting as he had heard it all before from Mr Hawatt.

Mr Montague also said that:

> *I didn't see any harm in attending that meeting if it was going to assist the council in feeling comfortable with the person they had appointed as manager of planning, and anything that was considered would result in a report to the relevant committee or to the council at a subsequent time. Nothing, there was nothing there that committed anybody to anything.*

Further, Montague said that at this stage "it was Hawatt's show, not mine". It was submitted for Mr Montague that this meeting was nothing more than the communication by councillors, who held a majority of the floor of Council, of their political and planning priorities, and that no further significance can be attached to it.

However, the Commission is satisfied that, the fact that Mr Montague acceded to the meeting with his new director of city planning, and attended it without verifying that all councillors had been invited, confirms Mr Montague's attitude to Mr Hawatt's influence at the Council following "the war". In this respect, the Commission accepts the submission from Mr Stavis that this meeting signalled to Mr Stavis that Mr Hawatt was the voice of the Council and that Mr Hawatt's directions about the business of Council had the support of Mr Montague.

The Commission is satisfied, having regard to all of the events surrounding Mr Stavis' appointment and the circumstances of this meeting, that this was an attempt to influence Mr Stavis in the exercise of his functions as director of city planning.

Confidential Council document in Mr Vasil's possession

At around this time, an A3-document was prepared by Council's planning staff setting out the work schedule and status updates on projects within the planning division. The document included references to the status of planning proposals within Council and the priority allocated to different projects. The document was confidential to the Council.

A copy of the document was located in files kept by Mr Vasil at the Ray White real estate agency when a search warrant was executed there. Mr Vasil said that he was given the document by Mr Hawatt. Mr Hawatt said that he thought that Mr Occhiuzzi gave him a copy of a document like that; although, it could not be the same copy found in Mr Vasil's office because that recorded events that happened after Mr Occhiuzzi left the Council. Mr Hawatt said that he did not recall giving such a document to Mr Vasil, and could not recall receiving a copy of the document from Mr Stavis. He accepted that it was a confidential document and said that he would not normally give confidential documents to anyone.

The Commission is satisfied that, having regard to Mr Vasil's evidence and having regard to the relationship between Mr Hawatt and Mr Vasil, Mr Hawatt was the source of the document found in Mr Vasil's file. It is not necessary to determine who was the source of the document for Mr Hawatt. As a councillor, Mr Hawatt was entitled to access to such a document.

Contact with Mr Stavis at Council

Mr Hawatt had a very significant amount of contact with Mr Stavis during his time as director of city planning. Between the day Mr Stavis started work on 2 March 2015 and 11 May 2016, the latter being the day before council amalgamations, Mr Hawatt and Mr Stavis exchanged over 600 text messages. The Commission also had in evidence a number of email exchanges and lawfully intercepted telephone conversations between the two. Mr Stavis also met with Mr Hawatt, and to some extent with Mr Azzi, about matters in which they had an interest. Mr Stavis attended meetings at Mr Azzi's house and had been to Mr Hawatt's house. Mr Stavis' perspective of the relationship can be seen from a text message on 21 April 2016 when Mr Hawatt had been overseas, "Hi Mike, miss yr advice/guidance, too much happening. When ru back? Spiro".

In late 2015 to mid-2016, the Commission also lawfully intercepted a number of telephone calls between Mr Hawatt and Mr Stavis in which Mr Stavis reported to Mr Hawatt on his work and sought Mr Hawatt's guidance as to how he should do his job.

The Commission has also identified examples in which it found that Mr Azzi directed Mr Stavis as to how he should do his job, in relation to 538-546 Canterbury Road, Campsie (chapter 8), and the Doorsmart project (chapter 9).

In his evidence to the Commission, Mr Stavis accepted that in his work as director of city planning he prioritised the unwritten key performance indicators of Mr Khouri, Mr Vasil, Mr Montague, Mr Hawatt and Mr Azzi of finding solutions for non-compliant development proposals over his contractual key performance indicators. In particular, and as is set out later in this report, Mr Stavis allowed himself to be guided in how he should do his work by the wishes expressed by Mr Montague (who was authorised to direct Mr Stavis) and Mr Hawatt and Mr Azzi (who were not).

It was submitted on behalf of Mr Stavis that he was in a very difficult position once he started work as director of city planning. He was employed by a pro-development Council with the indication that he was to work collaboratively with the Council and negotiate outcomes with interested parties. The Commission has had regard to those circumstances in its findings in this report.

It was also submitted that it was an overreach to suggest that the selection process necessarily meant that Mr Stavis was thereafter influenced and controlled by Mr Hawatt and Mr Azzi because on this analysis all persons with a job are beholden to the person who accepted their application. The Commission does not accept this submission, having regard to the particular circumstances in which Mr Stavis was hired, including the private contact with Mr Hawatt and the very public "war" driven by Mr Hawatt, with the support of Mr Azzi, which secured his position.

Requests for assistance

While employed as director of city planning, Mr Stavis asked for assistance from Mr Hawatt with some matters touching on his work life.

The 12-month period of Mr Stavis' first contract was due to expire in January 2016. In October 2015, Mr Stavis sent a text message to Mr Hawatt:

> *Hi Mike, is there any way I can get my contract signed before December? Why can't it happen now. I'm worried about amalgamations etc. I haven't spoken to Jim. What do u think?*

Mr Hawatt replied, "OK I will follow up with Jim when I get back". Mr Stavis responded:

> *Thx mate. You are a true gentleman. There's no reason why I can't sign now to extend and to align with the other directors. Pls don't mention I said anything, I'm just worried that's all.*

Mr Hawatt responded, "No problem. I will take care of it".

Ten days later, at 9.49 pm, Mr Stavis sent Mr Hawatt another message:

> *Hi Mike, sorry for sending you this message so late. I'm really worried mate. Can't I sign the contract extension this week or next at the latest? Please help me mate. I've busted my arse to do everything I've been asked, I just need piece of mind. Anyway, please let me know. Cheers mate*

Mr Hawatt repled, "OK leave it to me". A few days later, he advised Mr Stavis:

> *All OK. Contract being prepared and council resolution adopted no issues at all. I told him* (Mr Montague) *that people from other councils were asking me about you for a job with them. I said we don't want to lose him and he agrees. Don't worry it all will be done soon. He can't change his mind anyway. Michael*

Mr Stavis responded, "thanks mate much appreciated. Your [sic] a true gentleman".

In March 2016, Mr Stavis also sought Mr Hawatt's assistance to have his salary increased, asking by text message:

> *Hi mate. Can you please talk to Jim about the pay rise he promised, he said he would do ages ago. Pls don't say that I said anything.*

Mr Hawatt said that he would do it subtly, and Mr Stavis said that he had also mentioned the issue to "Pierre".

Each of these requests for assistance was despite Mr Stavis knowing that Mr Montague had responsibility for his conditions of employment, yet he sought Mr Hawatt's help in that respect. That he did so, and that he also mentioned it to Mr Azzi, confirmed that at the time he thought that Mr Hawatt and Mr Azzi had a considerable degree of influence with Mr Montague.

Attempts to protect Mr Stavis and Mr Montague after amalgamation

On 17 December 2015, Mr Hawatt and Mr Vasil had a lawfully intercepted conversation in which Mr Hawatt told Mr Vasil that the amalgamation would definitely be between Canterbury and Bankstown councils. They discussed other councils that would amalgamate, and then Mr Vasil asked, "so is Spiro safe in Bankstown?". Mr Hawatt said, "we're gonna protect him … we'll protect all the people, that staff we have". Mr Vasil said

"yeah no he – be careful he doesn't start thinking about". Mr Hawatt replied, "no – no- no- no I told him – I told him".

The Commission is satisfied this exchange demonstrates that Mr Vasil was concerned about Mr Stavis leaving the Council.

On 26 March 2016, as amalgamations approached, Mr Azzi and Mr Hawatt had a lawfully intercepted telephone call in which they discussed what would happen to staff in the new council. Mr Azzi reported to Mr Hawatt a conversation that he had with the then general manager of Bankstown Council, Matthew Stewart, telling Mr Hawatt that he said to Mr Stewart:

> *…look, look Matt, in the whole of Canterbury, all of them are hopeless … I agree. I don't want – we don't want anyone from Canterbury only one person we're interested about and I will go all the way behind him and push. You don't have to upset and you know when you upset me I get angry very bad. You take care of this one, I don't care about the rest. He said what about Jim I said you have to work it out with him.*

It is clear that Mr Azzi was not talking about Mr Montague when he said that there was only one person he was interested in at the Council. It is also consistent with all of the other information gathered in this inquiry that he did not have much regard for any planning staff with the exception of Mr Stavis. The Commission is satisfied that Mr Azzi was reporting to Mr Hawatt that he told Mr Stewart he would push for Mr Stavis to remain employed with the amalgamated council. This conclusion is confirmed by the events of a meeting between Mr Azzi, Mr Hawatt, Mr Montague and representatives of Bankstown Council a few days later.

On 30 March 2016, a meeting involving representatives of the Canterbury and Bankstown councils was held at Mr Khouri's house. Mr Montague, Mr Hawatt and Mr Azzi attended from the Council, and Mr Stewart and Khal Asfour (mayor) attended from Bankstown. Mr Robson, the mayor of the Council, was not invited.

Mr Stewart told the Commission that, at that meeting, Mr Hawatt and Mr Azzi:

- praised Mr Montague for being the "greatest general manager" but that he was at the end of his career and Mr Stewart would be the future
- agreed that Mr Montague would retire and Mr Stewart would be appointed by the government, and that, when this happened, Mr Stewart should bring Mr Montague back as a consultant on the same pay and conditions.

Mr Azzi denied that anything about Mr Stewart hiring Mr Montague was said at the meeting, stating that he could not force anybody or tell anybody which job to take. Mr Hawatt said that he did remember something about trying to persuade Mr Stewart to keep Mr Montague on as a consultant. Mr Montague agreed that there was a discussion about him providing services after the transition.

The Commission is satisfied that Mr Stewart was a reliable witness whose evidence can be accepted.

Mr Stewart also told the Commission that Mr Montague and Mr Hawatt each tried to sell Mr Stavis to him. Mr Montague said that Mr Stavis was "the best planner", and Mr Hawatt said that Mr Stavis was "forward thinking" and "gets results". Mr Stewart did not agree to any of the proposals, and tried to say that the process was out of his hands and that there was no guarantee that either would be the general manager. He also said that he would not have Mr Stavis as director of city planning in his Council, and that, if he were to be appointed general manager, he would go through a process and recruit his team. When asked to clarify who said what at the meeting, Mr Stewart indicated that "councillor Hawatt did all of the verbalisation" and that "councillor Azzi's contribution was small but in support of the things that councillor Hawatt was saying".

Mr Azzi denied that names of potential directors were discussed at this meeting. Mr Hawatt said that he could not recall Mr Stewart saying that he would not have Mr Stavis as one of the directors. Of his contact with Mr Azzi about Mr Stavis, he said that his discussions were hypothetical and political discussions, and that Mr Stavis had been calling with concerns about his position. He said that they may have given him some assurance that they would speak to Mr Stewart about his position.

Mr Montague recalled that Mr Hawatt had tried to sell Mr Stavis, and Mr Stewart saying that he would not have him.

Having regard to the events surrounding Mr Stavis' appointment, and the evidence set out in the balance of this report, the Commission is satisfied that the relationship which Mr Hawatt and, to a lesser extent, Mr Azzi, developed with Mr Stavis and Mr Montague after "the war" gave them a degree of influence in planning and development at the Council. Their efforts to keep Mr Stavis and/or Mr Montague in place were directed at maintaining that degree of influence.

Contact after amalgamation

The relationship that developed between Mr Stavis and Mr Hawatt can be seen in the contact that occurred after the two councils amalgamated, when Mr Stavis remained in his job but Mr Hawatt did not. After amalgamation was

proclaimed at 12.10 pm on 12 May 2016, Mr Hawatt had no role to play in representing constituents. Despite that fact, at around 4 pm on the afternoon that amalgamations were proclaimed, Mr Hawatt called Mr Stavis and told him that he would "have to continue pressuring you but privately". Mr Stavis said, "no problem at all, you know that".

Mr Hawatt and Mr Stavis remained in contact through May into June 2016 about how planning matters were being dealt with in the amalgated council, and tactics that Mr Stavis could use to ingratiate himself with Mr Stewart, who had been appointed interim general manager and was considering who would be appointed to which positions within the organisation.

In one of those conversations, Mr Stavis told Mr Hawatt that he confided in him more than anyone else, and he valued his judgment. In another, Mr Hawatt expressed his approval of the steps Mr Stavis had taken to ingratiate himself with Mr Stewart. Mr Stavis said that, "he was talking as if I had the job", and Mr Hawatt said, "oh fantastic – fantastic". Mr Stavis also reported to Mr Hawatt that he had received a call from Mr Azzi enquiring about a council business paper, and he let Mr Stewart know about that call. Between them, Mr Hawatt and Mr Stavis agreed to keep their call confidential.

On 3 June 2016, Mr Stavis told Mr Hawatt that he wanted to see him face-to-face. He said that "Matt Stewart is on my arse about the processing times … and he's been auditing me". Mr Stavis said that, "it's not going to be the same" and "we got to play it differently". Mr Hawatt said that they would have a chat about that.

On 10 June 2016, Mr Hawatt asked Mr Stavis if he could "pass by us" a legal opinion relating to a developer's development application, and Mr Stavis responded with a summary of the opinion. Mr Stavis said that it was likely he did not get permission to disclose the advice to a third party. He saw it as having raised a potential issue about permissibility with the proponent and conveying the results of that to Mr Hawatt and to the proponent.

From these contacts, the Commission concludes that Mr Stavis was happy to take guidance from Mr Hawatt on how applications should be approached.

Mr Hawatt was happy to continue his relationship with Mr Stavis after amalgamation because he hoped, through Mr Stavis, to be able to continue to exert influence at the amalgamated council in planning and development. That both Mr Stavis and Mr Hawatt sought to conceal their contacts indicates that they knew that the nature and extent of that contact was improper.

Development application processing times

When giving evidence at the public inquiry, Mr Montague, Mr Hawatt and Mr Azzi each suggested that they were dissatisfied with Mr Occhiuzzi because of development application processing times at the Council. Each instructed Mr Stavis that this was a concern which the new director needed to address. Each told the Commission that they thought Mr Stavis lived up to their expectations, and did a good job. However, evidence gathered by the Commission showed that development application processing times grew longer, rather than shorter, while Mr Stavis was the director. There was also an increase in the development applications determined in the 2014 – 15 year, which is indicative of an increased work load and could, to an extent, explain the increase in assessment times.

In June 2016, Mr Stewart drew Mr Stavis's attention to the fact that Bankstown Council had significantly shorter development application processing times than Canterbury. On 17 June 2016, in a lawfully intercepted conversation with Mr Hawatt, Mr Stavis suggested that this was because Bankstown refused non-complying development applications, where as at Canterbury they tried to "help people" and "sort it out".

Vulnerability of Mr Stavis

Some matters in Mr Stavis' personal life rendered him vulnerable to influence from people in a position to cause his employment to be terminated. In 2012, Mr Stavis' town planning business, SPD Planning, had ceased to operate for financial reasons. Mr Stavis owed money to staff for wages and superannuation, and had entered into deeds of arrangement for the payment of debt, but did not disclose these debts to the Council. At the time that Mr Stavis gave evidence in the Commission's public inquiry, he was continuing to make superannuation payments to one former staff member of SPD Planning.

When he was appointed, Mr Stavis' salary increased from $110,000 per annum (plus superannuation) to $250,000 per annum (including superannuation). Understandably, the increase was welcome.

Mr Hawatt, Mr Azzi and Mr Montague were each people who could influence whether Mr Stavis could continue to hold the position of director of city planning, as each had demonstrated to Mr Stavis in the tussle over whether he would be employed in the first place.

Mr Stavis also accepted in the public inquiry that he perceived that there were developers who had indirect influence over whether he would continue to hold his position as director of city planning because of their

relationship with Mr Hawatt, Mr Azzi and Mr Montague. Mr Stavis accepted that, as a result, Mr Hawatt, Mr Azzi, Mr Montague and several property developers were able to influence him in what he did and did not do in his job at the Council.

It was submitted for Mr Stavis that he effectively found himself in a situation of coercive control, and that his conduct was a pragmatic approach to a challenging work environment, whereby significant pressure was bought to bear on him by his superiors, including the general manager, who permitted Mr Hawatt and Mr Azzi to actively involve themselves in Mr Stavis' work. It was submitted that the code of conduct required Mr Stavis to carry out lawful directions by any person having authority to give such directions, and to give effect to lawful decisions, policies and procedures of the Council, whether or not the staff member agreed with or approved of them. It is sufficient to observe here that the general manager was a person entitled to give Mr Stavis directions; Mr Hawatt and Mr Azzi were not entitled to give Mr Stavis directions.

Mr Stavis gave some evidence that the general manager told all of the directors to look after the councillors, and in particular Mr Hawatt and Mr Azzi. He understood from the general manager the nature of the concerns that the councillors had with the former director, and that the role had historically been volatile. It was also submitted for Mr Stavis that regard should be had to the key performance indicators in his contract, including those that required he respond to councillor enquiries within a timely manner.

The Commission does not accept that the evidence rises to the level that Mr Stavis was coerced in the performance of his functions; although, it has identified some occasions on which there were attempts to influence him. However, the Commission does accept that there were circumstances particular to the role he took on which influenced the way in which he exercised his functions, including his perception that particular people could influence whether he kept his job. The Commission has taken those matters into account in the findings in this report.

The Commission has also had regard to the evidence that suggests that Mr Stavis was not an unwilling participant in the relationships that developed, particularly with Mr Hawatt, including that Mr Stavis sought his assistance with his contract renewal and pay rise.

Corrupt conduct

The Commission's approach to making findings of corrupt conduct is set out in Appendix 2 to this report.

Jim Montague

On or about 8 December 2014, Mr Montague appointed Mr Stavis as Council's director of city planning believing that he was not the most meritorious candidate for that position because he improperly allowed himself to be influenced by pressure from Mr Hawatt and Mr Azzi to make the appointment.

Such conduct on the part of Mr Montague constituted or involved the partial exercise of his official functions within the meaning of s 8(1)(b) of the ICAC Act.

The Commission is satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Montague had committed a disciplinary offence, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 3.5, requiring that he always act in the public interest
- clause 3.6, requiring that he not act for an ulterior purpose or for an irrelevant ground.

The Commission is satisfied that the breach is substantial because it involved the partial exercise of a legislative function to appoint on merit to a senior role in the planning department at the Council.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that this was serious corrupt conduct for the purposes of s 74BA(1) of the ICAC Act. Mr Montague was the most senior member of staff within the Council with ultimate responsible for the day-to-day management of the Council. The position to which he appointed Mr Stavis was a very senior position within the Council's hierarchy, and was seriously in breach of the legislative requirement to appoint staff on merit. The effect of the appointment can be seen in the balance of this report.

Michael Hawatt

The interview questions

On 16 November 2014, Mr Hawatt provided Mr Stavis with access to the "suggested interview questions" for the position of director of city planning, which Mr Hawatt had obtained in the course of his role as a councillor of the Council, and allowed Mr Stavis to photograph them; thereby, improperly advantaging Mr Stavis in his application for the position.

Such conduct on the part of Mr Hawatt constituted or involved a breach of public trust, pursuant to s 8(1)(c) of the ICAC Act.

Mr Hawatt held his position as a councillor on public trust. He was appointed to the interview panel by Mr Montague by reason of that position, and obtained information about the interview by reason of that position. In participating in the selection process, by reason of his public position on the Council, he was obliged to act honestly and in the public interest.

Providing Mr Stavis with access to the interview questions prior to the interview breached the public's trust because it was dishonest, as it was done without the consent or knowledge of the panel (with the exception of Mr Azzi), and partial in the sense that it gave one of the interview candidates a significant advantage over the others. It corrupted, in the ordinary sense of the word, the interview process for a very senior and significant role within the Council.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider the common law offence of misconduct in public office; in *Obeid v The Queen* (2017) 96 NSWLR 155 at [60], Bathurst CJ set out the elements of the offence as follows:

1) *a public official*
2) *in the course of or connected to their public office*
3) *wilfully misconducts himself, by act or omission, for example, by wilfully neglecting or failing to perform his duty*
4) *without reasonable excuse or justification, and*
5) *where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.*

As a councillor, Mr Hawatt was a public official. The conduct was sufficiently connected to his office that it constituted a "misuse", as it was by reason of his position as a councillor that he was invited to sit on the interview panel and given access to the interview questions. Sharing questions with a candidate for the interview panel without the authorisation or knowledge of other members of the panel, and without any other candidate being given the same advantage, was misconduct because it gave Mr Stavis an advantage in a process where there was an obligation and expectation of fairness and where there was a public interest in the appointment of that candidate. The conduct was sufficiently serious, having regard to the seniority and significance of the position involved. The Commission is satisfied that Mr Hawatt would not have engaged in the conduct but for his improper desire to favour Mr Stavis.

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Hawatt committed the offence of misconduct in public office.

The Commission is also satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Hawatt had committed a disciplinary offence, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 3.1(c), requiring that he not act in a way which was improper or unethical
- clause 3.1(j), requiring that he not act in a way that might give rise to the reasonable suspicion or appearance of improper conduct or partial performance of his public duties
- clause 3.5, requiring that he always act in the public interest
- clause 3.6, requiring that he not act for an ulterior purpose
- clause 5.10, requiring that he not take advantage of his position or functions in order to obtain a private benefit for another person (here, the benefit went to Mr Stavis).

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that this is serious corrupt conduct for the purposes of s 74BA(1) of the ICAC Act because of the seniority and significance of the position involved, and the very significant functions for which that position was responsible. It gave Mr Stavis an unfair advantage during the interview process and put him in a position of secret obligation to the person who gave him that advantage.

The Commission is satisfied that, as a councillor, Mr Hawatt engaged in misconduct as defined by s 440F of the LGA.

Failure to disclose interest to interview panel

By arranging to meet with Mr Stavis before the interview panel and showing and allowing him to copy the interview questions, Mr Hawatt gave Mr Stavis an advantage that he afforded to no other candidate. That this was a conflict of interest in respect of his public duty to provide impartial advice to the general manager as a member of the interview panel is apparent.

This was a non-pecuniary interest that, in the ordinary course, should have been disclosed to the panel pursuant to Council's code of conduct. The panel should also have been made aware that Mr Stavis had a copy of the interview questions in advance. Mr Montague told the Commission that, had he known that Mr Stavis had the interview questions, in his mind Mr Stavis was cheating and he could have aborted the whole interview process.

However, in the present circumstances, the Commission declines to make a corrupt conduct finding against Mr Hawatt in respect of the failure to disclose his interest to the interview panel. Concealment of the conduct from the interview panel has also been taken into account in the previous corrupt conduct finding; in the sense that it gave Mr Stavis an unfair advantage that would likely have been resolved had the conduct been disclosed, and put him under a secret obligation to Mr Hawatt.

Moving for Mr Montague's dismissal

Between about 24 December 2014 and 18 February 2015, Mr Hawatt misused his position as a councillor of the Council to pressure improperly Mr Montague to appoint Mr Stavis as Council's director of city planning.

Within the meaning of s 8(1)(a) of the ICAC Act, such conduct on Mr Hawatt's part adversely affected, or could have adversely affected, either directly or indirectly, the honest or impartial exercise of Mr Montague's official function of appointing senior staff.

The conduct could also constitute the dishonest or partial exercise of his own official functions within the meaning of s 8(1)(b) of the ICAC Act. His official functions as a councillor included calling for an extraordinary meeting under s 366 of the LGA. Although he purported to exercise that function in the public interest, his actual purpose was to secure the employment of Mr Stavis as director of city planning, regardless of Mr Montague's view of the merit of the appointment or the circumstances in which he had decided to withdraw the appointment. This was because Mr Hawatt considered that Mr Stavis would take an approach to planning and development that would not only be more conducive to intensive development but would avoid or dilute the rigours of legislative requirements.

For the purposes of s 8(2)(c) of the ICAC Act, and for the reasons set out below, the conduct could also constitute conduct adversely affecting, either directly or indirectly, the probity of the exercise of functions by Mr Montague and which could involve blackmail.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider the offence of blackmail, under s 249K(1)(b) of the *Crimes Act 1900* ("the Crimes Act"). That offence constitutes the making of an unwarranted demand, with menaces, with the intention to obtain a gain or cause a loss to another or with the intention of influencing the exercise of a public duty. A demand with menaces is "unwarranted" unless the person believes that he or she has reasonable grounds for making the demand and reasonably believes that the use of the menaces is a proper means of reinforcing the demand (s 249L(1) of the Crimes Act).

It was submitted for Mr Hawatt that his actions could not constitute "demands" because he simply intended to protect the councillors and the ratepayers. For the reasons outlined in this chapter, the Commission does not accept this submission and considers that it was inherent in the situation (and apparent to Mr Montague) that the conduct was directed to Mr Montague exercising his functions in a particular way.

"Menaces" includes an express or implied threat of any action detrimental or unpleasant to another person (s 249M(1)(a) of the Crimes Act). A threat does not constitute a menace unless the threat would cause (s 249M(2) of the Crimes Act):

- an individual of normal stability and courage to act unwillingly in response to the threat, or
- the particular individual to act unwillingly in response to the threat and the person who makes the threat is aware of the vulnerability of the particular individual to the threat.

"Public duty" is defined to include a power, authority, duty or function that is conferred on a person as the holder of a public office.

Here, Mr Montague held the function of appointing or dismissing senior staff as the holder of the public office of general manager. The "unwarranted demand" was to confirm the appointment of Mr Stavis as the director of city planning. The Commission has concluded that Mr Hawatt did not believe that he had reasonable grounds for making the demand, because he was seeking to achieve the employment of Mr Stavis regardless of Mr Montague's view of the merits of the candidates and the reasons for withdrawing the appointment.

The "menaces" in this circumstance were explicit, in that Mr Hawatt publicly threatened Mr Montague with termination of his employment at the Council, which was both detrimental and unpleasant to him. The Commission is satisfied that this threat would cause Mr Montague to act unwillingly and that Mr Hawatt was aware of the vulnerability of Mr Montague to the threat of losing his position of general manager. That his purpose was to influence Mr Montague in the exercise of his function to appoint Mr Stavis is clear also from the negotiations he engaged in behind the scenes, for Mr Montague's early retirement (a more favourable and less unpleasant outcome for Mr Montague) in exchange for the employment of Mr Stavis.

The conduct had the intended consequences of having Mr Montague confirm the appointment of Mr Stavis, although, Mr Montague believed that it was not on merit *and* that the appointment posed a significant reputational risk to the Council, which was an effect on the probity of the exercise of Mr Montague's functions.

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Hawatt committed an offence under s 249K(1)(b) of the Crimes Act.

It is also relevant to consider the common law offence of misconduct in public office. As a councillor, Mr Hawatt was a public official, and the conduct was in the course of or connected to his public office. That it was misconduct is apparent in that councillors were required to always act in the public interest, and not for ulterior motives or purposes, and the Commission is satisfied that Mr Hawatt's conduct was for the ulterior motive of ensuring Mr Stavis' appointment. That the misconduct was wilful, and merited criminal punishment, is apparent from the course of conduct involved, from showing Mr Stavis the suggested interview questions to Mr Hawatt's other private dealings and contacts with Mr Stavis. The Commission is satisfied that there was no reasonable excuse.

Submissions in reply for Mr Hawatt were that he was motivated by a desire to protect Council and ratepayers. This is contrary to the Commission's findings set out in this chapter. Conduct will only constitute misconduct in public office if the person would not have engaged in the conduct but for the improper motivation (*Maitland v R; Macdonald v R* [2019] NSWCCA 32). The Commission is satisfied that the concern expressed by Mr Hawatt for the financial liability and the desire to get in new blood was false, and therefore that the conduct would not have been engaged in but for the improper motivation.

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Hawatt committed misconduct in public office.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that this is serious corrupt conduct for the purposes of s 74BA(1) of the ICAC Act. The function that Mr Hawatt was trying to influence was significant; generally in that it concerned the appointment of senior staff, and specifically because it concerned the appointment of the director of city planning. The weight of the evidence before the Commission demonstrated the significance of this appointment in the context of the growth with which the Council was grappling at the time.

Further, the means used by Mr Hawatt to exert pressure on Mr Montague was a serious misuse of his functions as a councillor. Mr Hawatt did not care why Mr Montague attempted to withdraw the offer, but wanted to secure the appointment of Mr Stavis as director of city planning.

The Commission is satisfied that, as a councillor, Mr Hawatt has engaged in misconduct as defined by s 440F of the LGA.

Offering Mr Montague a gratuity payment

On 13 January 2015, Mr Hawatt misused his position as a councillor of the Council by offering Mr Montague a gratuity payment of 20 weeks' salary if he appointed Mr Stavis as the Council's director of city planning and retired early.

This conduct on the part of Mr Hawatt could adversely affect the honest or impartial exercise of Mr Montague's functions of appointing a director of city planning, within the meaning of s 8(1)(a) of the ICAC Act. If the threat of termination was the stick, the offer of early retirement and a gratuity payment was the carrot, enticing Mr Montague with a way out on his own terms.

Further, the conduct could constitute a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act. It constituted an offer to use his function of voting on Council and dealing with other members of the Council's collegiate body to use Council funds for an improper purpose; namely, to secure the appointment of Mr Stavis as director of city planning regardless of Mr Montague's view of the merits of the candidates and the reasons for withdrawing the appointment. This was a misuse of his position because the power was conferred to advance the public interest.

It was submitted for Mr Hawatt that any motion about the entitlements of the general manager would be subject to public scrutiny from Council ratepayers. This is not consistent with evidence in the public inquiry, which indicated that questions about the general manager's entitlements had previously been dealt with in closed council sessions.

It was also submitted for Mr Hawatt that each voting councillor would bring their own mind to the decision. That can be accepted. However, it is not to the point. The Commission has found that the offer constituted an offer to use his function of voting on Council and dealing with members of Council's collegiate body, on a topic which he had demonstrated support, for an improper purpose.

For the purpose of s 9(1)(a) of the ICAC Act it is relevant to consider s 249B(2)(a)(i) of the Crimes Act, which provides:

> *(2) If any person corruptly gives or offers to give to any agent, or to any other person with the consent or at the request of any agent, any benefit –*
>
> *(a) as an inducement or reward for or otherwise on account of the agent's-*
>
> *(i) doing or not doing something, or having done or not having done something…*
>
> *the firstmentioned person is liable to imprisonment for 7 years.*

In this circumstance, the agent was Mr Montague, as a person employed by the Council as general manager. The principal was the Council, and the inducement or reward was the 20 weeks' salary (which Mr Montague was not otherwise entitled to under his contract if he retired) and the withdrawal of the motion for termination, allowing Mr Montague to retire on his own terms, in exchange for the appointment of Mr Stavis, which was a matter "in relation to the affairs or business" of the Council.

That the offer was made corruptly can be inferred from all of the circumstances known to the Commission, having regard to standards of conduct normally held. It was made to influence Mr Montague in the otherwise impartial and honest exercise of public functions, and (as is apparent from the correspondence which Mr Hawatt sent after the offer was rejected) was made without the authority of the Council. That it was made without authority, and that Mr Hawatt may not have been able to follow through, does not detract from the fact of the offer. He could certainly follow through on the offer to withdraw the motion for Mr Montague's termination, and he had the ability to exercise his functions of dealing with other councillors and voting to pursue the offer.

The Commission is satisfied, for the purpose of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Hawatt committed the offence of corruptly offering a benefit pursuant to s 249B(2)(a)(i) of the Crimes Act.

It is also relevant to consider the common law offence of misconduct in public office. Mr Hawatt made the offer in connection with his public office, but he was not authorised by the Council to make that offer. It was an offer intended to influence Mr Montague in the otherwise impartial and honest exercise of his public functions. As such, it was wilful misconduct, and without reasonable excuse or justification.

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Hawatt committed misconduct in public office.

The Commission is also satisfied, for the purpose of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Hawatt had committed a disciplinary offence, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 3.1(c), prohibiting acting in a way which is improper or unethical
- clause 3.1(j), prohibiting acting in a way which may give rise to the reasonable suspicion or appearance of improper conduct or partial performance of public or professional duties
- clause 5.9, prohibiting council officers from using their position to influence other council officials in the performance of their public or professional duties to obtain a private benefit for themselves or someone else
- clause 5.10, prohibiting council officers taking advantage (or seeking to take advantage) of their status or position with or functions they performed at council in order to obtain a private benefit for themselves or anyone else.

It was submitted for Mr Hawatt that his conduct could not involve attempting to obtain a private benefit for Mr Stavis because it was not a private benefit for

Mr Stavis to have a legally valid work right honoured. The Commission does not accept that submission. It is clear from the events described in this chapter that Mr Hawatt wanted Mr Montague to honour the contract in a particular way; that is, by confirming Mr Stavis' employment, and not by terminating the offer of employment pursuant to contract.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that this is serious corrupt conduct for the purposes of s 74BA(1) of the ICAC Act. The functions that Mr Hawatt sought to affect were significant, particularly in the context in which the Council was operating at the time. Further, it constituted an attempt to have the general manager agree to retire on more favourable terms outside a proper process. It is a very serious matter for the office of the general manager of the Council to be affected by improper influence.

The Commission is satisfied that, as a councillor, Mr Hawatt engaged in misconduct as defined by s 440F of the LGA.

Code of conduct complaint

By a document dated 7 January 2015, Mr Hawatt provided information and instructions for, and signed, a code of conduct complaint concerning conduct by Mr Montague. Any person in the community can make a code of conduct complaint. Although the complaint was made in his capacity as a councillor, the Commission is not satisfied that the making of a code of conduct complaint is an official function of a councillor such that the conduct could fall within s 8(1)(b) of the ICAC Act. The Commission does not make a corrupt conduct finding in respect of this conduct.

Pierre Azzi

The interview questions

On 16 November 2014, Mr Azzi allowed Mr Stavis to photograph Mr Hawatt's copy of the "suggested interview questions" for the position of director of city planning; thereby, improperly advantaging Mr Stavis in his application for that position.

Such conduct on the part of Mr Azzi constituted or involved a breach of public trust, pursuant to s 8(1)(c) of the ICAC Act.

Mr Azzi held his position as a councillor on public trust. He was appointed to the interview panel by Mr Montague by reason of that position, and in participating in that selection process, by reason of his public position on council, he was obliged to act honestly and in the public interest.

Allowing Mr Stavis to photograph the interview questions prior to the interview breached the public's trust because it was dishonest, as it was done without the consent or knowledge of the panel (with the exception of Mr Hawatt), and partial in the sense that it gave one of the interview candidates a significant advantage over the others. It corrupted, in the ordinary sense of the word, the interview process for a very senior and significant role within the Council.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider the common law offence of misconduct in public office. As a councillor, Mr Azzi was a public official. The conduct was sufficiently connected to his office such that it constituted a "misuse", as it was by reason of his position as a councillor that he was invited to sit on the interview panel and entrusted with responsibilities in that respect. Permitting a candidate for the interview panel to take a copy of the interview questions without the authorisation or knowledge of other members of the panel, and without any other candidate being given the same advantage, was misconduct because it gave Mr Stavis an advantage in a process where there was an obligation and expectation of fairness and where there was a public interest in the appointment of that candidate. The conduct was sufficiently serious, having regard to the seniority and significance of the position involved. The Commission is satisfied that Mr Azzi would not have engaged in the conduct but for his improper desire to favour Mr Stavis.

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Azzi committed misconduct in public office.

The Commission is also satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Azzi had committed a disciplinary offence, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 3.1(c), requiring that he not act in a way which was improper or unethical
- clause 3.1(j), requiring that he not act in a way that might give rise to the reasonable suspicion or appearance of improper conduct or partial performance of his public duties

- clause 3.5, requiring that he always act in the public interest
- clause 3.6, requiring that he not act for an ulterior purpose
- clause 5.10, requiring that he not take advantage of his position or functions in order to obtain a private benefit for another person (here, the benefit went to Mr Stavis).

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that this is serious corrupt conduct for the purposes of s 74BA(1) of the ICAC Act because of the seniority and significance of the position involved, and the very significant functions for which that person was responsible. It gave Mr Stavis an unfair advantage during the interview process and put him in a position of secret obligation to the person who gave him that advantage. The Commission has also had regard to the obligations which Mr Azzi had as a councillor to act in the public interest.

The Commission is satisfied that, as a councillor, Mr Azzi engaged in misconduct as defined by s 440F of the LGA.

Moving for Mr Montague's dismissal

Between about 24 December 2014 and 18 February 2015, Mr Azzi misused his position as a councillor of the Council to pressure improperly Mr Montague to appoint Mr Stavis as Council's director of city planning.

Such conduct on Mr Azzi's part adversely affected, or could have adversely affected, either directly or indirectly, the honest or impartial exercise of Mr Montague's official function of appointing senior staff, within the meaning of s 8(1)(a) of the ICAC Act.

The conduct could also constitute the dishonest or partial exercise of his own official functions within the meaning of s 8(1)(b) of the ICAC Act. His official functions as a councillor included calling for an extraordinary meeting under s 366 of the LGA. Although he purported to exercise that function in the public interest, his actual purpose was to secure the employment of Mr Stavis as director of city planning regardless of the merit of his claim to that position.

For the purpose of s 8(2)(c) of the ICAC Act, and for the reasons set out below, the conduct could also constitute conduct adversely affecting, either directly or indirectly, the probity of the exercise of functions by Mr Montague and which could involve blackmail.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider the offence of blackmail, under s 249K(1)(b) of the Crimes Act. Here, Mr Montague held the function of appointing or dismissing senior staff as the holder of the public office of general manager. The "unwarranted demand" was to confirm the appointment of Mr Stavis as the director of city planning. The Commission has concluded that Mr Azzi did not believe that he had reasonable grounds for making the demand because he was seeking to achieve the employment of Mr Stavis regardless of Mr Montague's view of the merits of the candidates and the reasons for withdrawing the appointment.

The "menaces" in this circumstance were explicit, in that Mr Azzi publicly threatened Mr Montague with termination of his employment at the Council, which was both detrimental and unpleasant to him. The Commission is satisfied that this threat would cause Mr Montague to act unwillingly and that Mr Azzi was aware of the vulnerability of Mr Montague to the threat of losing his position of general manager. That his purpose was to influence Mr Montague in the exercise of his function to appoint Mr Stavis is clear also from the negotiations he engaged in behind the scenes for Mr Montague's early retirement (a more favourable and less unpleasant outcome for Mr Montague) in exchange for the employment of Mr Stavis.

The conduct had the intended consequences of having Mr Montague confirm the appointment of Mr Stavis although Mr Montague believed that it was not on merit *and* that the appointment posed a significant reputational risk to the Council, which was an effect on the probity of the exercise of Mr Montague's functions.

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Azzi committed an offence under s 249K(1)(b) of the Crimes Act.

It is also relevant to consider the common law offence of misconduct in public office. Mr Azzi used the functions of his public office to influence another public official in the exercise of his public functions, for an improper purpose, to secure the employment of Mr Stavis regardless of Mr Montague's view of the merits of the candidates and the reasons for withdrawing the appointment. The excuse that Mr Azzi offered was that the general manager had not consulted with the Council. For the reasons outlined elsewhere, the Commission does not accept that evidence and considers that there was no reasonable excuse for the conduct. That it was wilful misconduct and deserving of criminal punishment is apparent from Mr Azzi's conduct in showing Mr Stavis the interview questions prior to the interview, and his private dealings with Mr Stavis outside

the interview process, including meeting with him in early December 2014.

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Azzi committed misconduct in public office.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that this is serious corrupt conduct for the purposes of s 74BA(1) of the ICAC Act. The function of appointing senior staff, which Mr Azzi was trying to influence, was significant. The weight of the evidence before the Commission demonstrated the importance of this appointment in the context of the growth with which the Council was grappling at the time.

Further, the means used by Mr Azzi (together with Mr Hawatt) to exert pressure on Mr Montague was a serious misuse of his functions as a councillor. Mr Azzi did not care why Mr Montague attempted to withdraw the offer, but wanted to secure the appointment of Mr Stavis as director of city planning.

The Commission is satisfied that Mr Azzi as a councillor has engaged in misconduct as defined by s 440F of the LGA.

Section 74A(2) statements

In making a public report, the Commission is required by s 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 DPP with respect to the prosecution of the person for a specified criminal offence

b) the taking of disciplinary action against the person for a specified disciplinary offence

c) the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

An "affected" person is defined in s 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.

The Commission is satisfied that, in respect of the matters covered in this chapter, Mr Hawatt, Mr Azzi, Mr Montague, Mr Vasil and Mr Khouri are "affected" persons.

Michael Hawatt

There is admissible evidence that Mr Stavis obtained a photograph of the interview questions prior to attending the interview panel for the director of city planning, and circumstantial evidence that tends to show that the source was Mr Hawatt and/or Mr Azzi. However, the allegation that he was shown the interview questions by both Hawatt and Mr Azzi came from Mr Stavis, and was taken in a form which is not admissible.

In these circumstances, the Commission declines to seek the opinion of the DPP in respect of Mr Hawatt's conduct in providing the interview questions to Mr Stavis.

However, 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 Hawatt for the offence of:

- blackmail under s 249K(1) of the Crimes Act and the common law offence misconduct in public office, in respect of his actions directed to achieving Mr Stavis' appointment between 24 December 2014 and 18 February 2015
- corruptly offering a benefit under s 249B(2)(a)(i) of the Crimes Act and the common law offence of misconduct in public office for offering Mr Montague a gratuity payment if he appointed Mr Stavis and retired early.

There is admissible evidence, from Council records, lawfully intercepted telephone calls, SMS messages and email records, which go to demonstrating that the conduct occurred, and is relevant to Mr Hawatt's motivation for the conduct. In addition, the evidence of Mr Montague would potentially be available.

As Mr Hawatt is no longer a councillor, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

Pierre Azzi

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 Azzi for the offence of blackmail under s 249K(1) of the Crimes Act and the common law offence of misconduct in public office, in respect of his actions directed to achieving Mr Stavis' appointment between 24 December 2014 and 18 February 2015.

There is admissible evidence, from Council records, lawfully intercepted telephone calls, SMS messages and email records, which go to demonstrating that the conduct occurred, and are relevant to Mr Azzi's motivation for the conduct. In addition, the evidence of Mr Montague would potentially be available.

As with Mr Hawatt, and for the same reasons, the Commission declines to obtain the advice of the DPP with respect to the prosecution of Mr Azzi for any offence in respect of allowing Mr Stavis to have access to the interview questions.

As Mr Azzi is no longer a councillor, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

Jim Montague

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Montague for any specified criminal offence. The Commission has not made a finding that his conduct could constitute or involve a criminal offence.

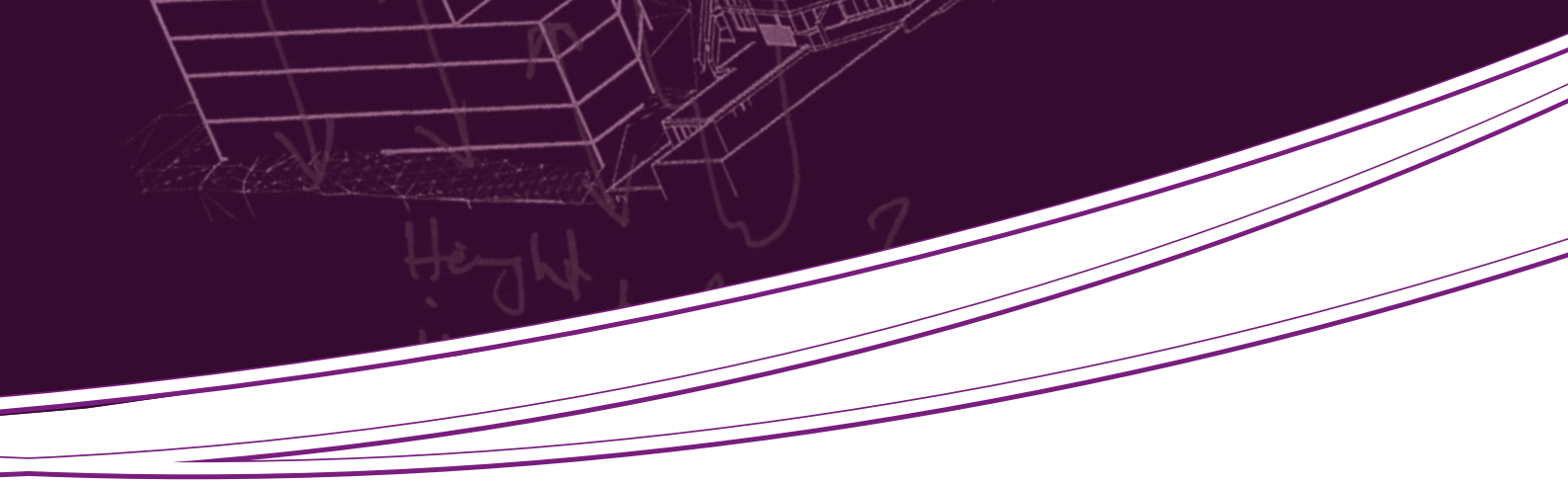
As Mr Montague is no longer a council officer, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

George Vasil

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Vasil for any specified criminal offence. The Commission is not satisfied that there is sufficient admissible evidence to consider obtaining the advice of the DPP with respect to any offence.

Bechara Khouri

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Khouri for any specified criminal offence. The Commission is not satisfied that there is sufficient admissible evidence to consider obtaining the advice of the DPP with respect to an offence under s 87 of the ICAC Act because it is not satisfied that his evidence was false or misleading in a material particular.



Chapter 3: The development application lodged by Spiro Stavis' neighbour

This chapter examines conduct by Spiro Stavis in his capacity as director of city planning at the Council in relation to a development application lodged by his neighbour.

Mr Stavis' objection to the development

On 18 September 2014, a development application was lodged with the Council seeking approval to construct a residential dual-occupancy subdivision at a site in Ridgewell Street, Roselands ("the Ridgewell Street development application").

Mr Stavis' family home shared a common boundary with the Ridgewell Street site, and he lodged an objection to the development application by letter dated 21 October 2014. The letter advised that "we are extremely concerned with the proposed development and believe that it is totally unacceptable". The letter identified a number of grounds for objection, largely about overshadowing, privacy and visual impacts. The letter recommended a 2.5-metre high masonry fence along the full-length of the shared boundary to assist in mitigating the impact.

On 11 November 2014, the Council wrote to the development applicant identifying issues with the application that needed to be addressed, and requesting that amended plans and/or additional information be provided by 2 December 2014.

On 17 November 2014, the same day as the interviews for the director of city planning position, Mr Stavis followed up on the status of the Ridgewell Street development application with the relevant Council planner. Mr Stavis continued to follow up with the planner after he had been offered and accepted the position of director of city planning and after the offer had been withdrawn.

On 20 January 2015, while awaiting the outcome of negotiations in relation to that position, Mr Stavis emailed the Council planner asking "how much longer will the applicant be given?". He continued:

> *The applicant has had ample time to submit amended plans. It seems to me that if amended plans aren't received this week then a reasonable case exists to refuse the DA* (development application).
>
> *In my experience, a quick refusal in such circumstances is best.*

Mr Stavis accepted that the policy of "quick refusal" was not one that he followed scrupulously once he was director of city planning. He said, "there were circumstances where it's best to try and work with people. That would be my view. I guess I was answering as a, as an owner or a person who resided rather than as a, I guess, a director". The position that Mr Stavis took when personally affected by an application was not the "solutions-driven" approach he took in respect of other people's applications.

Amended plans were lodged by the applicant on or about 26 February 2015. Mr Stavis continued to have concerns about the amended plans, primarily in relation to privacy and overshadowing impacts.

Contact following commencement as director

Mr Stavis started his position as the director of city planning on 2 March 2015. By 3 March 2015, the Council planner with carriage of the matter had prepared an assessment report for the Ridgewell Street development application recommending approval subject to conditions. The conditions included some matters consistent with the concerns raised by Mr Stavis, including requiring retention of the large tree on the property and construction of a 1.8-metre timber or colorbond fence to mitigate acoustic and visual privacy concerns.

It appears that, due to the events which followed, the development application was not determined on the basis of the 3 March report.

In considering his conduct in relation to this matter, the Commission notes that, to Mr Stavis' credit, he has accepted in his submissions that it fell short of the standards set by the code of conduct and his proper role as director of city planning. It was submitted on his behalf that any findings the Commission makes should have close regard to the context of his conduct, including that a development application lodged by a neighbour could be an emotive issue, and that this was a dilemma not addressed by Council policies.

Certainly, Mr Stavis gave evidence that it was an emotional issue for him. However, that is why it was improper for him to involve himself in any way. Further, the Commission does not accept that this was a dilemma that was not addressed by Council policies. As is set out elsewhere, Council policies made it abundantly clear that Council officers had an obligation to disclose and manage conflicts of interest.

At 10.20 pm on 4 March 2015, Mr Stavis, using his Council email address, contacted George Gouvatsos, manager of development assessments at the Council, and asked to be shown the amended plans for "Ridgewell". At 7.53 pm on 10 March 2015, Mr Stavis, using his Council email address, contacted Mr Gouvatsos in relation to "Ridgewell" and asked him to "please note I'd like to review the conditions of approval before they are ratified". Mr Stavis said that he made this request because he wanted to see if his concerns had been taken on board. He accepted that, by sending this email, he was "laying the ground" for his intervention to ensure that conditions placed on any approval of the development application advantaged and did not disadvantage him.

At 11.10 pm on 12 March 2015, Mr Stavis, using his Council email address, asked Mr Gouvatsos whether there was "any update on the draft conditions" for "Ridgewell". Mr Stavis agreed that he was trying to get information from a subordinate in order to pursue a private interest, and not the public interest, although, he denied having an appreciation of that at the time. In his submissions, he accepted that he should not have done this.

At 11:05 am on 19 March 2015, Mr Gouvatsos wrote to Mr Montague about the Ridgewell Street development application. He noted that Mr Stavis had lodged an objection "to a number of the design elements of the proposal that would affect his privacy" and that "the matters raised have been taken into account as part of the assessment". Mr Gouvatsos advised Mr Montague that:

> *The issue we now have is that Spiro is no longer just a neighbour lodging an objection but an employee and more importantly our Director. We therefore feel that we cannot now determine the DA under delegation as there could be a perception that we may have been influenced by his position.*
>
> *I suggest that we refer the DA to an independent planner to assess and report the matter to IHAP* [Independent Hearing and Assessment Panel] *and then CDC* [Canterbury Development Committee] *for determination. This will be the most transparent way in processing this application which avoids any perception of collusion.*

At 12.21 pm, Mr Montague replied, "George I agree". On the same day, the development application was referred to an external consultant for assessment.

On 23 March 2015, the Council planner with carriage of the assessment advised the applicant that:

> *…the issue Council now has with regard to the submission received, is that the objector has recently become an employee within Council as the Director City Planning. In this regard, the DA cannot be determined under delegation. It has been directed that the DA be reviewed by an independent planner and the DA be reported to the* [IHAP] *for determination. This is standard practice regarding DAs that involve Council employees (as applicants, property owners or objectors).*

The applicant asked if "should the objector's concerns be appeased is there any chance that the objection can be withdrawn and the application determined under delegated authority?".

On 13 April 2015, Mr Gouvatsos emailed Mr Stavis providing the name and contact details for the external consultant assessing the Ridgewell Street development application. Mr Stavis said that he could not recall whether he made a request for the contact details for the consultant, but the Commission accepts that it is likely that he did.

On 20 April 2015, the external consultant emailed his draft assessment of the Ridgewell Street development application to a Council planner. The external consultant recommended deferral on the basis (among other things) that modification of the design to retain the tree was required and noted that, "if deferral is not considered appropriate, then my recommendation would be refusal".

On 16 June 2015, Mr Stavis, using his Council email address and signing off as the director of city planning, sought an update about the Ridgewell Street development application and noted that "they have not responded to our concerns". Mr Stavis instructed Mr Gouvatsos to "please ask the consultant to finalise the report for the next CDC meeting". Mr Stavis said that, in sending this

email, he had his "owner's hat on", and that in using the phrase "our concerns" he was "muddying the waters between my, our concerns as a family and, and there were concerns from obviously [the external consultant] in terms of the amended plans being lodged".

The Council planner advised Mr Stavis that she had attempted to contact the applicant a number of times and had not received amended plans. Mr Stavis instructed her to ask Mr Gouvatsos "whether he thinks we should send him one final email giving 14 days to lodge". The Council planner indicated that Mr Gouvatsos agreed with that approach.

At 11.20 pm on 23 July 2015, Mr Stavis emailed the Council planner and asked for a copy of the amended plans for the Ridgewell Street development application. At 11.06 am on 24 July 2015, the applicant provided amended plans by email. Mr Stavis could not recall how he knew the amended plans had been lodged. Mr Stavis agreed that he asked to see the plans in order to pursue his private interest and not the public interest, but said again that he did not see it in those terms. At 8.06 pm on the same day, Mr Stavis emailed his assistant and asked that she "chase" the planner regarding his request for a copy of the amended plans as she had not responded. Mr Stavis accepted that he should not have done this. At 8.15 am on 28 July 2015, the planner sent Mr Stavis a copy of the amended plans.

The second objection letter

On or about 20 August 2015, Mr Stavis and his wife lodged a second letter of objection with the Council in respect of the development application for Ridgewell Street. The letter indicated that, notwithstanding improvements to the design in the amended plans, they remained concerned about a few matters, and wanted a 2.5-metre masonry wall erected on the common boundary.

Involvement of Michael Hawatt

In around September 2015, Mr Hawatt became involved as a conduit between Mr Stavis and his neighbour in relation to the Ridgewell Street development application.

Both Mr Stavis and Mr Hawatt told the Commission that Mr Hawatt initiated the contact with Mr Stavis, on behalf of the applicant.

At 8.54 pm on 23 September 2015, Mr Hawatt sent a message to Mr Stavis, "can we meet at 12pm in front of … Ridgwell [sic] St Roselands on Saturday re your neighbour". At 9.10 pm on the same day, Mr Stavis replied to Mr Hawatt, "no probs", and then at 9.17 pm added:

> *I have to be careful though cause I've got an independent consultant assessing it and I don't want me to be accused of influencing the decision, hope you understand. I'm sure we can work it out though.*

At 9.20 pm, Mr Hawatt replied to Mr Stavis: "I can explain your issues. Let me know how to resolve them and what they are". Mr Stavis said that, although it appeared as though Mr Hawatt was acting as his agent in negotiating with his neighbour, he did not take the text message that way. Mr Stavis said that he thought Mr Hawatt was just acting as a conduit, "in the normal way that he did".

On 24 September 2015, a Council planner sent to Mr Stavis "annotated plans and submission" for the Ridgewell Street development application, which included:

- plans for the development application with notations in Mr Stavis' handwriting, including markings for a 2.5-metre high masonry wall on the boundary, the deletion of some windows and the removal of stairs from a patio on Mr Stavis' boundary
- Mr Stavis' second objection letter.

At 1.13 pm on the same day, Mr Stavis forwarded these documents to his assistant and asked that she print out the plans on A3 and the letter on A4 paper, noting that he had a meeting with Mr Hawatt at 4 pm. At 10.04 pm, Mr Stavis sent Mr Hawatt a text message:

> *Hi Mike, tell him I'd like a 2.5m high brick or similar fence along the whole of my rear boundary on the boundary. I think I put it on the plans. Cheers.*

At 11.21 am on 26 September 2015, Mr Hawatt called the owner of Ridgewell Street. The conversation lasted 26 seconds. At 4.39 pm on the same day, Mr Hawatt sent Mr Stavis a text message: "All done and agreed to. He will submit changes next week". This correspondence indicated that the owner had agreed to place a 2.5-metre high brick or similar fence along the whole of Mr Stavis' boundary.

Mr Hawatt and Mr Stavis met around 24 September, and, according to his evidence to the Commission, Mr Stavis gave Mr Hawatt a copy of the marked up plans. When giving evidence to the Commission, Mr Stavis denied that he made changes to the plans with a view to conveying to the applicant that unless the changes were made, they would not get a favourable determination. Rather, he said that they were "suggested changes".

That his handwritten amendments to plans were "suggested changes" is a comment Mr Stavis made in respect of other applications the subject of the Commission's inquiry. This approach is analysed in more

detail elsewhere in this report. It is sufficient to note here that the amendments had been made by the director of city planning, who had the function to direct staff in respect of the determination of this application, and who had lodged an objection to the application as the owner of the neighbouring property, which had resulted in some delay in the assessment process. Both the fact of his role and the fact of the objection gave the notations more weight than mere suggestion; it would not have been unreasonable for an applicant who received such a document in those circumstances to perceive that if he or she did not make changes that satisfied Mr Stavis, he or she would not get a favourable determination.

In his submissions, Mr Stavis conceded that his contact with Mr Hawatt regarding the development application was improper; although it was submitted that it was not inappropriate for him to object or suggest changes to the plans provided that this was done in his personal capacity. For the reasons outlined above, the Commission is satisfied that this conduct could not be extricated from Mr Stavis' public official position.

Mr Hawatt told the Commission that he gave the marked-up plans to Mr Stavis' neighbour and said that, if the neighbour could address these issues, Mr Stavis would not "make the complaint" and the matter would be resolved.

Although they both denied having strategic or conspiratorial discussions about delaying the development application if the changes were not made, the position was effectively this:

- in March 2015, the applicant had been advised by Council staff that assessment of the application had been delayed because "the objector has recently become an employee within Council as the Director City Planning", and the application would need to be reviewed by an independent planner and reported to the IHAP for determination
- in March 2015, the applicant had asked the Council whether, "should the objector's concerns be appeased is there any chance that the objection can be withdrawn and the application determined under delegated authority"
- in September 2015, a councillor, Mr Hawatt, advised the applicant that, if the changes requested by Mr Stavis were made, the matter could be resolved
- it was inherent in the situation that, arising solely from his position as director of city planning, Mr Stavis had a significantly stronger negotiating position than the applicant.

Mr Stavis said that he thought about his communications with Mr Hawatt in relation to the Ridgewell Street development application in the way that he thought about his communications with Mr Hawatt in relation to other applications that Mr Hawatt was interested in. Ultimately, Mr Stavis accepted that he was providing Mr Hawatt with material that would advance and protect Mr Stavis' personal interests in relation to his residence. Mr Stavis conceded in his submissions that, to the extent that he used the potential withdrawal of his objection as an incentive to the applicant to change the plans, this was improper.

On 28 September 2015, an owner of the Ridgewell Street site forwarded to Mr Stavis, using his Council email address, a further set of amended plans for the development application. The plans included a proposal for a 2.5-metre high masonry wall. On the same day, Mr Hawatt sent to Mr Stavis the following text message:

> *Message from owner in Ridgwell St re his agreed amendment as discussed.*
>
> *Hi Michael, revised plans have been emailed through to Fran Dargaville. Please provide me with any updates.*

On 29 September 2015, Mr Stavis emailed Mr Hawatt regarding "Ridgewell St – Amended Plans", stating "almost there. I've marked up final notations on the plans (see attached). Can you please get the architect to amend his plans accordingly and we can progress quickly". Mr Stavis accepted here that he held out as an incentive to the applicant the possibility of quick determination if the plans were amended to his liking. Attached to the email were the amended plans, prepared on 28 September 2015, with handwritten notations from Mr Stavis in red pen indicating that the height of the masonry wall (2,500 mm) needed to be shown on the plans and elevation, and that certain windows should be shown as frosted.

On the same day, Mr Hawatt sent the plans with Mr Stavis' notations to the owner of the Ridgewell Street site. In his email message accompanying the plans, Mr Hawatt advised that "the height as we discussed needs to be dropped to 1 step instead of the current 3 as discussed. I am told once you make the changes it should be ready for approval". On 2 October 2015, there were some further negotiations about dropping the height of the house, resulting in Mr Stavis advising Mr Hawatt, "I'll be happy with 3m high wall across the whole boundary of my house. Ask him to email me the plans when done".

On 6 October 2015, the owner instructed the architect to increase the height of the masonry fence/wall to the neighbouring property from 2,500 mm to 3,000 mm.

On 7 October 2015, the owner wrote to Mr Stavis and Mr Hawatt, asking that they refer to amended plans "with changes made as requested" and noted that he was "awaiting for DA approval by the end of this week". The architect then emailed amended plans, dated 7 October 2015, to Mr Stavis and Mr Hawatt. The amended plans now included a 3-metre high masonry wall on the boundary with Mr Stavis' property.

Also on 7 October 2015, Mr Hawatt sent a text message to Mr Stavis advising that "Ridgwell [sic] St amended plans have been submitted and the owner is eager to have this finalised ASAP".

On the same day, Mr Stavis responded to the architect by sending back the plans dated 7 October 2015 with amendments noted in red. Mr Stavis wrote, "please make the final changes/notations highlighted in red … and resend a complete architectural set so we can finalise our report".

The amendments enclosed with Mr Stavis' email included a "3.3m" marking on the masonry wall on the boundary with Mr Stavis's residence. Mr Stavis did not accept that, by sending this email, he intended to convey to the other side that he would provide the service of finalising the report on the development application. However, the inference that this was the benefit he was offering if the amendments were made is plainly available from the words that he used. The email was sent using his Council email address and he used words indicating that he was speaking on behalf of the Council in relation to the assessment report. By these email contacts, and through messages sent through Mr Hawatt, Mr Stavis made it clear to the applicant that, if they were to get the quick approval they wanted, that he was the officer at the Council who needed to be satisfied with the plans.

Mr Stavis also forwarded a copy of his email to Mr Hawatt, noting "This is what I sent him. Once I receive I will finalise the report". Mr Stavis said that this was a "bad choice of words" as he was not responsible for writing the report.

Mr Stavis advised Mr Hawatt by text message, "I sent u the email I sent to architect re ridgewell st. Once he does this its all sorted". That evening, at 10.04 pm on 7 October 2015, Mr Stavis emailed the architect and asked, "can you please advise when you are able to provide the info as per my email below so we can finalise?".

Throughout this exchange, Mr Stavis did not copy his emails to Mr Hawatt and to the applicant to any other Council officer involved in the assessment of the Ridgewell Street development application.

On 8 October 2015, the owner of Ridgewell Street emailed the architect and Mr Stavis, copied to Mr Hawatt, attaching the final architectural plans. The final plans showed a "privacy masonry wall" of 3.3-metres high on the boundary with Mr Stavis' residence. Mr Stavis forwarded those plans to his personal email account.

On the same day, Mr Stavis emailed Andrew Hargreaves, team leader of development assessment operations at the Council, and advised that "the amended plans have addressed both Viv's and my concerns, hence we withdraw our objection". When Mr Stavis was asked whether this was what he had contemplated doing in exchange for the changes to the plans, he said that "it wasn't that calculated".

At 7.26 pm on 8 October 2015, Mr Stavis emailed the owner and advised:

> *All good. I have instructed the planner to finalise as soon as possible under delegated authority.*
>
> *Andrew will advise you shortly when the DA will be finalised.*

This email was copied to, among others, Mr Hawatt and Mr Hargreaves. Mr Stavis accepted that, in this email, he was assuring the owner that the owner would get what he wanted in the use of his powers as director of city planning.

On the same day, Mr Hawatt also emailed the owner and advised, "all good. It's now 100% and being finalised".

On 9 October 2015, Mr Hargreaves emailed Mr Stavis and advised that he was trying to obtain the external consultant's email address so that he could send him the plans for final assessment and approval under delegated authority. Later that day, Mr Hargreaves emailed the external consultant and advised that the objection had been withdrawn by virtue of the amended plans, with the result that the development application could be determined under delegated authority. Mr Hargreaves asked the consultant to prepare a report and conditions of consent for approval by another planning officer.

On 15 October 2015, Mr Stavis asked Mr Hargreaves to "follow up urgently" with the consultant. Mr Stavis agreed that he was trying to expedite the matter because he was trying to deliver on what he had promised.

On 19 October 2015, the owner emailed Mr Stavis asking whether there was any update as to when they would receive the approval for the the Ridgewell Street development application. On the same day, Mr Stavis sent an email to Mr Hargreaves forwarding the owner's email, advising that he wanted to review the report prior to finalisation and ideally wanted the report to be finalised by the end of the week. Mr Hargreaves replied that the external consultant was hoping to complete the

report and get it to the Council by the end of the week. Mr Stavis asked again to review the final draft. Mr Stavis said that he wanted to make sure that the report implemented the changes consistent with his agreement with the owner.

Mr Stavis edits the report

Between 26 October and 6 November 2015, Mr Hawatt followed up with Mr Stavis, and Mr Stavis followed up with Mr Hargreaves; both chasing an outcome for the Ridgewell Street development application.

On 10 November 2015, the consultant sent a draft copy of the report to Mr Hargreaves. The draft recommended approval subject to conditions, which included the deletion of a front porch to minimise overshadowing of Mr Stavis' residence, and the deletion of a window to mitigate overlooking of private space.

On 16 November 2015, Mr Hawatt sent Mr Stavis a text message, saying "just received a missed call re Ridgwell [sic] St. What is the progress before I call him back". Mr Stavis replied, "I've got the draft report I'll go over it tmrw. It will be done by end next week". Mr Hawatt asked Mr Stavis, "can you push it?". Mr Stavis replied, "I will". On the same day, Mr Stavis asked Mr Hargreaves to "email me the draft report asap". Mr Hargreaves sent the draft report to Mr Stavis at 8.01 am on the following day.

Mr Stavis then proceeded to make a number of handwritten amendments to the consultant's report, including to:

- increase the height of a window and a screen enclosing a balcony on the boundary with Mr Stavis' residence
- insert that "further discussions between the owner of the adjoining property & the applicant has led to a 3.3m high masonry fence being provided"
- add the condition, "a new 3.3m high masonry fence shall be constructed along the entire common boundary with [Mr Stavis' residence] in consultation with the adjoining property owner".

Each of these changes was to the advantage of Mr Stavis' residence, and consistent with what had been agreed with the owner. Each of these changes was incorporated in effect in the final assessment report for the Ridgewell Street development application ("the final report"). In a subsequent email to Mr Hargreaves, Mr Stavis offered his personal assistant to make changes to the report. From this, and from Mr Stavis' evidence, the Commission infers that Mr Stavis directed Mr Hargreaves that the changes he indicated in his handwritten amendments be made. The final report was not altered to indicate that Mr Stavis was involved in drafting the report as well as the external consultant.

Mr Stavis conceded in his submissions to the Commission that it was improper for him to review and annotate the assessment report.

Further contact from Mr Hawatt

On 23 November 2015, Mr Hawatt sent a text message to Mr Stavis saying, "Hi Michael [sic]. Please don't forget about me and Ridgewell St Roselands Duplex". On 24 November 2015, Mr Stavis emailed Mr Hargreaves regarding Ridgewell Street and instructed "make sure we issue [notice of determination] asap. This week if possible".

On 25 November 2015, Mr Hawatt asked Mr Stavis, "what's the latest on Ridgwell [sic] St?" Mr Stavis replied, "I've signed off the report, he will have consent next week". On 27 November 2015, Mr Hargreaves approved the development application for Ridgewell Street, on the conditions set out in the consultant's report.

On 2 December 2015, Mr Hawatt asked Mr Stavis, "what's the latest on Ridgwell [sic] St?" Mr Stavis replied, "I'm aiming to have it ready by Friday, but early next week at the latest. Too many people off sick. Doing best I can". Mr Stavis emailed Mr Hargreaves regarding Ridgewell Street stating:

> *I know your* [sic] *busy with Canterbury Rd. I have the owner chasing. Can Eva help by making the changes to the report? I promised the consent would be issued this Friday or early next week.*

Mr Hargreaves replied, "I've already approved this DA and I'm signing the consent at the moment". Mr Hargreaves posted the development consent on 2 December 2015.

Mr Stavis' state of mind

It would be difficult to identify a more obvious conflict of interest for a director of city planning than that in which Mr Stavis found himself here. In his evidence on this topic, he referred to "muddying the waters", having his "owner's hat on" and blurring the boundaries, while using functions available to him as director of city planning. These responses neatly encapsulate his conflicted position. However, Mr Stavis repeatedly gave evidence to the Commission that he did not think about his position in terms of a "conflict of interest" and that he did not think about his conduct in terms of using his public office to advance his private interest. It is to Mr Stavis' credit that,

in his submissions, he accepted that he did not manage his conflict of interest properly and pursued his private interest.

In assessing whether Mr Stavis' conduct falls within s 8(1) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), it is necessary to consider whether the conduct involves the requisite mental element. Section 8(1) is directed to advertent and not inadvertent conduct. Mr Stavis' denial must therefore be examined in the context of the facts known to the Commission.

On 24 March 2015, Mr Stavis underwent training in the Council's code of conduct and signed a document indicating that he understood the code, and undertook to perform his Council role in accordance with the code. Mr Stavis' contract, signed by him on 28 May 2015, required that he comply with the provisions of the code of conduct. The Commission also notes that Mr Stavis had been employed at two local councils (Strathfield and Botany Bay) in the years immediately prior to working for the Council. He was not newly arrived to the public sector. In this context, Mr Stavis' evidence that he could not say with certainty that he read the code of conduct when he arrived at the Council should be given little weight.

Mr Stavis' interest in his property was both pecuniary, in the sense that he had a financial interest in his home, and non-pecuniary, in the sense that he was concerned about the impact of the development on his family's privacy and enjoyment of their property.

Mr Stavis' contract, signed by him on 28 May 2015 and covering the period 19 January 2015 to 18 January 2016, provided that his duties and functions also included:

- acting honestly and exercising a reasonable degree of care and diligence in carrying out the employee's duties and functions
- complying with the provisions of the code of conduct.

Mr Stavis also told the Commission that he understood as an employee of local government that he had to act honestly and in good faith, in the interests of the council and the members of the community that he served, and he was not to gain improper benefits for himself. He told the Commission that he understood that, when he was director of city planning, he was required to disclose potential conflicts of interest.

Additionally, at 9.17 pm on 23 September 2015, Mr Stavis sent a text message to Mr Hawatt where he told him he had to be careful because he had an independent consultant assessing the proposal and did not want to be accused of influencing the decision.

Although he denied that this text message showed that he was fully aware of the need to keep separate his role as director of city planning from his role and interest in the Ridgewell Street development application as a neighbour, the Commission cannot accept this evidence in light of the plain words that were used.

The Commission is satisfied that, at least from 24 March 2015, Mr Stavis knew about his obligations under the code of conduct and had an appreciation that his conduct in respect of the Ridgewell Street development application was improper.

Corrupt conduct

While director of city planning, Mr Stavis' official functions included control of strategic planning and statutory planning functions.

In exercising control over those functions, he was entitled to give directions to subordinate officers in respect of the functions within his control. He was also entitled to review and approve reports prepared in respect of development assessments.

Mr Stavis misused his position as director of city planning at the Council in relation to a development application lodged in respect of his neighbour's property at Ridgewell Street, Roselands, by on:

- 4 March and 23 July 2015, requesting Council planning staff provide him with the amended plans for the development application
- 16 June 2015, attempting to have a Council planning officer arrange for the development assessment report for the development application to be finalised knowing that the finalisation of the report at that time would likely result in a recommendation that the development application be refused
- 16 June 2015, suggesting that a Council planning officer should send the applicant a final email giving the applicant 14 days to lodge amended plans for the development.

Such conduct on the part of Mr Stavis constituted or involved the partial exercise of his official functions as director of city planning within the meaning of s 8(1)(b) of the ICAC Act because Mr Stavis was motivated by his own private interest in his residential property that adjoined the Ridgewell Street site.

Between 22 September and 8 October 2015, Mr Stavis misused his position as director of city planning to obtain an improper advantage when negotiating changes to the plans for a development application lodged in respect of

his neighbour's property at Ridgewell Street, including by using Mr Hawatt as an intermediary with his neighbour.

Such conduct on the part of Mr Stavis constituted or involved a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act. Mr Stavis held the office of director of city planning and its associated official functions on trust for the public, and to use that office to advance his own private interest as a neighbour was a breach of that trust.

Mr Stavis used his office by taking advantage of an opportunity available to him by reason of that office; namely, that it was within his public functions to organise or at least influence early determination of the Ridgewell Street development application.

Although withdrawal of the objection was a private function, it was by reason of his public office that the objection had lengthened the assessment process. The effect of the withdrawal was to hasten the determination of the Ridgewell Street development application, as it could be determined under delegation rather than going to the IHAP and then the CDC. Withdrawal of the objection by Mr Stavis then fulfilled the promised incentive for the applicant to make changes to the plans, which benefitted Mr Stavis, and that arose only by reason of his public office.

Mr Stavis misused his position as director of city planning at the Council in relation to a development application lodged in respect of his neighbour's property at Ridgewell Street by:

- in or around October 2015, directing a Council planning officer that he be given access to the Council consultant's draft assessment report for the development application
- on or after 16 November 2015, after having obtained the draft assessment report, marking up amendments to the report to favour his interests and directing a Council planning officer to make those changes.

Such conduct on the part of Mr Stavis involved the partial exercise of his official functions within the meaning of s 8(1)(b) of the ICAC Act, and a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act. Mr Stavis was motivated by his private interests as a neighbour and not the public interest. He took advantage of an opportunity not available to other objectors, which arose by reason of his public office. To use that opportunity to advance his own private interests was a breach of public trust.

The Commission is satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found in each respect were to be proved in admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Stavis had committed a disciplinary offence in respect of the Ridgewell Street development application between June and November 2015, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 3.1(c), prohibiting acting in a way which is improper or unethical
- clause 3.1(j), prohibiting acting in a way which may give rise to the reasonable suspicion or appearance of improper conduct or partial performance of public or professional duties
- clause 3.5, requiring council officers to always act in the public interest
- clause 4.2, requiring council officers to avoid or appropriately manage any conflict of interest
- clause 5.10, prohibiting council officers taking advantage (or seeking to take advantage) of their status or position with or functions they performed at council in order to obtain a private benefit for themselves or anyone else.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider the common law offence of misconduct in public office in considering Mr Stavis' conduct in:

- using his office to negotiate changes to the plans for the Ridgewell Street development application between 22 September and 8 October 2015
- amending the consultant's report on or after 16 November 2015.

The elements of this offence are set out in chapter 2.

During the relevant period, as an employee of a local council, Mr Stavis was a public officer. That his conduct was in the course of, or connected to, his public office is described above, and that it could involve wilful misconduct is apparent from the Commission's finding as to Mr Stavis' state of mind, and its finding that it could involve a substantial breach of the Council's code of conduct. Further, at common law, Mr Stavis was not permitted to use his public office to advance his own interests.

The excuse or justification that has been offered by Mr Stavis before the Commission was that this was an emotional issue for him and he was not thinking straight. The Commission does not consider that this would be a reasonable excuse or justification for the conduct that was otherwise prohibited. The Commission also considers the conduct to be sufficiently serious that it could merit criminal punishment.

Further, when he amended the consultant's report, Mr Stavis amended the record of the exercise of a statutory function, but concealed that it had been modified by a person with a private interest in the application. This was a serious breach of public trust.

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Stavis committed misconduct in public office.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

For the purposes of s 74BA of the ICAC Act, the Commission is also satisfied that Mr Stavis's conduct described in this part is serious corrupt conduct. In arriving at this conclusion, the Commission has taken into account the course of conduct, the seniority of Mr Stavis within the Council and the significance of the functions for which he was responsible.

Section 74A(2) statement

The Commission is satisfied that, in respect of the matters dealt with in this chapter, Mr Stavis is the only "affected" person for the purposes of s 74A(2) of the ICAC Act.

It was submitted for Mr Stavis that his conduct was improper and should be criticised by the Commission, but that any recommendations for further referral were not warranted in circumstances where Mr Stavis had accepted responsibility for his actions and that, due to the emotive nature of the issue, it fell into a separate category to the other allegations considered in this investigation.

The Commission has taken these submissions into account, but has also had regard to the course of conduct involved and the serious departure from the standards expected of the office that Mr Stavis held.

The Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosections (DPP) with respect to the prosecution of Mr Stavis for the common law offence of misconduct in public office in relation to:

- using his public office to negotiate changes to the plans for the Ridgewell Street development application between 22 September and 8 October 2015
- amending the consultant's report on or after 16 November 2015.

There is relevant admissible evidence that goes to this conduct, including Council business records (including emails, records relating to the code of conduct and Mr Stavis' contractual obligations, and records relating to the assessment of the Ridgewell Street development application), and the text messages sent to and from Mr Hawatt from Mr Hawatt's mobile telephone, which was seized under search warrant. In addition, the evidence of the Council officers who dealt with Mr Stavis would potentially be available.

As Mr Stavis is no longer a Council officer, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

Chapter 4: Properties owned by Michael Hawatt's son-in-law

This chapter examines whether Michael Hawatt engaged in conduct that adversely affected the impartial exercise of Spiro Stavis' official functions in relation to development applications for properties located at 51 Penshurst Road, Roselands, and 23 Willeroo Street, Lakemba, in order to favour the interests of Talal El Badar.

Talal El Badar is, and was at the relevant times, married to Mr Hawatt's daughter, Laila. Mr El Badar also had an interest in a property owned by Mr Hawatt at 31 Santley Crescent, Kingswood, during a period which overlapped with the consideration of Mr El Badar's development applications at the Council. This chapter examines the nature of Mr El Badar's interest and Mr Hawatt's attempts to find a buyer for the site. Mr Hawatt's attempts to find a buyer are also relevant to matters considered in chapter 9 of this report.

51 Penshurst Road, Roselands

The development application

On 13 February 2015, Mr El Badar lodged a development application for 51 Penshurst Road, Roselands. The application sought consent for the demolition of the existing structure and the construction of 12 townhouse units with one level of basement car parking. At the time, Mr El Badar, his wife (Mr Hawatt's daughter, Ms El Badar) and their children were living at the property.

On 29 April 2015, Ms El Badar sent to Mr Hawatt a text message stating, "don't forget us 51 Penshurst td [sic] roselands". Ms El Badar told the Commission that she communicated with her father about the development application at Penshurst Road. She said:

> *When I did speak to my father about, if I thought council was taking long or anything like that, he'd ask me just send me the address and he'd see, like, if he heard anything or what not. He'd, yeah, so I just would send him my address.*

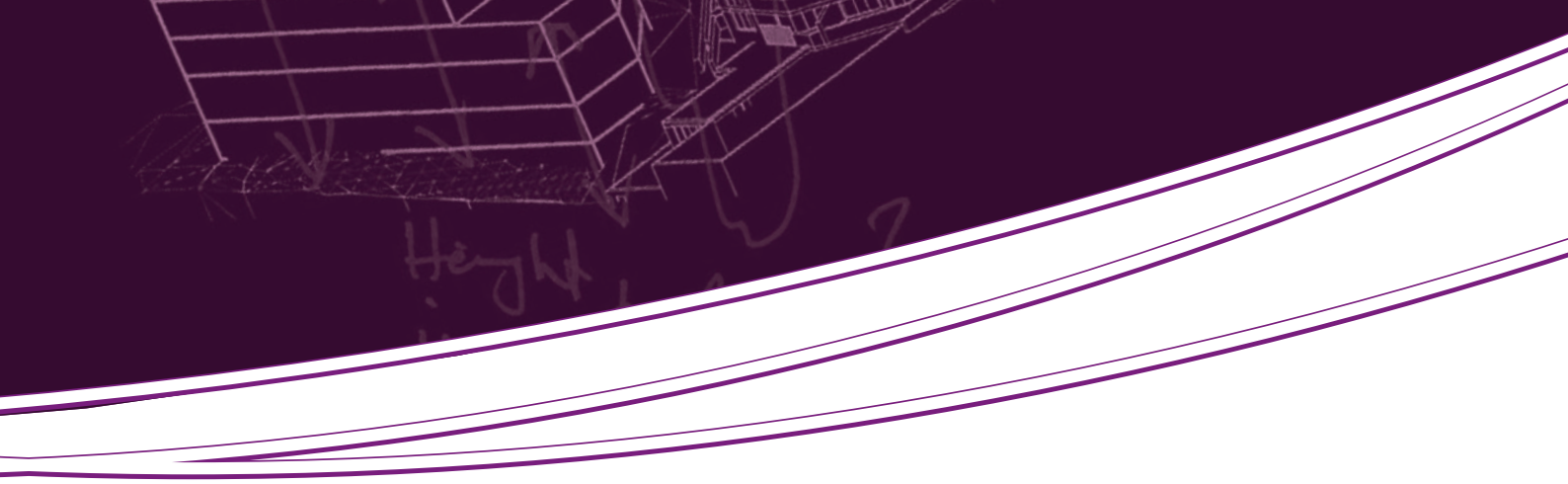
Ms El Badar said that she did not expect Mr Hawatt to do anything about the development application; although she felt like it was taking a long time. She was looking to move out of 51 Penshurst Road, Roselands, which they could not do until the development application was approved. Mr El Badar told the Commission that he knew that his wife had been talking to Mr Hawatt about her concerns about her living situation.

On 11 May 2015, Mr Hawatt emailed Mr Stavis in respect of 51 Penshurst Road, Roselands, "the owners of the above property have been waiting for over 1 month for the engineers storm water response and the DA with council for 12 weeks. Can you have a look at find out why the delays". Mr Stavis forwarded Mr Hawatt's email to George Gouvatsos, manger of development assessments at the Council, and asked, "story please?".

On the following day, Mr Stavis advised Mr Hawatt by email that "we have spoken to the development engineer and have prioritised this referral to allow for the applicant to address any stormwater issues that may arise". In his email, Mr Stavis indicated that the development engineer had undertaken a preliminary assessment "and identified some fundamental issues that need to be addressed". He also indicated that this information had been conveyed to the applicant.

On 22 May 2015, the applicant's architect wrote to the Council to indicate that they had been instructed by the applicant to make amendments to the development application to comply with the Council engineer's requirements. The architect indicated that "we will accept a Deferred Commencement approval subject to acquisition of a water drainage easement from the down stream properties".

On 11 June 2015, the development application for 51 Penshurst Road, Roselands, was referred to the City Development Committee (CDC) with a recommendation that it be approved as a deferred commencement.



The Council officers' report recommended that the consent not operate until the applicant satisfied Council that the site drainage was designed to drain under gravity, which required an easement over the downstream properties, and that the stormwater drainage concept plan had been amended to address various issues.

When the matter came before the CDC, Mr Hawatt "declared a less than significant non pecuniary interest" in the item. He remained in the Council chamber but took no part in the discussion, and did not cast a vote in relation to the matter. The CDC resolved that the development application be approved for deferred commencement, consistent with the recommendation by the Council officers. To proceed to development approval, the applicant would have to satisfy the Council of compliance with deferred commencement conditions within 12 months of the date of the consent.

Issue with deferred commencement condition

On 28 July 2015, Mr El Badar wrote to Council indicating that his efforts to negotiate an easement to comply with the deferred commencement condition had not been successful. Mr El Badar requested that, "in lieu of the easement, Council allow us to incorporate a combination of pump-out and charged system for the entire site".

Mr Stavis' intervention

On 3 August 2015, Ms El Badar sent Mr Hawatt a text message, which stated "51 Penshurst rd roselands". Mr Hawatt said that he understood that Ms El Badar's text message was a reminder for him to follow the matter up. Three minutes later, Mr Hawatt sent a message to Mr Stavis, "51 Penshurst Rd Roselands re storm water pump out connection. Can you see how to help?". On 3 August 2015, Mr Stavis forwarded the message by email to Mr Gouvatsos, adding "for response please".

On the following day, Mr Stavis emailed Mr Hawatt to advise that he had asked the development engineer to prioritise the assessment of stormwater plans for this development application. Later that evening, the development engineer emailed Mr Stavis to advise that, "the answer will be that the submitted plans do not satisfy the Deferred Commencement Condition". Mr Stavis replied and asked that the engineer "prepare a response for me to councillor".

On 5 August 2015, the development engineer prepared a memorandum, which indicated that the deferred commencement conditions had not been satisfied.

On 7 August 2015, Mr Hargreaves wrote to the applicant indicating that there was no evidence provided to the Council showing that bona fide attempts had been made to attempt an easement. The letter noted that the applicant's architect had accepted the deferred commencement condition, which required the easement.

On or around 28 August 2015, Mr El Badar lodged an application to modify the development consent for 51 Penshurst Road, Roselands, under s 96 of the *Environmental Planning and Assessment Act 1979*. The application sought that a pump-out system for storm water be permitted on the basis that he was unable to obtain an easement from the neighbours. Mr El Badar provided letters indicating that his request for an easement had been refused.

On 31 August 2015, Mr Hawatt sent a message to Mr Stavis regarding 51 Penshurst Road, Roselands, indicating that

> *…section 96 was submitted last Thursday re stormwater access using pump out system. The applicant have* [sic] *tried on a number of occasions to get access through his neighbours properties but to no avail even with good offers no one is willing to accept. The applicant is avoiding going to court. How can we help him re his proposal.*

Mr Stavis replied indicating that, "they need to provide written evidence that legitimate offers with proper valuation were sent and were received and rejected. Have they provided this evidence in their s96". Mr Hawatt forwarded Mr Stavis' response to Mr El Badar. Mr Stavis sent Mr Hawatt further text messages in which he said that he was happy to help, but he needed the evidence of what offers had been made. He also told Mr Hawatt that he had asked to review the file. These text messages indicate that Mr Stavis was motivated by Mr Hawatt's enquiries to take a direct role in an application of interest to Mr Hawatt.

The plans for the s 96 application were allocated to a Council staff member, Felicity Eberhart.

On 28 September 2015, Ms El Badar sent Mr Hawatt a message, "51 Penshurst rd roselands". A few minutes later, Mr Hawatt sent Mr Stavis a message, "any news re stormwater for 51 Penshurst rd roselands?". Ms El Badar said that she did not expect her father to do anything other than find out what was going on with the property. Mr Hawatt also maintained that he treated his daughter no differently from anyone else who made an enquiry of him.

However, in an earlier compulsory examination, when he was asked about whether his daughter ever sent him the address of any properties for which she had an application before the Council, he said "she'll never put that position, put me in a spot". In that examination, Mr Hawatt accepted that, if he had intervened on behalf of his daughter, he would have been compromised on the basis of a conflict of interest. This would also be true of any requests for assistance from his son-in-law.

On 20 October 2015, the development engineer provided a memorandum to Ms Eberhart, which indicated that the s 96 application was recommended for refusal. This recommendation was made on the basis that the Canterbury Development Control Plan ("the CDCP 2012") required that the proposed development must have gravity drainage. The memorandum noted that, where the neighbours had refused the offer to acquire an easement, there was an alternative under s 88K of the *Conveyancing Act 1919*. Section 88K is a mechanism by which the court can order an easement to be obtained.

On 22 October 2015, the engineer advised Ms Eberhart by memorandum that the stormwater plan submitted with the s 96 application was not compliant with the CDCP 2012. Ms Eberhart had sought a second opinion from the engineer to ensure she had sufficient consensus to inform the Council's position before she communicated with the applicant.

On 26 October 2015, Ms Eberhart sent a letter to Mr El Badar indicating that there were two options: either to explore other options of meeting the deferred commencement condition or to withdraw the application. Ms Eberhart's advice to Mr El Badar constituted a problem for him and, on the same day, he sent a text message to Mr Hawatt with a URL for an application associated with the property.

On 27 October 2015, Mr Hawatt sent Mr Stavis a message, "re 51 Penshurst Rd Roselands all info requested was sent 8 weeks ago and waiting. Any news?". Mr Stavis replied to Mr Hawatt, "I don't think he's telling you the whole story but I will advise you asap". Mr Stavis sought a response from Council staff, who advised that the question of drainage had been referred to the development engineer for review, which had taken a little longer than usual but "the outcome was such that we were unable to support the Section 96, and the applicant has been advised of this in letter dated 26 October 2015".

On 29 October 2015, following a meeting between Council staff and the applicant, Mr Hawatt forwarded a message from Mr Stavis to Mr El Badar advising that the issues in relation to Penshurst Road were resolvable.

On 4 December 2015, Mr Hawatt sent Mr El Badar a text message advising, "everything is okay now, just stop talking!!!!!!!". Consistent with this message, on 7 December 2015, Mr Stavis advised Mr El Badar's solicitor that he had instructed his staff to finalise the report, copying Ms Eberhart, among other staff members. On the same day, Ms Eberhart replied to advise that a draft report had been prepared and she was awaiting engineering comments.

On 11 December 2015, Mr Stavis emailed Ms Eberhart and the engineer to ask, "has this DA been finalised? Super urgent!!!". Mr Stavis recalled that he wrote this because there had been some delay, and that "we had been told that any councillor request was considered a priority". This is consistent with Mr Hawatt's evidence that it was normal for a councillor to get priority on their requests. Mr Stavis agreed that it was fair to say that he had used the words "super urgent" and the exclamation marks in part because of the communications he was receiving from Mr Hawatt about the matter.

In this respect, the Commission does not accept the submission on behalf of Mr Hawatt that he did not use his position to influence Mr Stavis. It was inherent in Mr Hawatt's position on Council and the role he had taken in having Mr Stavis gain employment with the Council, as discussed in the previous chapter, that his requests would get priority, and that he used that position and influence to obtain priority for his family members' application.

On 14 December 2015, Mr Hawatt called Ms El Badar. During the lawfully intercepted conversation, Ms El Badar asked him whether he knew "when roughly we'll get this letter for the thing because … we can't really bought it –

I – I found a house … but Talal said we can't buy it until we get the letter". Mr Hawatt said, "let me find out" and he would let her know. Ms El Badar said "cause if – if we do get it we can bid on a house on Saturday". Shortly thereafter, Mr Hawatt sent Mr Stavis a message, "is the approval letter ready for Penshurst St re stormwater?".

During the telephone call of 14 December 2015, Mr Hawatt told Mr El Badar "your thing is also a hundred percent, that's been – there's a letter been organised alright". Mr Hawatt said that he did not know what this was about, but said it could be "his stormwater thing". Mr El Badar accepted that this was a reference to the Penshurst Road development.

On 16 December 2015, Mr Hawatt had a lawfully intercepted telephone conversation with Mr El Badar in which Mr El Badar confirmed that he would pay Mr Hawatt the funds Mr Hawatt needed for the purchase of a Queensland unit. For the reasons set out under "31 Santley Crescent, Kingswood," below, the Commission is satisfied that the funds, comprising $300,000, were to be a loan from Mr El Badar and his business partners to assist Mr Hawatt.

On 16 December 2015, Mr Hawatt sent Mr Stavis a message asking about the progress on Penshurst Road. Mr Stavis replied "Thursday/Friday for Penshurst".

It was submitted for Mr Hawatt that there can be no suggestion of improper conduct in respect of this application. Given the evidence above, the Commission does not accept that submission.

Outcome

On 21 December 2015, the s 96 application was approved under delegated authority by Andrew Hargreaves, team leader of development assessment operations at the Council, consistent with a report prepared by Ms Eberhart. Ms Eberhart told the Commission that Mr Stavis' involvement in the assessment process did not have any effect on her assessment of the application in terms of the priority or outcome of the assessment.

On 23 December 2015, Mr Hawatt sent Mr Stavis a message saying, "is letter ready for Penshurst St Roseland?". Mr Stavis replied, "letter for Penshurst St was posted on Tuesday". That evening, Mr Hawatt called Ms El Badar, and thanked Mr El Badar for his help with the Gold Coast unit. Ms El Badar said, "it's good to know people and to help each other". Mr Hawatt told Ms El Badar to tell Mr El Badar that "you guys got the thing … it's been done your letter so we're going to have to just wait for it now". Ms El Badar told the Commission that it was her understanding that the assistance provided by Mr Hawatt in relation to Penshurst Road, and the assistance provided by Mr El Badar in relation to Santley Cresent, were two separate things.

On 23 April 2016, Mr El Badar sold 51 Penshurst Road, Roselands, for $3.25 million. RP Data shows that the property had been purchased in September 2012 for $1.25 million.

23 Willeroo Street, Lakemba

Background

On 16 March 2015, Hamec Pty Ltd lodged a development application on behalf of Mr El Badar for 23 Willeroo Street, Lakemba, seeking demolition of the existing structure and construction of five townhouses. Mr El Badar's partner in the development was Abdullah Osman. Mr Osman was also the director of a company called Bella Ikea Pty Ltd, and had a company, Oscorp Holdings Pty Ltd, which was a shareholder of Bella Ikea.

The CDCP 2012 required a 20-metre frontage for townhouses to be built on the site, and 23 Willeroo Street, Lakemba, had a 15.24-metre frontage. Mr El Badar said that it was his view that the rule should not apply if the land was only 15 metres across. The CDCP 2012 also required setbacks of four metres, which Mr El Badar told the Commission would mean that, on his site, he would not be able to develop anything.

On 15 July 2015, a planner from the Council wrote to Hamec to advise of a number of issues with the application, including non-compliance with side-boundary setbacks.

On 24 July 2015, Mr Hawatt sent a text message to Mr Stavis:

> *Can you let me know the issues associated with a site at 23 Willeroo St Lakemba. I am told that its an isolated site with units on both sides. This should be assessed on its merit not on the current* [development control plan] *with the setbacks which makes it unworkable.*

Mr Hawatt said his involvement in the development application was to make enquiries because there were concerns that it was taking too long. He said that his enquiries were in the nature of any other inquiry when approached for assistance. It was submitted for Mr Hawatt that he only made limited enquiries about this property, and that it was part of his job as a properly elected councillor to make such enquiries. When it was put to him that this text message was an argument for the development application to be approved (rather than an enquiry), he said that he, "just made an inquiry like anyone else, and it's up to the planner to assess it, not up to me". He said that it was his opinion, and it was up to the

assessment staff to make the decision. He did not accept the proposition that he was trying to get the particular application approved. Having regard to the words used, and the relationship between Mr Hawatt and Mr Stavis, which developed through Mr Stavis' recruitment, the Commission is satisfied that Mr Hawatt was advocating in favour of the development.

Mr Stavis said that he found out that Mr El Badar was Mr Hawatt's son-in-law while the Willeroo Street application was ongoing, although, he could not remember when. Mr Hawatt said that he did not think he told Mr Stavis. He said he specifically did not want Mr Stavis to know that it was his son-in-law because he thought it would be improper to influence him by advising him that one of the development proponents was his son-in-law. However, submissions on his behalf suggested that he acted transparently and never sought to hide that the proponent was his son-in-law.

Mr Stavis sent the message from Mr Hawatt to Mr Gouvatsos and asked that he prepare a response. On 27 July 2015, Mr Stavis replied to Mr Hawatt, providing him with an update as to the assessment of the development application. Mr Stavis noted that a letter had been sent to the applicant on 15 July 2015, which outlined the progress of the development application, and that he was happy to meet the applicant. The director of Planzone Consulting took Mr Stavis up on this offer on behalf of Mr El Badar and the meeting took place on 10 August 2015.

On 18 August 2015, Mr El Badar filed a class 1 appeal in the Land and Environment Court in relation to the deemed refusal of the development application for 23 Willeroo Street, Lakemba. The Council instructed external solicitors, and engaged a planning consultant to assist with the appeal because it had a shortage of staff at the time. Council filed a statement of facts and contentions in the proceedings prepared by its consultant, which included contentions in relation to "unacceptable bulk" and inadequacy of private open space for each dwelling.

Mr El Badar accepted that he was not prepared to fix the problems identified by Council in the letter, and determined that it would be quicker and more efficient to go to court. He said that, in his experience, it was the only way to obtain an approval.

The appeal was listed for a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (referred to as an "s 34 conciliation").

Conciliation process

The s 34 conciliation conference took place on 4 November 2015. During that conference, the applicant's representatives presented some amended plans, on a without prejudice basis. The Council's representatives advised that the amended drawings went little or no way to resolving Council's concerns. Directions were made for further amended plans to be prepared and supplied to the Council.

On 7 December 2015, further plans were supplied. Council's consultant expressed the view that the applicant was, in effect, shifting deckchairs on the Titanic and not making any substantive modifications to the proposal.

As at 10 December 2015, it appears to have been the view of both Council's consultant and Mr Hargreaves that the applicant had enough chances and the matter should proceed to a defended hearing if the Council could not reach agreement with the applicant. Peter Jackson, a partner in the law firm retained by Council in this matter, was instructed accordingly, and advised that he would let the applicant's solicitor know the Council's position. Mr Jackson also expressed the view that Council "ought not assist the applicant in designing a proposal that might get over the line. It is solely a matter for the applicant".

Intervention from Mr Stavis

On 18 December 2015, the Commission lawfully intercepted a telephone call between Mr Hawatt and Mr El Badar, in which Mr Hawatt advised that amalgamation had been announced and that the Council would be amalgamating with Bankstown Council. Mr El Badar commented that approvals would get done more quickly, and Mr Hawatt replied that Mr El Badar's applications had already been approved. Mr El Badar told him that Willeroo Street had not, and Mr Hawatt replied "we'll get it done". Mr El Badar told Mr Hawatt there were still issues with the Council complaining about everything, including the size of a study room. Mr Hawatt said, "ah leave it to me, just give me – send me the address I'll fix – what's the address" ,and that he had a meeting with Mr Stavis at 2 pm. Mr Hawatt then confirmed with Mr El Badar that he and his partners would be ready to pay Mr Hawatt the money he needed for the settlement of the Queensland unit.

This telephone call is contrary to Mr Hawatt's evidence that he did not talk to Mr El Badar about this development. The call also supports a conclusion that Mr Hawatt was indicating to Mr El Badar that he would use the powers available to him to fix the problems that Mr El Badar was experiencing. The Commission does not accept Mr Hawatt's evidence that the word "fix" was very vague, and that the word was "meaningless" because, at the end of the day, it was up to whomever was assessing the application. Mr Hawatt rejected the proposition, put to him in the public inquiry, that he could fix the issues by talking to Mr Stavis about the application.

Mr Hawatt and Mr Stavis met on the afternoon of 18 December 2015. Mr Stavis' note of the meeting included a reference to Willeroo Street.

Later that day, the Commission lawfully intercepted another telephone call between Mr Hawatt and Mr El Badar. Mr Hawatt confirmed that Penshurst Road was all signed off, and that he had spoken to Mr Stavis about Willeroo Street. He said that Mr Stavis was going to look into it and come back to him, but that Mr Hawatt had told Mr Stavis that someone had changed the rules on the application again and asked for different things, and that was not right. Mr Hawatt confirmed again that Mr El Badar would have the money ready for settlement of the Queensland unit. Mr Hawatt did not accept that his words in this call indicated that he was trying to influence the way the Council's litigation was being conducted.

On 21 December 2015, Council's solicitors advised Mr El Badar's solicitors that:

> *…the amendments do not go far enough to address the Council concerns, and unless there is further significant change, there may be little utility in continuing the s 34 conciliation process.*

On the same day, the Commission lawfully intercepted a call between Mr El Badar and Mr Hawatt in which (after confirming that the transfer of $300,000 to Mr Hawatt's solicitor was complete) Mr El Badar complained that the Council was still being "silly about the bulk and about the setbacks" on the Willeroo Street site. Mr Hawatt said that Mr Stavis was looking into it, and that he would follow up.

Following his conversation with Mr El Badar, Mr Hawatt asked Mr Stavis "any news on 23 Willeroo St Lakemba?". Mr Stavis replied that "it is on appeal, they have not, I understand they have not made the changes we want in terms of bulk and scale etc. happy to meet to discuss".

Following these text messages, Mr Hawatt called Mr Stavis. The call was lawfully intercepted by the Commission. Mr Stavis told Mr Hawatt:

> *Now listen the only way – because there's lawyers involved now what you should tell your – the person is … to tell them to instruct their lawyers … to request a meeting, an info – without prejudice meeting … with me … and then I can sit in that room and we'll work it out.*

Mr Stavis accepted that the fact that Mr Hawatt took an interest in the application highlighted the need for him to get involved.

Mr Hawatt then called Mr El Badar and told him to ask his lawyer to request a without prejudice meeting with Mr Stavis for the following day. Mr El Badar called Mr Hawatt back, and Mr Hawatt explained that the meeting was so that they could sit down with Mr Stavis and sort it out. Mr Hawatt did not accept that, by using those words, he meant to convey that Mr Stavis would provide a solution. However, his words indicate at least an assumption that Mr Stavis would be able to help Mr El Badar to resolve the outstanding issues.

In the lawfully intercepted telephone call, Mr Hawatt asked Mr El Badar why they had not approached Mr Hawatt before they went to court, and Mr El Badar said that he did not like to ask too much. Mr Hawatt said that he had asked this question because he could have resolved the issue beforehand by finding a solution. The Commission accepts from this, and from the weight of the other evidence gathered in this matter, that Mr Hawatt saw himself as someone who could facilitate the provision of solutions to development proponents including his son-in-law.

Mr El Badar said that the reference to asking too much was on the basis that he was generally reluctant to approach people for help.

On 5 January 2016, Mr Stavis and Mr Hargreaves met with Mr El Badar and his architect. Mr Hargreaves prepared a file note of that meeting, in which he recorded that, while no agreement had been reached, the amendments proposed at the meeting approached a more appropriate design response.

On the same day, the Commission lawfully intercepted a telephone call between Mr El Badar and Mr Hawatt, in which Mr El Badar told Mr Hawatt that Mr Stavis had solved the problem, but that he was being "a bit harsh". Mr El Badar explained that there was an issue with the size of a study room, which Mr Stavis said had to be made smaller in case it was turned into a third bedroom. Mr Hawatt asked Mr El Badar whether Mr Stavis knew Mr El Badar was his son-in-law. Mr El Badar replied that he did not think so. Mr Hawatt told Mr El Badar that, if he had any issues, to tell Mr Stavis that Mr Hawatt was his father-in-law. Mr Hawatt and Mr El Badar confirmed that "the other one" (being Penshurst Road) was all fixed up and ready to go on the market, which should make Ms El Badar happy.

In his evidence to the public inquiry about this call, Mr Hawatt said that he thought the conversation indicated that the issues had been resolved, and therefore that there was nothing sinister about asking whether Mr Stavis knew about the family relationship. That, of course, is not the case. It is clear from the recorded conversation that there was still an issue concerning the size of a study room. Mr El-Badar said that he did not ever tell Mr Stavis that he was Mr Hawatt's son-in-law because he never had the need to do so.

Following that telephone call, Mr Hawatt sent a text message to Mr Stavis:

> *23 Willeroo St Lakemba. 2 sqm study? Doesn't that* [s]*ound ridiculous? I asked them to look at 6sqm study instead. Can you look into to help.*

It is clear from this message that Mr Hawatt understood the size of the study room remained an issue. Mr Hawatt said that, in this text message, he was putting forward his own judgment, and denied that he was trying to influence the assessor on the basis that it went to Mr Stavis rather than the assessing planner. Mr Hawatt denied that he was intervening in the assessment process.

The Commission is satisfied that this message made clear that Mr Hawatt was displeased with the position that the Council was taking and he wanted Mr Stavis, who had responsibility for development assessment, to look into it.

Mr Stavis replied that he was happy to compromise to 4 m2, and that "believe me, it's a good outcome for them". Mr Stavis agreed that this message showed him providing a solution to the development proponent for whom Mr Hawatt was advocating.

On or around 12 January 2016, the applicant submitted further plans. The Council's consultant reviewed the plans and advised that they did not go far enough to address concerns raised through the s 34 conciliation process regarding the scale of the proposed development and the constraints of the isolated site. Council's consultant recommended that the Council proceed to a defended hearing. Mr Hargreaves agreed, and instructed Council's solicitors to proceed to a defended hearing. Mr Jackson advised the applicant's solicitors on 19 January 2016.

On 20 January 2016, Mr El Badar informed Mr Hawatt that the Council had terminated the "s 34 phase" after he had met with Mr Stavis. Mr El Badar also told Mr Stavis by email that the last meeting "was all a waste of time". Mr Stavis received this email while he was on leave, but on the same day sent an email to Mr Gouvatsos asking, "what's the story … please find out what's going on and fix the issue".

Mr Stavis also asked Mr El Badar to email to him any correspondence he received from Council's solicitor. He advised Mr Gouvatsos that he wanted to personally review any plans submitted on behalf of Mr El Badar before terminating the s 34 conciliation conference. Mr Gouvatsos replied to Mr Stavis, providing advice from Mr Hargreaves about the inadequacies of the plans. Mr Gouvatsos noted that:

> *Talal has only engaged with us about making amendments to the design since he commenced proceedings and not during the DA stage, when we requested amended plans.*

Mr Stavis replied that the consultant was not privy to the meeting of 5 January 2016 and "should not have been relied upon to give advice". Mr Stavis requested that the lawyers be instructed to continue with the s 34 conciliation process. Mr Stavis also advised that he wanted to avoid a prolonged costly hearing if possible.

On 22 January 2016, Mr Hargreaves changed his instructions to Mr Jackson, advising that the Council did intend to continue with the s 34 conciliation process.

On 29 January 2016, Mr Stavis advised the applicant that he had reviewed the amended plans and was disappointed with what he described as "tokenistic" changes. Mr Stavis attached the plans, which he had marked up with suggested amendments.

Mr Stavis forwarded this email to Mr Hawatt, advising:

> *I'm trying hard to accommodate them but it's a narrow isolated site and therefore needs to be sensitively designed which is what the court will ask him to do (there's case law on this). They may as well make the changes I'm suggesting now, rather than spend money paying lawyers etc. He will still get 5 x 2 bedroom townhouses with what I'm suggesting.*

Mr Stavis said that, by this email, he was working hard to provide a solution that would result in an approval, but that the owners had to make changes that he and his staff required.

That afternoon, Mr El Badar and Mr Hawatt had a lawfully intercepted telephone conversation in which Mr El Badar said that Mr Stavis was "being silly" about the Willeroo Street development application, but that the other one was all finished and there were no problems there. Mr Hawatt said that he would see if "we" could resolve the issue, and that "we'll work something out".

Mr El Badar and Mr Stavis then emailed each other, each taking issue with the other's recollection of the meeting of 5 January 2016. Mr Stavis said that, if Mr El Badar was not intending to prepare amended plans, the Council would instruct its solicitors to proceed to hearing.

On 31 January 2016, Mr Hawatt sent to Mr Stavis a text message:

> *Hi Spiro*
>
> *Whats the issue re 23 Willaroo* [sic] *St Lakemba.*
>
> *Its within the fsr and height limit and meets objectives of setbacks and is an isolated site. Why council is playing hardball?*
>
> *Let me know.*
>
> *Michael Hawatt*

Mr Stavis replied that he would show Mr Hawatt tomorrow and that "he can get what he wants but I think the architect and his solicitor is giving bad advice".

On 2 February 2016, Mr El Badar sent further amended plans to the Council.

On 3 February 2016, the Commission lawfully intercepted another telephone call between Mr El Badar and Mr Hawatt, in which Mr Hawatt said that he had heard that everything went well. On the same day, Mr Hargreaves instructed Council's solicitors to seek a further adjournment of the Willeroo Street proceedings because the applicant was "close to providing us with a design we can support".

Also on the same day, Mr Hawatt asked Mr Stavis, "is it OK now so I can tell him" and Mr Stavis replied that he had instructed the lawyers to "back off" and the applicant needed to submit an amended package.

On 10 February 2016, Mr Hargreaves and Mr Stavis met with Mr El Badar to discuss the plans lodged on 2 February. At that meeting, Council officers advised that the amended designs were predominantly satisfactory.

On 11 February 2016, in another lawfully intercepted telephone call, Mr El Badar told Mr Hawatt that everything was good with Mr Stavis, and that he understood that Mr Stavis was being a bit hard because of the "Australian donkey" (in Arabic) before whom Mr Stavis wanted to look good. In the context of the assessment of the Willeroo Street application, the Commission is satisfied that this was a reference to Mr Hargreaves. Mr Hawatt observed that "he's okay, you got everything" and Mr El Badar said "thank you very much [uncle]".

As is evident from that telephone call, Mr Hawatt's son-in-law seemed to think that he had something to thank Mr Hawatt for; namely, his intervention with Mr Stavis leading to an agreement as to what would be approved by the Council to the satisfaction of Mr El Badar. Mr Stavis accepted that, as a result of Mr Hawatt's intervention, Mr El Badar and his co-owners received a higher level of service from him than if Mr Hawatt had not intervened. It was submitted for Mr Hawatt that he only made limited enquiries about this site, that he did not pursue Mr Stavis over this property and he did not use his position to influence Mr Stavis or to obtain a private benefit for Mr El Badar. Given the evidence outlined above, the Commission cannot accept these submissions.

From the evidence in respect of this application and from the weight of evidence gathered in this inquiry, the Commission finds that Mr Hawatt knew that his intervention had a real and appreciable impact on Mr Stavis. These were more than just "enquiries" for information that could be provided, they were interventions that involved criticism of Mr Stavis' approach and advocacy for the applicants. The Commission is satisfied that Mr Hawatt understood that he was intervening in the progression of the development application with the intention of influencing Mr Stavis to give preferential treatment to his son-in-law.

Outcome

Mr Hawatt's intervention on behalf of Mr El Badar in relation to the 23 Willeroo Street development application ensured the intervention of Mr Stavis, in favour of Mr El Badar.

A report was prepared for the Council recommending that it enter into an s 34 conciliation agreement with the applicant, and listed for inclusion in a CDC meeting scheduled on 12 May 2016. This meeting did not proceed, because the proclamation effecting the amalgamation of Council was published on that day. The matter was determined by the administrator appointed to the City of Canterbury Bankstown Council, who resolved that the Council enter into an s 34 agreement with the applicant.

31 Santley Crescent, Kingswood

Background

The site at 31 Santley Crescent, Kingswood, was owned by Mr Hawatt, and disclosed to the Council as an investment property. From May 2011, the site was subject to a caveat. It is sufficient for the Commission's purposes to note that, to remove the caveat, Mr Hawatt had agreed to purchase another unit in Queensland for $300,000 in his name and in the name of the caveator.

Interest of Mr El Badar and his partners

From early 2015, Mr El Badar was involved at looking at the 31 Santley Crescent, Kingswood, site with a view to potentially developing it, along with his business partners, including Mr Osman. Mr El Badar said that he and his partners had agreed with Mr Hawatt on a price of around $1 million for the property. They thought they could develop units or boarding rooms on the site, and instructed an architect to that effect in October 2015.

They agreed to pay $300,000 to Mr Hawatt by way of a deposit to secure the property. Mr El Badar and his partners contributed $50,000, and $250,000 was sourced from Bella Ikea, a company of which Mr Osman was a director and, through one of his companies, a shareholder. The first amount was paid on 18 November 2015 and the second on 21 December 2015.

Mr El Badar told the Commission that he did not care about the caveat, but Mr Hawatt did, so he asked for the $300,000 to help him remove the caveat and buy a unit in the Gold Coast. This is effectively consistent with Mr Hawatt's evidence.

Mr El Badar and his partners realised that they would not be able to develop what they wanted on the site and asked Mr Hawatt if they could pull out of the sale. Once Mr Hawatt had found another purchaser, he allowed them to pull out. Mr Hawatt told Mr El Badar that he could not return the money straight away.

In a number of lawfully intercepted calls at around this time, Mr El Badar and Mr Hawatt discussed two subjects: Mr El Badar's development applications and the money that Mr Hawatt needed to purchase the Queensland unit.

In his evidence to the Commission, Mr El Badar disagreed that he and his partners loaned Mr Hawatt $300,000 to assist him in return for the assistance that Mr Hawatt was providing in relation to his development applications at Council. He said that it was a deposit for sale, although a larger deposit than usual.

The Commission examined legal files held by Mr Hawatt's solicitor and found, although one had been drafted, there was no executed option in respect of the sale with Mr El Badar and his partners, nor was there a contract for sale executed by both parties. There was the front page of a contract signed by Mr Osman's brother, Alae Osman, in respect of the sale, without a purchase price nominated. Mr Osman was of the view that he and his partners had a right to the property by way of that contract.

Regardless of the state of the documents, the understanding of Mr El Badar and Mr Hawatt captured on lawfully intercepted telephone calls was that Mr El Badar and his partners had agreed to purchase Santley Crescent, and that they would give way to a better offer from Marwan Chanine. The precise timing and legal nature of that agreement is not clear from the evidence available to the Commission. Mr Hawatt said that the money became a loan after Mr El Badar decided not to proceed with the sale.

Also at around this time, Mr Hawatt was negotiating with Marwan Chanine for the sale of the Santley Crescent property for a larger sum of money than to Mr El Badar and his partners. This matter will be considered further in chapter 9, but it is relevant to note here that for the sale to Marwan Chanine to proceed, Mr Hawatt needed to be able to remove the caveat on his property, which required the purchase of the Queensland unit. He did not have the money available to do so, except through the assistance of Mr El Badar and his partners. If Mr El Badar had not given him the rest of the money, Mr Hawatt would have lost his deposit on the unit.

On 7 July 2016, Mr Hawatt repaid $100,000 to Mr El Badar's partners. Mr Hawatt told the Commission that he had paid the outstanding amount some weeks before he gave evidence in the Commission's public inquiry.

Corrupt conduct

Michael Hawatt

In respect of each development application, Mr Hawatt's conduct was not confined to the permissible conduct of requesting information or advice from Mr Stavis. His correspondence was in the nature of advocacy to a person responsible for the exercise of development assessment functions and whom, Mr Hawatt knew, had a particular relationship with him. The nature of this relationship is set out elsewhere in this report, but it is sufficient to note that Mr Hawatt knew that Mr Stavis would endeavour to progress his son-in-law's proposed developments so that he could respond with news of that progress.

It was submitted for Mr Hawatt that he only made limited enquiries about these properties, and would have declared an interest if required. It was submitted that what he did was part of his job as a properly elected councillor. He denied using his position to influence Mr Stavis in respect of either development.

The Commission does not accept these submissions, but considers that the contact he had with Mr Stavis was outside his proper role as a councillor, as it involved acting to obtain a benefit for a family member. Further, the Commission is satisfied that having regard to all of the evidence, Mr Hawatt did use his position to influence Mr Stavis in the exercise of his functions in relation to 23 Willeroo Street.

The conduct was directed to securing from Mr Stavis a more favourable and expeditious resolution of his family member's applications with the Council than they would otherwise have received.

Between about May and December 2015, Mr Hawatt misused his position as a councillor of the Council to influence Mr Stavis to act favourably in relation to the development application for 51 Penshurst Road, Roselands, being property in which his daughter and son-in-law had a pecuniary interest.

Such conduct on the part of Mr Hawatt adversely affected, or could adversely affect, either directly or indirectly the honest or impartial exercise of the official functions of a public official within the meaning of s 8(1)(a) of the ICAC Act, by pursuing Mr Stavis in relation to development applications in which his daughter and son-in-law had a pecuniary interest.

Between about December 2015 and February 2016, Mr Hawatt misused his position as a councillor of the Council to influence Mr Stavis to act favourably in relation to the development application for 23 Willeroo Street, Lakemba, being property in which his daughter and son-in-law had a pecuniary interest.

Such conduct on the part of Mr Hawatt adversely affected, or could adversely affect, either directly or indirectly the honest or impartial exercise of the official functions of a public official within the meaning of s 8(1)(a) of the *Independent Commssion Against Corruption Act 1988* ("the ICAC Act"), by pursuing Mr Stavis in relation to development applications in which his daughter and son-in-law had a pecuniary interest.

The Commission is also satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found in each case were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Hawatt had committed a disciplinary offence, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 5.9, prohibiting council officers from using their position to influence other council officials in the performance of their public or professional duties to obtain a private benefit for themselves or someone else
- clause 5.10, prohibiting council officers from taking advantage (or seeking to take advantage) of their status or position with council in order to obtain a private benefit for themselves or any other person or body.

Further, the Commission is satisfied that the conduct could in each case involve a substantial breach of clause 3.1(j) of the code of conduct, which prohibits acting in a way that may give rise to the reasonable suspicion or appearance of improper conduct or partial performance of public or professional duties.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission considers Mr Hawatt's conduct in each case to be serious corrupt conduct under s 74BA(1) of the ICAC act, taking into account that Mr Hawatt had been a councillor since 1995 and the particular relationship he had cultivated with Mr Stavis. As has been noted elsewhere in the report, the Commission considers it to be a serious matter for the exercise of planning functions to be affected by an improper purpose, which is obscured from public scrutiny. Here, that purpose was the advantaging of Mr Hawatt's family. It occurred in circumstances where Mr Hawatt had received a significant loan through his son-in-law's business associates, which assisted him to progress the sale of his investment property (and to invest in property in Queensland).

The Commission is satisfied that, as a councillor, Mr Hawatt engaged in misconduct as defined by s 440F of the *Local Government Act 1993*.

Spiro Stavis

The Commission does not make any finding of corrupt conduct in respect of Mr Stavis' conduct. There was insufficient evidence that any conduct engaged in by Mr Stavis constituted serious corrupt conduct.

Section 74A(2) statements

The Commission is satisfied that, in respect of the matters covered in this chapter, Mr Hawatt and Mr Stavis are "affected" persons for the purposes of s 74A(2) of the ICAC Act.

Michael Hawatt

The Commission is not of the opinion that consideration should be given to obtaining the advice of the Director of Pubic Prosceutions (DPP) with respect to the prosecution of Mr Hawatt for any specified criminal offence. The Commission has not made a finding that his conduct could constitute or involve a criminal offence.

As Mr Hawatt is no longer a councillor, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

Spiro Stavis

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Stavis for any specified criminal offence, or that consideration should be given to the taking of action against Mr Stavis for any specified disciplinary offence. The Commission has not made a finding that his conduct could constitute or involve a criminal or disciplinary offence.

Chapter 5: Assad Faker and 15–23 Homer Street, Earlwood

This chapter examines conduct in relation to a planning proposal lodged on behalf of Assad Faker in May 2014.

The wedge-shaped parcel of land at 15-23 Homer Street, Earlwood, is owned by Croycon Investments Pty Ltd. Mr Faker was at the relevant times a sole director, secretary and shareholder of that company. The site sits between Homer Street and the southern foreshore along the Cooks River.

On 13 May 2014, the Council received a rezoning application from Mr Faker in respect of 15-23 Homer Street, Earlwood. The application sought an increase in the height controls which applied to the site to 18 metres. At the time, the site had a height limit of 10 metres and no floor space ratio (FSR) control. The change was sought to allow a five-storey mixed-use development along Homer Street, stepping down to four storeys along the Cooks River reserve and three storeys along the edge of the site adjoining 25-33 Homer Street. The adjoining site had a four-to-five storey residential apartment building.

Relationships

Mr Faker contacted Michael Hawatt prior to submission of the planning proposal to lobby for his rezoning application to be approved. Mr Faker thought that Mr Hawatt had some influence on the Council. There was no evidence that Mr Faker and Mr Hawatt socialised or that Mr Hawatt was interested in a business relationship with Mr Faker. The Commission found that Mr Faker gave credible evidence.

Preparation of the planning proposal

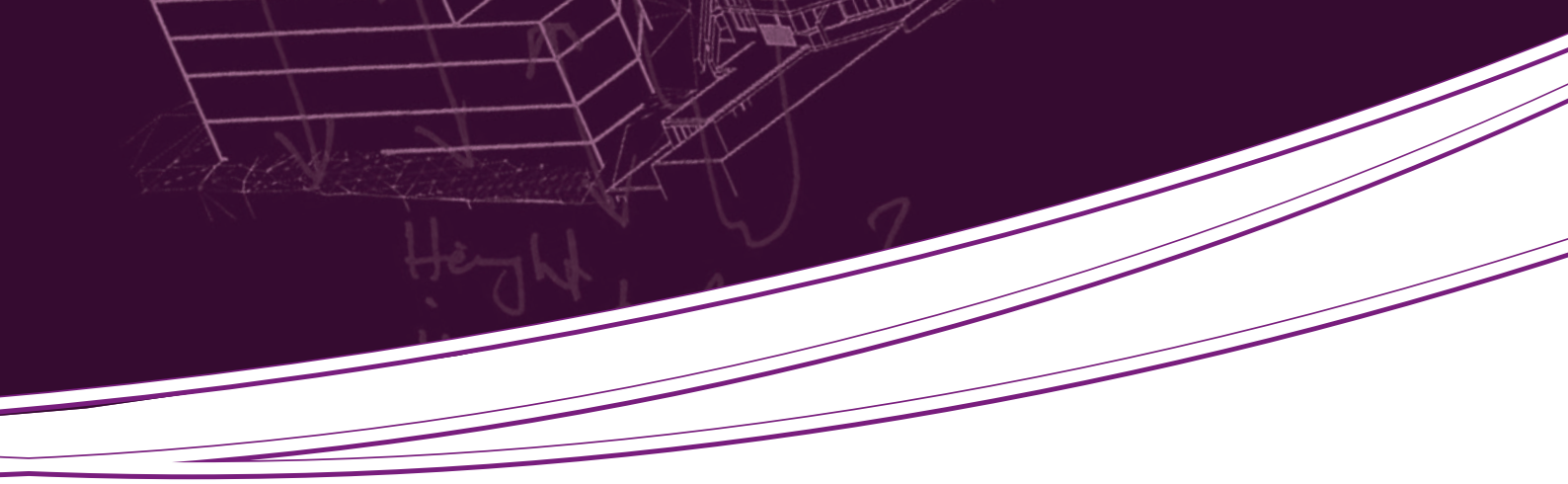
On 13 November 2014, an officer's report was submitted to a City Development Committee (CDC) meeting in respect of the planning proposal seeking, among other things, to increase the maximum building height from 10 metres to 18 metres. Warren Farleigh, along with Lisa Ho, were the lead officers within the urban planning team who prepared the report. Gillian Dawson, then acting director of city planning, told the Commission that the team often discussed planning proposals more generally, and that no one in the team supported this planning proposal, on the basis that it was not a good fit for the area (having particular regard to the river frontage, which is used for cycling and pedestrian activity) and that it was well outside the existing controls. Ms Dawson reviewed and approved the officer's report that was submitted to the CDC.

The officer's report indicated that:

- previous planning studies for the site concluded that a height limit of 10 metres was appropriate for the subject site and the surrounding area
- the proposed 18-metre height was not recommended but some increase to allow a new building to more closely match the adjoining building in terms of height and stepping down could be considered
- the maximum height recommended was 14 metres, stepping down towards the river
- the scheme envisaged a five-storey mixed-use development with a significantly greater FSR of 2:1 than the 1.49:1 on the existing adjoining building, and 1.1:1 on the nearby Adora Chocolates site.

The report demonstrated that the recommended 14-metre height on part of the site would allow a building that was approximately the same height as the building next door, while 18 metres would be significantly higher.

Instead of accepting the officer's recommendation, the CDC resolved, on 13 November 2014, that the building height for the site for 15-23 Homer Street, Earlwood, should be 17 metres. Councillor Con Vasiliades suggested to the Commission that this was an error, and that the



intention was for the height to match the height next door and to step down towards the river.

Ms Dawson told the Commission that the belief that the building next door had a 17-metre height limit was mistaken in that "there was a component of the building that was 17 metres but that wasn't as it presented to Homer Street". This was clear from the officer's report submitted to the CDC.

Ms Dawson was not contacted about the proposed resolution.

On 11 December 2014, following the CDC meeting, Ms Dawson provided at mayor Brian Robson's request "a comprehensive analysis of the likely potential implications of recent propositions for the site at 15-23 Homer Street, Earlwood". The analysis was prepared by Ms Ho and indicated the following:

The analysis indicated that the CDC resolution permitted a significant increase in density on the site from the proposed density sought by the applicant, let alone the recommendation, which had been made by the Council officer.

A comparative analysis has been provided to show the potential dwelling yields on the site and the likely built form outcomes based on the differing height scenarios. A figure of 90m^2 gross floor area per 2 bedroom dwelling has been used to work out the likely density.

Controls Site area 1144m2	**10m** Current height control	**14m** (part of site) As recommended by Council Officer's	**18m** As per applicant's proposal	**17m** As resolved by Council
FSR (gross floor area estimate)	0.9:1 (1029m^2)	1.4:1 (1601m^2)	2:1 (2288m2)	3.75:1 (4290m^2) *Based on 75% site coverage
Height	10m across entire site	Part 10m, Part 14m	18m across the entire site	17m across the entire site
Density	11 dwellings *Based on approved DA.	18 dwellings	25 dwellings *estimate based on applicant's concept plan as submitted with the planning proposal.	47 dwellings *estimate based on extrapolating height over majority of the site
Number of storeys	Part 2, part 3 storeys	Part 3, part 4 storeys	Part 3, Part 4 and Part 5 storeys	5 storeys

However, pursuant to the CDC resolution, the officers prepared a planning proposal and it was submitted to the NSW Planning Department for Gateway Determination under a letter dated 12 January 2015.

In the lead up to the Council meeting on 26 February 2015, Mr Hawatt gave notice of a motion in respect of the resolution of 13 November 2014 to the effect that "the intent was that the proposed building at 15-23 Homer Street Earlwood, is to be at similar height and stepping down as next door". The motion also sought that, "accordingly, an appropriate amendment be made by the planning division and be brought back to council for consideration before sending to Gateway for determination".

The business papers for the Council meeting included the following comment from Ms Dawson:

> *The adjoining development is four storeys (14 metres) at the Homer Street frontage, stepping down in height towards the Cooks River frontage. A small portion of the building set back 12 metres from Homer Street reaches 17 metres.*
>
> *A planning proposal to effect the Council resolution on 13 November 2014 was prepared and sent to the Department of Planning and Environment on 15 January 2015 for a Gateway Determination.*

At the meeting of 26 February 2015, Mr Hawatt's motion was withdrawn. Mr Hawatt told the Commission that Ms Dawson suggested to him that the Council could wait for the NSW Planning Department to come back with any issues. Ms Dawson said that she did not recall anyone contacting her about the motion, and said that, if the resolution had been passed in the terms proposed by Mr Hawatt, the department would have been contacted and informed that the planning proposal was to be withdrawn and substituted.

Following the meeting involving a select group of councillors at the Canterbury Leagues Club in early March 2015, Mr Stavis received an email from Mr Vasiliades asking that he ensure that the outcome of the planning proposal was *not* 17 metres across the site but as per Mr Hawatt's draft resolution of 26 February 2015.

Gateway Determination

On 19 March 2015, the NSW Planning Department sent to the Council a Gateway Determination, signed by Simon Manoski (who worked for the department at the time), as delegate of the minister for planning.

Relevantly, the Gateway Determination required that:

> *…prior to public exhibition the planning proposal is to be amended to include … further justification to support a maximum building height of 17 metres on the site. An additional study that accurately represents and addresses the impact of future development on the character of the local area is to be made available with the planning proposal during the exhibition period.*

Council officers understood this condition to require an additional study to justify the 17-metre height. Ms Dawson contacted an officer from the NSW Planning Department to obtain clarification of the condition. The officer advised that the additional study did not necessarily have to be prepared by the Council but that it had to be exhibited concurrently with the planning proposal. The officer also indicated that, if the department felt that the exhibition material was not appropriate, they could always lodge their own submission to the planning proposal, which would become an unresolved government agency objection. However, the department would not become aware of the exhibition unless it was advised by the Council. Ms Dawson told the Commission that the Council would not usually notify the department when a planning proposal went on exhibition.

The Council was also authorised to exercise the functions of the minister for planning under s 59 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") in respect of the Homer Street planning proposal. This authorisation permitted the Council to make the local environmental plan (LEP) or decide not to make the LEP. However, the functions under s 59 could not be validly exercised if a condition of the Gateway Determination had been breached.

The first Olsson report

On 29 May 2015, the Council engaged Russell Olsson, an urban designer, to complete the additional study required by the Gateway Determination.

On 18 June 2015, Mr Olsson provided an "urban design site envelope study" for 15-23 Homer Street, Earlwood ("the first Olsson report"). The first Olsson report stated that a 17-metre height limit "would be excessive for the study site" and "inappropriate for the following reasons":

> – *the adjacent development at 25-33 Homer Street only reaches 17m in part of the building that is set back from the street boundary*
>
> – *the smaller scale of 2-10 Homer Street establishes a lower street edge massing on Homer Street*
>
> – *various views from within and beyond the precinct establish that a lower maximum height is more consistent with the urban design principles which are stated on page 8 of this report.*

The first Olsson report recommended alternative height limits with a maximum of 14.5 metres and an FSR of 1.29:1. The report took into account that the desired future character of the area was as a "lively neighbourhood centre" with "active outdoor spaces and natural settings". The report noted that "views towards the riverbank are important and trees should line the foreshore" and "the precinct should support walking and cycling routes".

The first Olsson report also demonstrated that, although the maximum height of the development proposed for 15-23 Homer Street, Earlwood, was consistent with the adjacent development at 25-33 Homer Street development, "the massing onto Cooks River is much higher [than] the existing 25-33 Homer Street development".

When the first Olsson report was discussed amongst the Council officers, Ms Dawson recalled that there was a difference of opinion. She said that Mr Stavis:

> *…felt that the proponent's proposal was a better outcome and that we were being too conservative and my view was that we shouldn't be there purely to maximise developer's potential, we also had to look at the public interest*.

Mr Stavis told the Commission that he had some concerns about the first Olsson report, including that:

- the views expressed were the same view that the Council staff had reached
- Council staff had not put the study out to tender.

Ultimately, he was not satisfied that the study had "exhausted all the possibilities that it needed to" or "analysed it to the nth degree to feel comfortable in saying that we can't achieve the 17 metres".

On 8 July 2015, Ms Ho provided Mr Olsson with some comments and asked that he make changes to his report. Ms Ho told the Commission that the provision of comments in this way was a normal process, and that the purpose was to ensure the facts and arguments to support the consultant's conclusions were "in place", but not to change the substance of the recommendations. Mr Olsson gave evidence consistent with this. The Commission is satisfied that Ms Ho's comments were not directed to changing Mr Olsson's opinion.

On 14 July 2015, Ms Ho recorded in a file note that she spoke to Helen Wilkins from the NSW Planning Department, who advised that:

> *…where a study has been carried out that cannot meet the conditions of the Gateway Determination, Council needs to form a position on the matter, ie whether to support the height recommended in the study or revert back to the original recommendation on the planning proposal. This would necessitate a revised planning proposal*.

Mr Stavis told the Commission that it was likely that he read this note.

Ms Ho said that, in around July to August 2015, Mr Stavis made enquiries about when the matter would go to public exhibition and that he "took over the process".

On 8 September 2015, Mr Stavis, Ms Dawson, Mr Farleigh, Ms Ho and Mr Olsson attended a meeting about the planning proposal. Ms Ho prepared a file note of this meeting, which included that Mr Stavis had suggested that greater height could be provided to the adjacent building, and Mr Olsson agreed on the condition that it did not accommodate an entire storey or level. Mr Stavis disagreed with that aspect of the note, suggesting that he had instead suggested there was an opportunity to look at greater height on the corner.

Following this meeting, Ms Ho's understanding was that the proposal was essentially put on hold.

On 17 September 2015, Mr Hawatt sent to Mr Stavis a text message asking about the current position on the planning proposal for 15-23 Homer Street, stating, "this is dragging on for too long. I hope the games are not being played again by certain people".

Mr Hawatt denied putting pressure on Mr Stavis to complete the planning proposal, and said that he was just following up on enquiries. Mr Stavis was clearly very conscious that Mr Hawatt was interested in the matter and was very active in representing the applicant. That Mr Hawatt was seeking to exercise influence over Mr Stavis in respect of the planning proposal is evident from a telephone call he had with Mr Faker on 14 December 2015. When Mr Faker complained that Mr Stavis was making him do another planning report, Mr Hawatt said, "I didn't know it was going to be all that much I would have had a talk to him again".

In early October 2015, Mr Stavis gave to Mr Faker a copy of the first Olsson report to give him an opportunity to address some of those issues. Mr Stavis said that his primary concern was that Mr Olsson had not addressed all the issues. In light of the contact from Mr Hawatt, and the fact that he knew Mr Hawatt was advocating for the applicant, the Commission is satisfied that Mr Stavis did this because he was trying to achieve an outcome which accorded with Mr Hawatt's wishes. Mr Stavis accepted that this was a solution he came up with in relation to the first Olsson's report not satisfying the Gateway Determination.

The JBA report

In December 2015, Mr Stavis received a draft report from JBA Urban Planning Consultants, commissioned on behalf of Mr Faker, concerning the planning proposal for the site ("the draft JBA report"). Neither Ms Ho nor Mr Farleigh knew that the draft JBA report had been received.

Mr Stavis did not accept that he withheld the draft JBA report from his staff because he wanted to ensure that they were not involved in its finalisation; rather, he said that he was not satisfied with the way that they were dealing with the matter. It was submitted for Mr Stavis that it was entirely a matter for him that he did not keep his subordinates informed.

On 23 December 2015, Mr Stavis sent back to Mr Faker's architect a marked up version of the draft JBA report. The markings were made in red pen in Mr Stavis' handwriting. Although he wrote on the front of the document that his comments "should not be mis-construed as approval/support of the proposal", he accepted in his evidence to the Commission that he saw that version of the report as being deficient in meeting the goal of satisfying the Gateway Determination condition of providing additional justification for the 17-metre building height limit in the planning proposal.

Mr Stavis denied that he was editing the draft JBA report, but characterised his conduct as clarifying issues or information in the report. He did not accept that he made himself an advocate for the development proponent or put himself in a position of conflict by trying to improve the report submitted on behalf of the applicant. In circumstances where Mr Stavis would be responsible for the assessment of that report, his detailed review of the draft and provision of comments, with a view to progressing the planning proposal, risked placing him in a position of conflict. This, and the conduct that followed in respect of this proposal, is an example of Mr Stavis' "solutions-focused" approach that concerns the Commission.

It was submitted for Mr Stavis that it was not improper to analyse deficiencies in a report submitted by an applicant, and that criticism of this approach is inconsistent with views previously advanced by the Commission in relation to the role of negotiation in development assessment and an approach described as the "amber light" approach in the Land and Environment Court. The previous commentary by the Commission relied on by Mr Stavis is from the Commission's Operation Atlas report concerning Wollongong City Council, and is as follows:

> *Although council planning departments are regulators of developers, planners must also work with developers in a negotiating relationship. This is the danger: planners have high levels of discretion, developers are highly motivated to maximise profit, and the two are in an extended relationship of give and take.*

This commentary highlights the risks of a solutions-focused approach, where that approach involves becoming too closely involved in achieving the goals of development applicants. There is a risk that those interests could overwhelm the regulatory functions for which council planning departments are responsible. In drawing attention to this risk, the Commission has had regard to the particular circumstances of Mr Stavis' employment, including his relationship with Mr Hawatt, who approached him directly to advocate for development interests.

At the time with which this investigation is concerned, the "amber light" approach involved the Land and Environment Court considering not only whether a proposal should be approved in the form that was before the court, but also whether the proposal was capable of approval with specific modifications imposed by the court (*The Benevolent Society v Waverley Council* [2010] NSWLEC 1082). The approach has since been criticised by the NSW Court of Appeal on the grounds that it has no statutory basis, and diverted attention from the functions being exercised by the court under the EPA Act to consider and determine the particular development application (*Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28 at [200]-[202]). It is sufficient to say here that the Commission is not satisfied that the amber light approach utilised in the Land and Environment Court is in the same vein as seeking to improve the material justifying the changes in a planning control.

On 13 January 2016, Mr Faker's architect advised Mr Stavis that they were going to provide additional information "as per your mark up". Mr Stavis replied, "the issues or mark ups raised by me were not intended as exhaustive comments. Please do your own analysis and provide a more comprehensive analysis and package as required".

In February 2016, the NSW Planning Department granted a 12-month extension to the Gateway Determination.

On or around 18 March 2016, the final JBA report was formally submitted to the Council. Ms Ho prepared a file note of her review of that report, dated 19 April 2016. Ms Ho's review found that the:

- report proposed a scheme that was even greater in terms of height, bulk and scale to that originally submitted by the proponent
- heights were considered excessive and did not meet the principal of stepping down to the river
- report was silent on compatibility with the scale of the Adora Chocolates building, being a key site within the precinct

- report claimed that the proposal was compatible with the neighbouring site, which was not the case
- report did not address how the proposal related to the river foreshore, and the proposal did not step down towards the river
- proposal would result in significantly diminished amenity for a number of units along the north-eastern side of the apartments on 25-33 Homer Street.

Mr Farleigh agreed with this commentary.

Mr Faker did not accept that he was seeking, by the final JBA report, to justify a development that was bigger than his planners initially proposed.

On 2 May 2016, Mr Farleigh sent an email to Mr Stavis advising that the additional information from the proponents had been reviewed and that "initial inspection suggests the proposal has changed again from that submitted with the planning proposal and request for a Gateway Determination". Mr Farleigh advised that Ms Ho's review of the material was on the file.

By April and May 2016, Mr Stavis had excluded his staff from the matter and dealt directly with the proponent, the proponent's architect and the author of the JBA report. He said that he took a more "proactive approach" because "there was a timeline with the Gateway Determination that needed to be adhered to, and that's … just the way I am". However, by this time, there had been a 12-month extension to the Gateway Determination conditions, which removed the need for urgency from that front.

The second Olsson report

On or around 20 April 2016, Mr Stavis met with Mr Olsson at the Council. There were no other Council officers present. At the meeting, Mr Stavis gave Mr Olsson a copy of the amended JBA report. Mr Stavis asked Mr Olsson to review the JBA report and to prepare a follow up report. Mr Olsson told the Commission that Mr Stavis also said to him words to the following effect:

- "the councillors are very pro-development and it is very difficult dealing with them"
- "I feel under a lot of pressure [from the councillors] regarding that matter"
- "assess the JBA report and change your report"
- "I think it's better than the previous proposal", referring to the JBA report
- "look I really like this report and I'd like you to make changes".

Mr Olsson said that he understood that Mr Stavis wanted him to agree that the JBA report was better. He said that he understood that Mr Stavis wanted him to change his report. Mr Olsson said that Mr Stavis told him that he could "charge us what you would like for that" and that Council was compiling a register of urban designers, for which Mr Olsson should register. Mr Olsson said that he felt that Mr Stavis was asking him to change his report and offering him "enticements" to do so. The enticements were by way of the "open cheque book" approach and the mention of getting on the register of urban designers. Mr Stavis accepted that, in April 2016, he was involved in a proposal to set up an urban design panel, but denied that he mentioned anything to this effect to Mr Olsson.

Mr Olsson did not make a contemporaneous note of this meeting, and gave evidence to the Commission from memory. It was submitted for Mr Stavis that the absence of corroboration and the state in which Mr Olsson's evidence was left after cross-examination precluded the Commission from accepting Mr Olsson's account, given the civil standard of proof. On the contrary, the Commission is satisfied that Mr Olsson maintained his evidence under cross-examination and denied that he misremembered aspects of the conversation. Although he gave oral evidence to the Commission some time after having the conversation with Mr Stavis, he made a statement to the Commission six months after the conversation, and his oral evidence was consistent with that statement.

Mr Stavis denied that the purpose of the meeting was to try to persuade Mr Olsson to change the opinions he had expressed in his report. He said that he wanted Mr Olsson to look at the issues raised in the final JBA report, in the context of Mr Olsson's previous report.

Mr Stavis accepted that, at the meeting, he drew the final JBA report to Mr Olsson's attention. However, he denied saying that the councillors were pro-development and that it was difficult dealing with them (although he accepted that this was a true statement of the position at the time). He said that he did not think it likely or possible that he said, "I think it is better than the previous proposal", although he accepted that it was likely that he was satisfied with the final JBA report. He accepted that he wanted Mr Olsson to produce another document that would involve or include a review of the final JBA report.

It was submitted for Mr Stavis that, in a pro-development context, he was entitled to test the limits of what the expert or consultant was prepared to support. The Commission accepts that submission, and notes further that Mr Stavis had a direction from Council in the form of a Council resolution, which entitled him to test the consultant's opinion. The conduct examined here turns on whether the Commission is satisfied that Mr Stavis

improperly offered Mr Olsson an inducement to provide an opinion that he would not otherwise have provided.

Mr Stavis knew that it would be dishonest to offer inducements to an external consultant to change the opinion expressed in their report. He also understood that it would be the wrong thing to try to influence an independent consultant assessing an application. He denied offering such an inducement to Mr Olsson.

The Commission accepts Mr Olsson's account of the conversation, because he gave an account which was consistent both internally and with the events which followed. Further, this was the first time Mr Olsson had been asked to change a report and this was therefore a memorable event to him. The Commission accepts that Mr Stavis attempted to offer Mr Olsson inducements, in that he could charge what he wanted and by suggesting that he could be considered favourably for the urban design panel Mr Stavis was involved in trying to establish. By offering such an inducement with a view to having Mr Olsson change his opinion, Mr Stavis acted dishonestly.

On 25 April 2016, the Commission lawfully intercepted a telephone call between Mr Stavis and Mr Hawatt, in which Mr Stavis told him that he has "come to an agreement" on Homer Street so it was going to happen. He told Mr Hawatt, "jump up and down, go up on your roof and say hallelujah Spiro". Mr Hawatt asked if "they were happy with it", and Mr Stavis said "of course they are". Mr Stavis accepted that he was indicating to Mr Hawatt that there was a satisfactory resolution to the Homer Street development as far as Mr Hawatt was concerned. A couple of days later, Mr Hawatt called Mr Faker to tell him that everything was good.

On 9 May 2016, Mr Olsson sent a draft report to Mr Stavis ("the second Olsson report"). Ms Ho was not asked to review this version of the report. Mr Olsson concluded that the JBA report was proposing effectively six storeys, and that this was an excessive height in the context of the riverfront. Mr Olsson recommended that:

> *Due to the excessive site coverage of the 17m (5 storey) height across the site, and the excessive height on the corner of Homer Street and the river, it is recommended that:*
>
> – *the 4th Storey (RL 16.0) in the JBA report be set back 5m from the riverfront building alignment and*
>
> – *the 5th storey (RL 19.0) be set back 8m from the riverfront building alignment (that is, a further 3m back from the set back 4th storey)*
>
> *The top floor setback from Homer Street and the stepping from east to west along the river, that are shown in the Solar Access diagram Figure 14 on page 12 of the JBA report, should be retained. The recommended 5m and 8m top floor setbacks from the river are in addition to the other setbacks proposed in the JBA report.*
>
> *It is recommended that these setbacks be followed in any Development Application prepared for the site, and that they could be resolved as part of a future DA.*

Just under an hour later, Mr Stavis sent the second Olsson report to Mitchell Noble, who had replaced Ms Dawson as Council manager of land use and environmental planning following her resignation, on what was Mr Noble's first day of work. Mr Noble, who reported to Mr Stavis, said that, on the afternoon of his first day, Mr Stavis told him that:

> *…he had a problem, that there was a Gateway Determination from the Department of Planning and Environment for this site that required an additional piece of work to justify the 17 metres proposed height control and that the council had resolved 17 metres and an additional study had been acquired but that it only supported a maximum of 14 metres.*

In a subsequent email about the second Olsson report, Mr Stavis told Mr Noble "I don't particularly like his recommendation, not quite what we discussed. Let's chat tomorrow please about his wording". The "we" referred to a discussion between Mr Olsson and Mr Stavis. Mr Olsson said that he was not surprised that this was Mr Stavis' view because he thought that Mr Stavis may have come away from the meeting thinking that Mr Olsson was going to do something much more closely aligned with the final JBA report than what he ultimately produced. Mr Stavis said that his comment was based on Mr Olsson's report being flawed, as Mr Olsson assumed that the final JBA report sought six storeys when Mr Stavis thought it only sought five.

Mr Stavis also sought to downplay the significance of progressing the planning proposal on the basis of the final JBA report, on the basis that a development application would still need to be submitted and approved. Mr Stavis disagreed that a rezoning, which allowed the construction of a tall, bulky building, would inevitably mean that a tall, bulky building would be allowed to be constructed on the site. Although a development application will not necessarily be approved just because there has been a change to the planning controls onsite, a development application complying with the planning controls is likely to face less obstacles to approval than a non-complying development that relied on clause 4.6 of the Canterbury Local Environmental Plan 2012.

Mr Noble told the Commission that he had reviewed both the second Olsson report and the JBA report within

24 hours of starting work. Mr Noble "thought it was clear that [Mr] Olsson's work was more responsive to the surrounding context and I preferred it for that reason".

Mr Stavis and Mr Noble then had a discussion about Mr Olsson's report. Mr Stavis told Mr Noble that "it was a decision of council and … we had been charged with moving that forward. We have clear directions and that's the way we needed to go". Mr Noble also told the Commission that Mr Stavis said that he spoke with Mr Olsson to see if he was flexible, and Mr Olsson said no. Mr Noble recalled that generally his conversation with Mr Stavis was about the second Olsson report being a blockage, and something that Mr Stavis was asking that Mr Noble "find a pathway around effectively". He said that he did not have any discussions about the merits of the respective reports with Mr Stavis, but that it was "a pathway discussion he was wanting from me".

Mr Stavis had no recollection of telling Mr Noble that he had spoken with Mr Olsson about his report to see if he was flexible. He said that he did brief Mr Noble, and that it was likely that he told him that the planning proposal had gone forward because of a decision of Council seeking to increase the building height. He did not recall saying anything about facing difficulties moving Homer Street forward because of the Olsson report, or indicating to Mr Noble that he wanted him to find a solution.

The Commission prefers Mr Noble's version of events, noting that it was shortly after he commenced working at Council and the events would have been memorable.

On 10 May 2016, Mr Stavis sent an email to Mr Olsson:

> *I have reviewed the revised report and I must admit it is a bit on the negative side with additional recommendations that I don't believe we discuss* [sic].

Two days later, Mr Olsson replied to Mr Stavis' email of 10 May:

> *When I looked at it, after our meeting, I realised that it is bigger than the original Planning Proposal. The Department question (asked justification for) the original 17m height, which was set back near the existing building. The latest proposal has the 17m height extending almost to the riverfront. My recommendation brings it back to something like the original Planning Proposal.*

Public exhibition

On 10 May 2016, Mr Stavis sent an email to Mr Noble, saying:

> *…as discussed today, please proceed to submit a response to the department's Gateway approval utilising the JBA report and provide me with a timeline on when this will be submitted. This is a priority let me know if you need additional resources to assist.*

Mr Stavis accepted that he would have described this as a priority given the pressure he was receiving from Mr Hawatt to progress the application.

Mr Noble forwarded this instruction to Mr Farleigh, stating:

> *I understand that the draft Olsson report does not support the proposed 17m height, and we will note that advice. However, given that Council has already been provided with advice to that effect previously and resolved to proceed with 17m height, the Council's direction is clear on this matter. Therefore we will proceed using the JBA report to address the relevant condition of the Gateway Determination.*

Mr Farleigh told the Commission that he approached Mr Noble and indicated that he was not happy with that approach, given that the Council had engaged Mr Olsson to provide an independent report. Mr Farleigh told the Commission that Mr Noble confirmed the direction to exhibit the JBA report.

Mr Noble said that he should have raised the merits of the proposal with Mr Stavis, but he did not. He said that he raised his concern with Mr Stavis about using the applicant's report when there was an independent study available, commissioned by the Council, but that Mr Stavis directed him to exhibit the JBA report and not the Olsson report. Mr Stavis told the Commission that he did not recall Mr Noble raising a concern about using the applicant's report in those circumstances, and that he relied on Mr Noble's advice about the way forward.

The Commission is of the view that Mr Stavis' evidence in this respect constituted an attempt to shift responsibility for the decision to exhibit the final JBA report rather than the second Olsson report. The Commission does not accept that Mr Noble was responsible for the decision or that Mr Stavis merely acted on his advice. Mr Noble reported to Mr Stavis and it was his second day in the position. Further, it was Mr Stavis who had been involved in the process of obtaining the final JBA report, the creation of which had no purpose except to try to satisfy the Gateway Determination.

It was submitted for Mr Stavis that the same factors that apply to Mr Noble's conduct in relation to the JBA report (inexperience in the job and feelings of obligation towards Mr Stavis) were not extended in mitigation when Counsel Assisting considered Mr Stavis' conduct. The Commission is satisfied that Mr Stavis and Mr Noble were in different positions, both having regard to their seniority, and to the

fact that Mr Stavis bore final responsibility for the actions taken by the Council's planning department. Further, Mr Noble could be directed by Mr Stavis, while Mr Stavis could not be directed by an individual councillor.

On 13 May 2016, Mr Stavis asked Mr Noble for an update on when the planning proposal would be referred to the NSW Planning Department. Mr Noble replied:

> *We are aiming to exhibit the planning proposal from Thursday 2 June to Friday 1 July 2016. We are required to notify the department when the planning proposal is placed on exhibition.*
>
> *We will be able to use the JBA study to satisfy the requirement for additional urban design work to justify the proposed 17m height control.*

Mr Stavis replied, thanked Mr Noble, and said "good work".

On 26 May 2016, Mr Stavis emailed Mr Noble and advised, "we agreed that Brighton Ave, Homer St and Croydon Ave would be sent to the dept this week. Please give me an update tmrw morning". Mr Noble confirmed that "both are on track to be sent tomorrow". Mr Stavis replied at 7.23 pm, "there's 3 to be done".

At 8:07pm on the same night, Mr Hawatt contacted Mr Stavis and asked about the progress on a number of sites, including Homer Street. At this time, Mr Hawatt was no longer a councillor. At 8.38 pm, Mr Stavis replied to Mr Hawatt, copied to other staff members of the amalgamated Council, "Brighton Ave, Homer St and Croydon Ave will be sent to the dept this week, Monday at the latest".

At 10.12 pm Mr Noble replied to the earlier email chain, following Mr Stavis' email of 7.23 pm, "all 3 tomorrow? I thought we agreed on Brighton Ave and Homer St by the end of this week. I'll try my best to get Croydon St out tomorrow too".

At 10.33 pm, Mr Stavis replied to Mr Noble, "pls Mitchell. Needs to happen".

On 2 June 2016, the Homer Street planning proposal went on public exhibition, and concluded on 1 July 2016. The exhibition did not include the first or second Olsson report, but did include the JBA report.

Mr Manoski (who, it may be recalled, signed the Gateway Determination), gave evidence that it was a matter for the Council to choose which study it would rely on as the "additional study". He did not disagree that this was a skewed process within the intent of the Gateway Determination; although, he did not consider that it was "strictly speaking" in contravention of the Gateway Determination. However, he said that this was not the intent of the NSW Planning Department and was not good practice. Mr Manoski's personal view was that the second Olsson report should have been exhibited, the proponent given an opportunity to dispute its contents and the whole matter reported to Council for a final determination.

Mr Olsson told the Commission that he would have expected his report to have been publicly exhibited, on the basis that it was the report obtained by Council in respect of the Gateway condition requiring justification. Mr Olsson said that, having regard to the purposes of public exhibition under the EPA Act, he thought it was a matter of public interest to have his report available, along with the JBA report if necessary.

The Commission considers, consistent with the evidence of Mr Manoski as well as Mr Occhiuzzi and Mr Noble, that the second Olsson report should have been reported back to the Council to determine how it would respond.

By not putting Mr Olsson's report on exhibition, Mr Stavis concealed from the public that a report had been commissioned by the Council that did not support the planning proposal. As to the reason for his action, and why he did not report the matter back to Council, the Commission accepts that Mr Stavis had regard to what Mr Hawatt wanted to occur on the planning proposal, which is to say, to what Mr Faker wanted as backed by Mr Hawatt. He also gave Mr Faker the impression that he was doing his best to get Mr Faker's planning proposal over the line.

However, the Commission is not satisfied that, in all of the circumstances, Mr Stavis's conduct in failing to put the report on public exhibition was dishonest or partial. Mr Stavis was entitled to have regard both to the direction from Council and the Gateway Determination, requiring additional justification for the height of 17 metres and a study that accurately represented and addressed the impact of future development in the local area. Consistent with the evidence given by Mr Manoski in the public inquiry, the words of the Gateway Determination are not sufficiently clear to preclude reliance on the applicant's report if Mr Stavis was satisfied that it accurately represented and addressed the impact of future development in the local area.

Although his involvement in amending the report risked that, in making this assessment, he had a conflict of interest, the Commission is not satisfied that there is sufficient evidence of his state of mind to make a finding of dishonesty or partiality in relation to the reliance on the JBA report. Although this conduct is concerning for its lack of transparency, and for the risk of the perception that private development interests were being favoured over the public interest, the Commission does not make a corrupt conduct finding.

During the public exhibition, the Council received the following submissions against the proposal:

- 20 individual letters
- 106 online written comments
- 511 signatures on a petition.

The Council received no submissions in support of the proposal.

Outcome

By the time that the public exhibition occurred, the Council had been amalgamated with Bankstown Council. Following public exhibition, the Homer Street planning proposal was forwarded to the amalgamated council in administration for a decision.

The report to council was drafted and submitted by "City Planning" ("the City Planning report"). It recommended that:

- council not proceed with the exhibited control of 17 metres
- council adopt height limits of 8.5 metres, 10 metres and 14 metres
- the NSW Planning Department be informed of the amendments to the planning proposal
- council re-exhibit the amended planning proposal

The City Planning report relied on the first Olsson report to support its recommendations.

On 23 August 2016, the administrator moved and resolved a motion consistent with the recommendations in the City Planning report.

Conduct of Mr Hawatt

Submissions for Mr Hawatt were that the conduct considered in relation to this property gives some insight into Mr Hawatt's motivations and methods of enquiring into properties. It was submitted that Mr Hawatt made enquiries on behalf of Mr Faker and coordinated meetings with Mr Stavis, and that Mr Hawatt saw this as part of his job to make enquiries of Council staff. It was submitted that the enquiries were demonstrative of the diligent and conscientious manner in which Mr Hawatt performed his duties as a councillor.

As outlined above, the Commission is not satisfied that these were merely enquiries but has found that there were attempts to influence Mr Stavis in the exercise of his functions. Reliance was placed for Mr Hawatt on the fact that he was still making enquiries after he ceased being a councillor as being indicative of his altruistic motivations regarding planning matters and development.

Having regard to the relationship between Mr Faker and Mr Hawatt, the Commission is satisfied that this conduct can be distinguished from the conduct considered in other parts of the report. However, the Commission is not satisfied that the conduct was demonstrative of the proper performance of the duties of a councillor, having regard to provisions in the code of conduct prohibiting councillors from directing, influencing or pressuring staff in the performance of their work, or recommendations they should make.

Corrupt conduct

Spiro Stavis

On or about 20 April 2016, Mr Stavis attempted to offer Mr Olsson inducements, being that he could charge the Council what he wanted for preparing a further report and by suggesting that he could be considered favourably for inclusion on an urban design panel that Mr Stavis was attempting to establish, in return for Mr Olsson preparing a favourable report with respect to the planning proposal for 15-23 Homer Street, Earlwood.

Such conduct on the part of Mr Stavis constituted or involved the dishonest exercise of his official functions within the meaning of s 8(1)(b) of the *Independent Commssion Against Corruption Act 1988* ("the ICAC Act"). The relevant functions were providing instructions to a planning consultant engaged by the division that was under his direction and making an offer of terms to that consultant. It was dishonest because it did not involve acting in good faith, but involved acting with the ulterior purpose of enticing a consultant to change his or her professional opinion knowing that it was wrong to do so.

The Commission is also satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Stavis had committed a disciplinary offence, being a substantial breach of the requirements of the February 2016 code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 3.1(c), prohibiting acting in a way which is improper or unethical
- clause 3.1(j), prohibiting acting in a way which may give rise to the reasonable suspicion or appearance of improper conduct or partial performance of public or professional duties
- clause 3.10, requiring council officers to ensure that development decisions are properly made and that parties involved in the development

process are dealt with fairly, and to avoid any occasion for suspicion of improper conduct in the development assessment process.

Generally, it was submitted for Mr Stavis that the code of conduct is aspirational, with provisions that are difficult to enforce or are plainly ambiguous, and that caution should be applied in finding breaches of the code. The Commission is satisfied that it has been able to identify Mr Stavis' conduct with sufficient precision, such that there is no ambiguity in the application of the clauses above. The Commission is satisfied that, to offer an inducement to a consultant in exchange for changing his professional opinion, is a substantial breach of these provisions.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission considers this to be serious corrupt conduct for the purposes of s 74BA(1) of the ICAC Act. This is on the basis of Mr Stavis' seniority at Council and having regard to the conduct itself. If successful in his attempt, Mr Stavis would have obtained a report supportive of a planning proposal contrary to the honestly held belief of an independent consultant, which would have obscured from public scrutiny the advice that it could not be supported in its current form. Given the significance of the functions involved, the Commission considers this to be serious.

Michael Hawatt

The Commission does not make any finding of corrupt conduct in respect of Mr Hawatt's conduct.

Assad Faker

The Commission does not make any finding of corrupt conduct in respect of Mr Faker's conduct.

Section 74A(2) statements

The Commission is satisfied that, in respect of the matters covered in this chapter, Mr Stavis, Mr Hawatt and Mr Faker are "affected" persons for the purposes of s 74A(2) of the ICAC Act.

Spiro Stavis

The Commission is not 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 Stavis for any criminal offence. The Commission has not made a finding that his conduct could constitute or involve a criminal offence.

As Mr Stavis is no longer a council officer, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

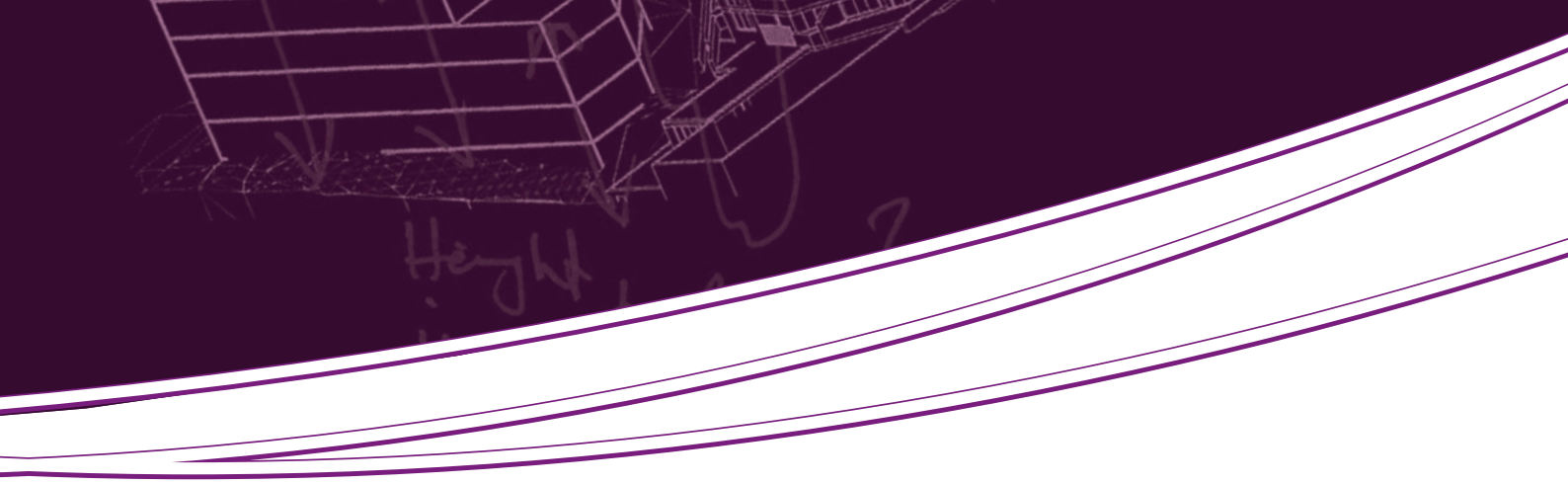
Michael Hawatt

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Hawatt for any specified criminal offence. The Commission has not made a finding that his conduct could constitute or involve a criminal offence.

As Mr Hawatt is no longer a councillor, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

Assad Faker

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Faker for any specified criminal offence.



Chapter 6: Charbel Demian and 998 Punchbowl Road, Punchbowl

This chapter examines the conduct in relation to a planning proposal lodged in February 2015 in respect of 998 Punchbowl Road, Punchbowl (also known as 1,499 Canterbury Road, Punchbowl).

Background

The site at 998 Punchbowl Road is located approximately 1.3 kilometres from the Punchbowl railway station, and was, at the relevant times, owned by a company controlled by Charbel Demian.

Mr Demian is a property developer who, in the period 2014 to 2016, had five development projects in the Canterbury local government area, including applications for two other sites considered in chapter 7 of this report.

Relationships on Council

Mr Demian met both Pierre Azzi and Michael Hawatt through the Council. He started having mobile telephone contact with Mr Hawatt in 2013, and first met Mr Azzi in 2014.

Mr Demian denied that he had a social relationship with Mr Azzi or Mr Hawatt, and said that he went to Mr Azzi's home on a number of occasions on a Friday but that this was for business purposes. Mr Azzi also said that these were not social occasions, although he was in the habit of providing hospitality to people at his home on a Friday, which, from time-to-time included Mr Demian, Jim Montague, Bechara Khouri, Mr Hawatt, Spiro Stavis and people associated with the Australian Labor Party.

On one occasion, in December 2015, Mr Demian socialised at Mr Azzi's house late into the night. Mr Montague occasionally saw Mr Demian at Mr Azzi's house on a Friday, sometimes with Mr Khouri, and he said that Mr Demian took these opportunities to talk to Mr Montague about his projects in the Canterbury local government area. Mr Montague told the Commission that he sometimes called Mr Stavis from Mr Azzi's house to find out information to provide to Mr Demian. Mr Stavis was aware that Mr Montague, Mr Khouri and sometimes Mr Demian, would regularly enjoy Mr Azzi's hospitality on a Friday.

Mr Demian told the Commission that he did not pay attention to who was driving planning resolutions at the Council, as it was not important to him. The Commission cannot accept this evidence, given that Mr Demian was an experienced developer with a significant financial interest in planning decisions being made in the Canterbury local government area. In submissions, Mr Demian accepted that he keeps a close eye on development applications, and "as is permitted by the law engages with senior Council assessment and managerial staff, and elected Councillors". It was also submitted for Mr Demian that he had a "working business relationship with the management and Councillors of the Council consistent with his negotiating major developments at the Council over a number of years". Mr Demian denied that there was anything improper in his communicating with senior management and councillors.

Mr Demian also told the Commission that he likely approached Mr Hawatt and Mr Azzi because he had witnessed their active involvement in Council resolutions around the residential development strategy. The call charge records available to the Commission indicate a significant level of contact between Mr Demian and Mr Hawatt, on the one hand, and Mr Demian and Mr Azzi, on the other. For example, in 2015, there were around 130 contacts or attempted contacts by mobile telephone between Mr Demian and Mr Hawatt, and around 50 between Mr Demian and Mr Azzi.

The Commission is satisfied that Mr Demian pursued a relationship with Mr Hawatt and Mr Azzi because he knew that they were best placed to advocate for his developments at the Council.

Planning proposal

As explained in chapter 1, the Council determined on 2 October 2014 that a planning proposal should be prepared to rezone the land at 998 Punchbowl Road, Punchbowl, to R4 (residential high-density zone) with a height of 15m and an floor space ratio (FSR) of 2.1:1. The existing controls for the site were R3 (residential medium-density zone), a height limit of 8.5 metres and an FSR of 0.5:1. The increased FSR was consistent with a submission received by the Council from Mr Demian's planning business, Statewide Planning Pty Ltd, seeking an increase to 2.2:1

Since the FSR, set on 2 October 2014, had not been exhibited, either the entire residential development strategy would need to be re-exhibited or the proposed changes to 998 Punchbowl Road would need to become part of a separate planning proposal.

In providing advice to the Council about how to progress its planning proposal following amendments made by councillors in October 2014, the NSW Planning Department advised:

> *Increases to the increased FSR for 998 Punchbowl Road, Punchbowl (1.8:1 to 2.2:1) … constitute intensification that has not been strategically justified.*

On 23 December 2014, Mr Montague advised the NSW Planning Department that the Council had decided to proceed with the planning proposal for amendments to the Canterbury Local Environmental Plan 2012. These were not subject to Council-resolved amendments or government authority objection. Mr Montague also advised that a separate planning proposal would be submitted for 998 Punchbowl Road to reflect the changes from the exhibited FSR of 1.8:1 to 2.2:1.

On 10 February 2015, the planning proposal was submitted to the NSW Planning Department. On 16 February 2015, the department requested that Council "submit additional information to demonstrate adequate justification for the 2.2:1 FSR sought to clearly demonstrate that it has strategic merit".

The Council appointed Peter Annand, an urban designer, architect and town planner, to prepare an independent urban design report. Mr Annand's retainer indicated that "the purpose of this project is to provide an independent urban design assessment of a planning proposal for land at 998 Punchbowl Road, Punchbowl". Gillian Dawson also confirmed with the department that the urban design study should be independent. Ms Dawson understood this to mean "independent" of both the proponent and of the Council, although it would be commissioned by the Council. Warren Farleigh indicated that it was the view of staff that the study should be independent so that the Council would be presented with an objective point of view.

Urban design reviews conducted by Mr Annand

First urban design review

The first Annand report, prepared in March or April of 2015, did not support the FSR of 2.2:1, but something closer to 1.8:1, being the original resolution from Council in October 2013. In relation to this recommendation, Mr Annand told the Commission that the set of plans, which were given to him to analyse, could not be implemented because there was road widening and other matters that had not been taken into account. At the time, there was already in place an acquisition notice for some parts of the site to be acquired for road widening.

Tom Foster, then a senior urban planner with the Council, told the Commission that:

> *2.2:1 didn't physically fit on the site under the proposed height limit, so because the two controls are actually independent of each other and have to be formulated in a way so that they work together and, and in, in assigning an FSR of 2.2:1 to the site the, the owners or their representatives have failed to account for land that was not available for development due to the fact that it was under reservation by the Road[s] and Maritime Services.*

There was also a potential issue because 998 Punchbowl Road was an isolated site, in that the site was surrounded by a lower medium-density residential zoning, it was a distance from the train station and not near any shops. Ms Dawson's view was that it was being considered for rezoning on the basis that it was a gateway site and an entry point to the Canterbury local government area.

On 24 June 2015, Mr Foster advised Mr Annand that side setbacks for four-storey components would need to increase to nine metres to enable compliance with new setbacks for apartment building in the NSW Planning Department's Apartment Design Guidelines (ADG). This led to revisions being made to the first Annand report ("the revised first Annand report").

On 26 June 2015, Mr Annand advised Mr Stavis and Mr Farleigh that "the new Design Guide setbacks as interpreted increase both side setbacks on Punchbowl Road job from 6 to 9m. This has the effect of dropping potential FSR from 1.8:1 to 1.3:1". Mr Stavis replied that, "we've already let the cat out of the bag to the applicant when we received your draft report. We need to get as close as possible to that FSR". Mr Stavis asked Mr Annand to come and see him on Monday.

Mr Stavis told the Commission that he was trying to get some clarity around Mr Annand's findings on this point. It was submitted for Mr Stavis that he was trying to give effect to a lawful direction of Council in respect of the FSR on the site. However, the words of his email suggest that it was the applicant's views that were the cause of Mr Stavis' concerns, rather than the direction of Council. Mr Annand's advice was that the FSR of 2.2:1 could not be achieved, and it was the drop from 1.8:1 to 1.3:1 that had caused Mr Stavis concern.

It is clear from the words that he used, that Mr Stavis was reporting that he had already told the applicant what was the likely outcome of Mr Annand's consideration. Despite this, Mr Demian told the Commission that he was not privy to the reports of the consultant and did not become aware that the consultant recommended an FSR of 1.8:1.

The Commission is satisfied that, from this point, Mr Stavis was seeking to persuade Mr Annand to change his views to favour the proponent.

Mr Annand and Mr Stavis exchanged emails about trying to make a time to meet, and Mr Annand advised Mr Stavis, "I think I know how to fix it". Mr Annand accepted that he made this comment in an endeavour to satisfy the concern expressed by Mr Stavis about getting as close as possible to the 1.8:1 FSR.

In the revised first Annand report, Mr Annand acknowledged that the setbacks could reduce the available FSR from 1.8:1 to 1.5:1; however, he argued, that it need not apply because the adjacent properties would likely be upzoned. The Commission heard contrary views about this issue from planning staff within the Council as to whether any assumption to that effect could be made, considering that the NSW Planning Department had decided against extending the Punchbowl precinct as part of the Sydenham to Bankstown corridor strategy on the basis that there was not enough strategic merit given the distance from the train station.

Second urban design review

On 12 August 2015, Mr Stavis emailed Ms Dawson to advise that he had:

> *…a meeting with the* [general manager] *and Charlie* [Demian] *this afternoon re the Harrison's site and following this 998 was raised. Can you please see tmrw so I can brief you.*

On 18 August 2015, Ms Dawson emailed Mr Stavis and asked "can you please confirm what exactly we are being asked to consider for this site as we want to contact Peter Annand for a quote". Mr Stavis replied, "pick up some of the 'lost' FSR by increasing the height on the corner of Punchbowl and Canterbury roads from 21m to 25m. Therefore bringing to be [sic] more in line with the Council resolution in terms of FSR". Ms Dawson replied, "Ok. However, want to note that we cannot see this site in isolation from its setting and we will want any study/ review to address that issue as well". Mr Stavis replied, "I concur".

From the emails exchanged between Mr Stavis and Ms Dawson, the Commission concludes that, during the course of his meeting with Mr Demian and Mr Montague on the afternoon of 12 August 2015, Mr Stavis was presented with a proposal to assist Mr Demian to recover some FSR that could not be achieved within the existing controls.

On 18 August 2015, Mr Farleigh emailed Mr Annand to advise:

> *…we have now been instructed to model the implications of a 25 metre building on this site, in terms of achieving an outcome that complies with SEPP 65* [State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development] *and the key controls in our DCP* [development control plan].

Mr Farleigh added, "we would appreciate your views on the desirability of such a building in this specific location, particularly in terms of context, relationship to surrounding development, amenity, precedent, etc".

On 25 August 2015, Mr Stavis emailed Mr Annand to ask for an update as to how he was progressing. He did not copy any other planning staff on this email. On the following day, Mr Annand advised that he had been "dragging the chain a little" and had provided his fee estimate to Mr Farleigh on the previous day. Mr Stavis approved Mr Annand's engagement.

Mr Stavis then advised Mr Annand, "main aim is to get 25m on the corner and as close to 2.2:1 FSR. Happy to meet to discuss". Mr Annand replied "25m. on corner ok … but no way you can get anything like 2.2:1 and provide decent and useful communal open space". Mr Stavis replied, "do your best". Mr Annand understood from this comment that Mr Stavis wanted 2.2:1 on the site. Mr Annand said that it was not unusual for a council to have input into an urban design assessment of this nature because:

> *Inevitably, with these sorts of projects, when you're dealing with a council, there are a variety of factors, political, community and so on, which influence councillor's attitude towards things, council officer's attitudes towards things. And that's something that one negotiates on the way through. Sometimes you say, "no, can't do that". Sometimes you say, "okay, well, we can probably squeeze that in".*

Mr Annand asked for a meeting on the following day because he had some ideas. Ms Dawson noted that it was unusual for Mr Stavis to be communicating directly with a consultant on a planning proposal without her or other members of the team being involved.

Mr Stavis met with Mr Annand in the absence of other staff and omitted to copy other staff into his emails with Mr Annand. Mr Stavis told the Commission that this was because he took a more "proactive" approach because of councillor enquiries. It was submitted for Mr Stavis that the involvement of staff and expedition for matters were ultimately a matter for him, as he had responsibility for service delivery. It was confirmed by staff who worked with him that Mr Stavis was sometimes more "proactive" in his approach. It was also a phrase used frequently by Mr Stavis to describe his approach to these issues, including in relation to the planning proposal for 15-23 Homer Street. However, being proactive does not account for excluding the responsible staff members from meetings and correspondence.

The Commission concludes that he took this course because he wanted to change Mr Annand's opinions to favour the course being sought by the proponent. By excluding his staff, he concealed from them his role in attempting to shape the findings of Mr Annand's report.

On 4 September 2015, Mr Annand provided to Mr Stavis and Mr Farleigh an urban design review for 998 Punchbowl Road, dated August 2015 ("the second Annand report"). The second Annand report considered a number of options in relation to the FSR and setbacks, as follows.

- Option A: generated an FSR of 2:1, but required communal open space either in the 9-metre setback or as a roof garden or both. Mr Annand indicated that "this could be acceptable but would establish a precedent for this section of Canterbury Road".
- Option B: compliance with SEPP 65 setbacks and generous communal open space, resulting in an "appropriate and acceptable" FSR of 1.85 to 1.91.
- Option C: partial compliance with SEPP 65 setbacks:

  The eastern setback is 6m (which is technically non-compliant but acceptable given likely future development to the east). The northern setback is 50% compliant (15m with common open space, 6m in excess of required 9m) and 50% non-compliant (6m instead of 9m) but this section will minimise overlooking to rooftops to the north. FSR achievable is about 2:1. This is [the] *preferred option.*

- Option D:

  fails to comply with northern or eastern setbacks and provides no significant or usable common open space at ground level and will consequently require a roof garden atop Level 6. This will establish an undesirable precedent for development on Canterbury Road requiring the communal open space to be on rooftops. This option achieves a high FSR of 2.4:1 but at the expense of amenity.

The second Annand report also noted that:

> *The proponent sought 2.2:1 in his initial Planning Proposal which is not possible within the required setbacks and building height and particularly if a reasonable and usable communal open space is provided at ground level, unless the communal open space was provided on the rooftop of Level 6.*
>
> *Whilst acceptable in tight locations and particularly where mixed-use development is concerned a roof garden would establish an undesirable precedent for Canterbury Road (north side) of a density that can only be achieved with roof garden communal open space.*

The second Annand report concluded that:

- a building height of 18 metres (six storeys) is appropriate but with a corner tower of about 250-260 m2 to eight storeys (25 metres).
- the maximum FSR that can be supported in this context with a generous and usable communal open space at ground level is 2:1.

Mr Annand also stated in his report that:

- "recent events have seen some 6-8 storey approvals (and recommendations) along Canterbury Road and this seems acceptable with appropriate justification"
- the height of from six to eight storeys was "acceptable on Punchbowl Road only because it marks a major intersection and entry into Canterbury [local government area]".

Mr Annand told the Commission that an increase in height could be justified on the site "to celebrate the entry into Canterbury and to nominate the turning point in to Punchbowl Road". Mr Foster, in contrast, observed that it was a major intersection but:

> *…when you look at the surrounding context of predominantly single-storey bungalows and aging commercial developments along the … frontage of Canterbury Road in particular, it wasn't something*

that really lent itself to be considered as a major gateway point.

Further, although Mr Annand justified his opinion because there had been approvals for eight storeys along Canterbury Road, Mr Foster also told the Commission, "they were kilometres and kilometres to the east" and "some suburbs away". Mr Annand told the Commission that he had thought that there were approvals in the vicinity, approximately two or three blocks away. Mr Stavis told the Commission that he was not aware of any precedents near the site for an eight-storey development.

On the same day, 4 September 2015, Mr Stavis replied by email to Annand Urban Design, copied to Ms Dawson and Mr Farleigh, providing "some minor comments/ corrections" and indicating that he was happy for the second Annand report to be finalised. The comments and corrections provided by Mr Stavis were stylistic and for clarification only, and did not seek to alter the content of the second Annand report.

Mr Stavis also indicated that he expected that there would need to be a report to Council seeking a new resolution, which reflected Mr Annand's preferred option C.

Ms Dawson replied to Mr Stavis' email of 4 September, indicating that she had "serious concerns regarding the preferred option", on the basis that:

- the option presumed that the adjoining land would be rezoned to R4, and that there could be a reduced setback to the boundary
- there were no plans to rezone the land
- the NSW Planning Department had already considered rezoning the land and did not think it was appropriate
- consequently, the FSR should be calculated with a nine-metre setback from the boundary
- she remained of the view that a 25-metre building adjacent to a single- and two-storey development was out of context.

This view was shared among other strategic planning staff.

Mr Stavis replied:

I disagree about it being out of context on the corner and envisage our height map would reflect a build form that Peter [Annand] *is comfortable with. I do however agree with you that it must comply with the setback under SEPP 65 and should comply with SEPP 65 in its entirety. I will speak to Peter.*

Also on 4 September 2015, Mr Stavis emailed Mr Annand:

It has been brought to my attention that the report presumes that the adjoining land on Canterbury Road will be rezoned to R4 High Density and as a consequence there can be a reduced set back to the boundary (6m instead of 9m required by SEPP 65). I do not believe we can make that assumption, as there is no plans at this stage to rezone that land.

As a consequence the setback should remain as 9m from the boundary if that is what SEPP 65 requires and the FSR calculated accordingly. You need to be as accurate as possible when calculating the FSR as it will be scrutinised.

Ms Dawson asked Mr Stavis by email whether Mr Annand could clarify "that the recommended heights have been seen in the context of the adjoining properties being 4-5 storey or remaining within 8.5m height?". She noted that:

…the RDS [residential development strategy] *did not support the rezoning of the adjoining properties on either Punchbowl Road or … Canterbury Road. I struggle with a 6 storey building as being appropriate, but an 8 storey building adjoining 1 & 2 storey development I believe is out of context?*

Ms Dawson added, further to Mr Stavis' email, "the setback to the Punchowl [sic] boundary will also need to be 9 m as there is no plan to rezone that land either". By this time, Ms Dawson said that she had the overwhelming feeling that she was being "side-tracked in the process". Mr Stavis replied to Ms Dawson's email, directed to Mr Annand, "unfortunately I don't think we can insist on the 9m along Punchbowl Rd even though it is a busy road, as the [development control plan] only requires a 6m setback". Ms Dawson indicated to the Commission that she and Mr Stavis were at cross-purposes, as she had been talking about the side boundary and Mr Stavis appeared to be talking about the front boundary.

At 11.18 am on 9 September 2015, Annand Urban Design sent to Mr Stavis, Ms Dawson and Mr Farleigh a revised version of the second Annand report ("the revised second Annand report"). At 11.55 am on the same day, Mr Annand emailed Mr Stavis separately:

Try this revision with further justification … Option C is still my preferred

However, if you all wish to stick with the letter of SEPP no65 ADG then I can wear Option B or even a revised B with 9m. to east boundary and slightly reduced FSR (lose about 416m2) of about 1.78:1 What do you reckon ??

The revised second Annand report concluded that a maximum FSR in the range of 1.8:1 to 2:1 could be permitted, based on:

> *…the provision of a well landscaped communal open space in the N-E corner of the site of approximately 375m2 and a roof garden in the order of 100m2 on the roof of level 6 (east portion).*

Mr Annand's earlier draft had referred to such a solution being an undesirable precedent for Canterbury Road. When he was asked about this discrepancy in the public inquiry, he sought to minimise his earlier criticism.

Mr Stavis replied to Mr Annand:

> *I'm in a conference back Friday. I noticed Lili sent a draft to Warren and Gil as well, contrary to what we agreed, I wanted to review first. Can you ask her to send an email saying it went in error and to disregard.*

The Commission concludes that Mr Stavis had asked Mr Annand to distribute the draft only to him, and not to send it to other members of his staff. At around this time, Mr Farleigh said that he was aware that Mr Stavis had met with Mr Annand without Mr Foster or himself.

At 12.29 pm on 9 September 2015, Mr Annand's staff member emailed Mr Stavis, Mr Farleigh and Ms Dawson asking that they disregard the previous email, enclosing the revised second Annand report, "as it was sent by mistake".

When asked about why he excluded his staff from his communications with Mr Annand, Mr Stavis said that he was taking a more proactive approach because he was under instructions to expedite planning proposals. He also accepted that he was getting pressure from Mr Demian and Mr Montague, if not Mr Hawatt and Mr Azzi, to achieve the result that Mr Demian wanted to achieve on the site, and that his staff were pushing back on the reports being obtained from Mr Annand that went to achieving that outcome. The Commission is satisfied that Mr Stavis took the approach of excluding his staff because the feedback he was receiving from those officers as to the merit of what was being proposed was directly contrary to the interests of Mr Demian.

On 14 September 2015, Mr Stavis emailed Mr Annand about the revised second Annand report, advising that he had proofread it and it sounded good. Mr Stavis asked Mr Annand to send the report again "as a separate email to Gil and me. Don't send as part of this email trail".

During the public inquiry, Mr Stavis was asked about why he did this, and he said that he wanted to proofread the report before it was circulated to his staff. When it was suggested to him that anyone could proofread a document, Mr Stavis said that he also wanted to make sure that it was "in the spirit of" the discussions that he had with Mr Annand, as he was the one who had been present at those meetings. None of that explains why he did not want the report sent as part of the email trail. The Commission is satisfied that, by that request, Mr Stavis sought to conceal his prior communications with Mr Annand from his staff.

Mr Annand then sent the revised second Annand report to Mr Stavis and Ms Dawson, advising that "option C is still my preferred. However am prepared to further accommodate SEPP 65 separations if you think it necessary…".

Proposal for FSR of 2.8:1

On 20 October 2015, on behalf of Statewide Planning and Mr Demian, DDC Urban Planning submitted a letter to Mr Stavis (by email), seeking that the planning proposal for 998 Punchbowl Road be amended to allow a maximum building height of 25 metres and a maximum permissible floor space ratio of 2.7:1. The letter enclosed site diagrams, including a "setback and FSR" diagram, which indicated that the total FSR sought was 3.2:1.

When asked about this request, Mr Demian told the Commission that he did not make this request because he was concerned about the impact that road widening requirements would have on his lot yield on the site. He said that what really changed was the extra separation requirements from the ADG. When it was suggested to him that this had an impact in achievable lot yield on the site, Mr Demian said:

> *No. What it did do, it actually had the footprint slightly reduced from the original design that we had and hence the request of the extra height you know, with similar, similar FSR.*

Mr Demian's answers to a series of questions put to him about the impact of setbacks on his lot yield, and the reasons why he submitted a request to increase both the height and the FSR on the site, were not consistent with a genuine attempt to assist the Commission.

On 23 October 2015, Mr Stavis sent an email to Mr Demian advising that:

> *I don't believe an FSR of 3.2:1 (which is more akin to Business zones) can be justified on planning grounds given the site's context, i.e. being in a residential zone, away from the town centre/public transport etc…*

This figure is consistent with the reports provided under the request for an FSR of 2.7:1.

On 26 October 2015, the development director of Statewide Planning submitted to the Council a request that the planning proposal be amended to allow on the site a maximum building height of 25 metres and a maximum permissible FSR of 2.8:1. The FSR diagram provided indicated that the "total FSR" was 2.94:1.

On 27 October 2015, Mr Stavis forwarded this request to Mr Annand for his review, stating that:

> *…a preliminary review seems to show that it does not comply with the setbacks and open space provisions under the* [development control plan] *and* [ADG]. *Can you please review and before you finalise any comments make an appointment to see me so we can discuss.*

No other planning staff were copied into this email.

On the same day, Mr Annand emailed Mr Stavis, advising that he needed more information, and advised that although the plans claimed to be able to achieve a footprint of 844 m2, he could only get 665 m2 with the setbacks. He also asked where eight storeys across the whole site came from.

On 4 November 2015, Mr Annand emailed Mr Stavis to advise that he would have a draft for Punchbowl Road by the next day for discussion. Mr Stavis replied and asked Mr Annand to "hold off" as he was meeting the applicant on the following Monday. On 8 November 2015, Mr Stavis asked Mr Annand to send him what he had by midday the following day as he had a meeting at 4 pm with the applicant.

At 9.40 am on 9 November 2015, Mr Annand sent to Mr Stavis a document titled "Punchbowl Road Proposal October 2015". Mr Annand added in his covering email, "final answer 2:1 @ 18m with 25m. tower". In the attached document, Mr Annand stated that the:

- applicant's proposal ignores the proposed road widening by the former Roads and Maritime Services (RMS) along the Canterbury Road frontage, a Council DCP setback requirement to Canterbury Road and significantly overstates the possible area of the building footprint
- applicant's proposal significantly overstated the potential FSR, which could be achieved on the site
- proposal at general height of eight levels (25 metres) is an over-development of the site
- proposed FSR of 2.8:1 is unachievable because of the failure to take into account RMS setbacks, and Council and ADG setback requirements.

Mr Annand again calculated a permissible FSR of 2:1 for the site. His calculations demonstrated that even the FSR of 2.2:1 would be non-compliant with Council setbacks.

On the same day, 9 November 2015, Mr Stavis was invited to attend a meeting with Mr Montague and Mr Demian. Mr Stavis said that he went to Mr Montague's office for the meeting and found Mr Demian, Mr Hawatt and Mr Azzi also there.

He said that Mr Demian presented to him a plan with an FSR of 2.8:1 and some other scribbled notes. He thought that Mr Demian put forward the merits of his proposal as he saw them. In an earlier account to the Commission, which Mr Stavis said was a more accurate account, he said that at the meeting he defended that the Council could not achieve the particular yield sought by Mr Demian within the design parameters.

Mr Stavis said that both Mr Azzi and Mr Hawatt were quiet at the meeting, but that Mr Montague told him that he had to come up with a solution. By this, Mr Stavis understood he was being instructed to find a way to achieve 2.8:1 on the site. Later, under cross-examination, Mr Stavis said that he recalled Mr Montague saying words to the effect of "go away, have a look at it", but that he understood this to mean to find a solution. Mr Stavis accepted that, although he felt under pressure to achieve an FSR of 2.8:1, he did not feel under pressure to achieve that result at the expense of justification of proper planning principles and he had not understood Mr Montague's direction in that way.

Mr Azzi had no recollection of such a meeting, but accepted that it could be possible he attended a meeting where Mr Montague and Mr Demian were present. Mr Hawatt also had no recollection of the meeting but said that it could have happened. Mr Montague recalled attending a meeting where Mr Stavis was presented with a plan with some "squiggle" on it, but could not recall Mr Hawatt and Mr Azzi being there. He also said that this meeting occurred in a function room and not in his office. The calendar invitation for the meeting indicated that it was to occur in the executive meeting room at the Council.

It was put to Mr Montague that there was a meeting involving Mr Hawatt, Mr Azzi, Mr Demian and Mr Stavis, and he said that it was possible but he did not recall it. He said that, if it did occur, he would have indicated to Mr Demian that he supported Mr Stavis. Mr Montague said that his expectation was that Mr Stavis would take all of the information away, consider it in the context of the Council's controls and previous decisions and come up with a recommendation. He agreed that he would have said words to the effect of "go away, have a look at it".

Generally, Mr Montague said that he did not see any harm in Mr Hawatt and Mr Azzi having input because, in the end, it was up to the development assessment staff to assess the proposal without fear or favour and put it before the Council, and they were removed from direct contact with the councillors.

Mr Demian thought that he had a meeting with Mr Stavis around June 2015, where Mr Stavis was presented with

an annotated piece of paper. Given the correspondence that followed, the Commission is satisfied that it occurred on 9 November 2015. Mr Demian recalled that his planner was present, and believed that Mr Montague was present. There was no evidence from Mr Demian that Mr Hawatt and Mr Azzi were present. Mr Demian denied that he was angry with Mr Stavis or that there was any tension between the two at the meeting. He denied that he told Mr Stavis that Mr Stavis did not know what he was talking about. Mr Demian said that he recalled that he and Mr Stavis reached a common position at the meeting, and that Mr Montague said words to the effect of "go away and work on this and come up with something that can be put to Council that complies".

In all of the circumstances, the Commission accepts Mr Stavis' evidence that Mr Hawatt and Mr Azzi were at the meeting. The Commission is satisfied that, at the meeting, Mr Stavis was shown a piece of paper with an FSR of 2.8:1 on the site, and that Mr Montague said to him words to the effect that he should go away and have a look at it. However, having regard to the way that Mr Stavis' evidence on this topic was given, and to all of the circumstances, the Commission is not satisfied that this was a direction to Mr Stavis to find a way to achieve that FSR on the site.

It was submitted for Mr Stavis that, in the environment in which these words were said, the implication was clear, that he should find a solution. He submitted that this was clearly a direction from Mr Montague, who had the authority to give such directions. It was submitted that he was required to comply with lawful directions under his contract and under clause 6.4(c) of the code of conduct, which was to the following effect: "Members of staff of council must … carry out the lawful directions given by any person having authority to give such directions".

Mr Stavis perceived himself to be under a degree of pressure to achieve the FSR. In his earlier evidence to the Commission, Mr Stavis said that, if he was not able to achieve 2.8:1 on the site, he would:

> *…probably … get increasing pressure to do it and as I think I mentioned in my earlier evidence to you, my previous evidence, you know, on one occasion there was Mr Azzi had basically said to me, you know, don't go down the path of the previous director … that was probably to the back of my mind I guess that potentially they could, you know, I'd follow the same fate as the previous director.*

Essentially, Mr Stavis thought that the pressure on him was such that, if he did not do what he was being asked in relation to the site, he would have been forced out like he thought Marcelo Occhiuzzi was. The occasion involving Mr Azzi is examined in more detail in chapter 9. It is sufficient to say here that the Commission is satisfied that such an interaction occurred, and that it likely occurred in November 2015.

That afternoon, Mr Stavis emailed Mr Demian and asked that he email him the marked-up plan they discussed on that day. On 11 November 2015, Mr Demian replied to the email chain, attaching an FSR plan for the site with handwriting. The handwriting included "FSR: 2.8", with 2.8 circled. Mr Demian agreed that it was his handwriting.

On 23 November 2015, Mr Annand sent an email to Mr Stavis attaching his "considered opinion for Punchbowl Road site". Mr Annand stated in his covering email:

> *I can readily support 2.5:1 at 6/8 storeys*
>
> *I feel 8 storeys at 2.8:1 will give rise to precedent problems but that is Council call*

The attached document stated that "the largest possible footprint" he could measure given some assumptions about setbacks for the Punchbowl Road site was 2.8:1, with a full building height of eight storeys (25 metres). Mr Annand indicated a preference for a six-storey building with an eight-storey tower, which would result in a maximum FSR of 2.57:1. Mr Annand's report also noted that, "inadequate communal space at ground level will require rooftop open space (ADG) and this must be accessible by lift and stair within the 25m". Mr Annand concluded that "an FSR of 2.8:1 is a dangerous precedent, particularly for the south side of the street".

In December 2015, Mr Stavis and Mr Annand arranged to meet to discuss Punchbowl Road.

Third urban design review

On 4 January 2016, Mr Stavis contacted Mr Annand asking for an update on Punchbowl Road, noting that "last we met you were going to prepare an updated report supporting 2.8:1 and 6/8 storeys as per the sketch I had given you?". In his evidence to the Commission, Mr Stavis agreed that the "sketch" was likely to have been the document shown to him by Mr Demian on 9 November 2015. Mr Annand replied that he would try to get a rough draft to Mr Stavis by Thursday that week.

In evidence to the Commission in a 2017 compulsory examination, Mr Stavis accepted that he had asked Mr Annand to come up with a solution whereby his report would support an FSR of 2.8:1 because he needed that to happen. Although there were further steps to be taken before a building with that FSR could ultimately be constructed on the site (including a development application), having a planning proposal from the Council that supported that FSR would go a long way towards an applicant achieving their desired yield. In that context, Mr Annand's report was helpful to that process.

At the later public inquiry, Mr Stavis told the Commission that he believed his compulsory examination evidence to be true at the time he gave it, although he recalled it differently at the public inquiry. The Commission prefers Mr Stavis' earlier evidence, as it was given closer in time to the relevant events.

On 7 January 2016, a "final draft" of an urban design review of the planning proposal dated December 2015 was sent to Mr Stavis on behalf of Mr Annand ("third Annand report").

The third Annand report provided that:

- *an up-zoning of the site from R3 to R4 with a height increase from 8.5m to 25m (2 storeys to 8 storeys) would seem appropriate based on the delivery of major public benefits in terms of a 3m widening of Canterbury Road reservation as set out in the Canterbury Road Corridor Masterplan and a RMS widening*
- *the proposal as set out in the proponents Planning Proposal report is generally able to be supported. Building heights are appropriate and the proposal accommodates the RMS road widening/Council setbacks, but does not provide sufficient usable communal open space*
- *the proposed building heights 25m (eight storeys) seem appropriate within the general framework of building heights. Note that a building height of 4-6 storeys as proposed in Councils Masterplan document seems appropriate, but a taller building may be acceptable on this significant corner, the gateway to Canterbury LGA*
- *an FSR increase from 0.5:1 to 2.8:1 does not represent an over-development of the site. Our investigations confirm that an FSR of 2.8:1 can be achieved within a height of 25m (8 storeys)*
- [in the context of the Canterbury Road Corridor Masterplan] *it would be acceptable to permit an 8 storey tower on this corner to celebrate the intersection with Punchbowl Road and the arrival in Canterbury LGA from the west*
- *recent events have seen some 6-8 storey approvals (and recommendations) along Canterbury Road and this seems acceptable with appropriate justification*
- *the proponent sought 2.8:1 in his Planning Proposal which is possible within the required setbacks and building height and particularly if a reasonable and usable communal open space is provided as a roofgarden, on top of the building.*

However, consistent with Mr Annand's inability to think of another explanation as to why he recommended 2.8:1, Mr Stavis conceded that he made it clear to Mr Annand that he was to provide an opinion that a height of 25 metres and an FSR of 2.8:1 could be supported.

To provide for an FSR of 2.8:1, the third Annand report reduced the setbacks required by the DCP and ADG as follows:

- reduce a nine-metre setback required under the DCP on Punchbowl Road to six metres because RMS road widening provides for the additional road widening sought by the DCP
- reduce an eastern side setback to six metres up to level 4, on the basis of likely further apartment development.

Further, the communal open space would either be in the nine-metre setback (which was inadequate) or as a roof garden or both. Mr Annand stated that "this is acceptable but may establish a precedent for this section of Canterbury Road".

Under the heading "conclusion", Mr Annand stated:

> *Given that this site is a "Gateway" entrance into the Canterbury Road we recommend the following:*
>
> ***Building Height***
>
> *Generally 8 storeys (25m) as a tower element/ gateway with capacity for a roof garden above.*
>
> ***FSR***
>
> *A maximum FSR of 2.8:1 could be permitted based on the provision of a well landscaped communal open space on the roof of the building and implementation of ADG setbacks. This space should be well landscaped for communal use, and be serviced by a small amenities room (WC, kitchen, storage) and perhaps meeting room.*
>
> *It is our conclusion that a building height of 25m (8 storeys) is appropriate, as a tower gateway into Canterbury LGA.*
>
> *The maximum FSR that can be supported in this context with a generous and usable communal rooftop garden open space at ground level is 2.8:1.*

It was Mr Foster's view, as expressed in the public inquiry, that the rooftop garden "was being touted as some kind of panacea for all, everything else that was wrong with the proposal". Mr Foster was also of the view that the site could not physically accommodate the FSR that had been sought. Mr Farleigh told the Commission that, while Mr Annand's work may have demonstrated that the site could physically accommodate the FSR, it

was a significant overdevelopment of a small site and represented a poor planning outcome.

By this time, Mr Annand was no longer truly independent of the Council, a fact known to Mr Stavis because of his involvement in the communications with Mr Annand. Preparing a report supporting 2.8:1 would mark a significant change to the views previously expressed by Mr Annand to Mr Stavis. It was submitted for Mr Stavis that Mr Annand was not independent because he was engaged and remunerated by the Council, and Mr Stavis did not improperly explore the limits of what Mr Annand was prepared to support.

The Commission is satisfied that, by his conduct, Mr Stavis made it clear to Mr Annand that he expected the report to support the FSR sought. This is conduct of a different order to exploring the limits of what a consultant was prepared to support. It is also of a different order to affecting independence by the engagement and remuneration by the Council of the consultant.

During the public inquiry, when Mr Annand was shown the third Annand report with the FSR of 2.8:1, he expressed surprise that he suggested that 2.8:1 could be permitted. He said that he was feeling uncomfortable at the product he was being asked to provide at this stage, and did not feel comfortable with something that would result in a "full eight-storey building". It was submitted for Mr Stavis that Mr Annand did not say in any contemporaneous evidence that he was not comfortable with the actions of Mr Stavis or the opinion he gave at the time.

The Commission is satisfied that Mr Annand's discomfort with the opinion, and the fact that he did not support an eight-storey building, was communicated to Mr Stavis by his email of 23 November 2015, and was consistent with all previous communications with Mr Stavis on the topic.

In his evidence to the Commission, Mr Annand accepted that, at the time he provided the opinion as to the viability of 2.8:1 in his third report, he did not honestly hold that opinion, and did not hold that opinion at the time that he gave his evidence. It was submitted for Mr Stavis that the Commission could place little weight on Mr Annand's evidence in the public inquiry, that he could not support the FSR, as this was historic revisionism in the shadow of the Commission's inquiry. On the contrary, the Commission is satisfied that it can accept this evidence because it was consistent with the contemporaneous records and did not reflect well on Mr Annand.

When he was asked whether he provided the opinions he did in the third Annand report because of the pressure he was under, Mr Annand said that he did not remember, but it was possible. He said that the pressure:

> *…would simply be the desire to get the project completed and off the books. It had been lingering around for a very long while and there had always been pressure to resolve it and the pressure would come from Spiro in the sense of, you know, he was very keen to get the thing resolved.*

Mr Annand accepted that it was more than just getting the matter resolved, because he could have done this by providing advice that 2.8:1 could not be supported. He said that he was disappointed in himself that the number made it into the report. In cross-examination, he said that he could think of no explanation other than pressure from Mr Stavis as to "why the 2.8 would be there"; although, he admitted that he was speculating as to an explanation.

It was submitted for Mr Stavis that other explanations for Mr Annand changing his report included that he was able to justify it on planning principles, or that Mr Annand wanted to keep the Council happy and get further work. The Commission is satisfied that it should not accept the first explanation, given the evidence of Mr Annand in its inquiry and the contemporaneous records. As to the second, this was not explored with Mr Annand during the public inquiry and, in any event, does not detract from the Commission's conclusions about the role of Mr Stavis in obtaining a report from Mr Annand to support an increased FSR and height despite Mr Annand's views about its suitability.

The Commission is satisfied that, having regard to the chronology of events and the accompanying correspondence, the changes in Mr Annand's opinion over time can properly be attributed to Mr Stavis influencing that opinion to achieve an outcome that was consistent with what Mr Demian sought. It was submitted for Mr Stavis that regard should also be had to the environment of coercive control in which he found himself. That Mr Stavis felt that he had to come up with a solution to please the people, who he perceived had influence over whether he kept his job, may well have been a consequence of the circumstances in which he was recruited.

However, the Commission considers there to be insufficient evidence in respect of allegations from Mr Stavis that he was pressured by Mr Hawatt, Mr Azzi or Mr Montague in respect of this particular proposal to the extent that their conduct could be seen as coercion, or that Mr Montague's conduct could be seen as a failure to protect Mr Stavis. Mr Stavis' own evidence on Mr Hawatt's involvement in this application was:

> *I just remember feeling that there was, being told there was an urgency around this application. I mean, it was never unpleasant. Like, there was no threats per se from him. It's just the way he was.*

Preparation of reports to the Council

On 8 January 2016, Mr Stavis advised Mr Demian that he had received a draft copy of the urban designer's December 2015 report supporting an FSR of 2.8:1 and 25-metre height. He asked Mr Farleigh and Mr Foster to program the planning proposal for 998 Punchbowl Road, which sought the FSR of 2.8:1, to go before the Council.

On the same day, Mr Stavis provided Mr Farleigh and Mr Foster with the final "urban design review of planning proposal" provided by Mr Annand, also dated December 2015 ("the final Annand report"). The content remained consistent with the third Annand report.

On 30 January 2016, Mr Stavis asked Mr Farleigh to program the planning proposal to go to the March Council meeting, advising that it was "very important we meet this deadline". Mr Stavis said that this would have been because he was given an instruction to this effect by Mr Montague, which he indicated was not unusual.

On 29 February 2016, Mr Foster submitted to Mr Stavis for his approval a draft report to go to the City Development Committee (CDC) in relation to 998 Punchbowl Road. The report had been reviewed by Mr Farleigh prior to being submitted to Mr Stavis. Mr Stavis asked that it be printed for his review. Mr Stavis then made handwritten amendments to Mr Foster's first draft, relevantly as follows in the table below.

The final Annand report that went to the CDC also advised that it was informed by the conclusions of its external consultant, which was misleading given that Mr Annand's conclusions were shaped by Mr Stavis. Mr Stavis knew this, and yet he added that text to the report to go to the CDC.

Mr Foster's report included two options. The first option was consistent with the changes to controls examined in the final Annand report. The second option was to adopt a height of 15 metres and a maximum FSR of 1.5:1, consistent with the FSR calculated in the revised first Annand report as being compliant with setbacks and the

Mr Foster's draft	Mr Stavis' change
Report by: senior urban planner	Report by: director city planning
Heading: Strategic considerations and relationship to Canterbury DCP 2012	
The proposal would also result in significant redevelopment outside of walking distance of a railway station … in an area with limited public transport access. *Whilst the ADG allows rooftop gardens as an alternative to ground level communal open space, CDCP 2012 prohibits roof gardens in residential zones. Provision of adequate deep soil landscaping and communal open space would necessitate a lower overall development footprint, and a corresponding lessening of floorspace in the proposed building.*	Text deleted and replaced with: *Notwithstanding and as informed by the Annand Associates Urban Design Report, the site is considered a gateway to the Canterbury LGA, thereby justifying the extra height for this corner site by 2 storeys from the general height of 6 storeys in other redeveloped sites along Canterbury [Road].*
Heading: Conclusion	
In addition, the strategic implications of allowing further intensification of an isolated site as a high density residential site away from local business centres and high quality public transport need consideration as this may set a precedent for similarly scaled developments on other parts of Canterbury Road that are not well served by access to facilities and services.	Text deleted.
Heading: Details of planning proposal options	
Provides an alternate option to increase the maximum FSR to 1.5:1 and height to 15m.	Text relating to the alternate option deleted.

ADG. Mr Foster told the Commission that he included the first option because "this was the position that Spiro was advocating to us" and "I understood that if I was to put forward a report that did not at least contain reference to this, to this position it would be rejected out of hand".

Mr Foster told the Commission that, when Mr Stavis gave him the edited document, he told Mr Stavis that he thought that:

> *…the councillors needed to, to be given a choice in this matter and, and he overruled, he said … words to the effect that, that this is the way we're going and we want a positive outcome.*

Mr Foster said that he interpreted "positive outcome" as being an outcome that was positive in terms of what the landowner was seeking. Although Mr Stavis could not recall using those words, the Commission accepts Mr Foster's recollection as being consistent with other reliable evidence. In effect, Mr Stavis' edits removed references that were critical of the outcome sought by Mr Demian. Mr Stavis accepted that, what the Council ultimately received was a recommendation and reasons consistent with what Mr Demian wanted, and what Mr Stavis said he understood Mr Montague wanted (being a solution which would satisfy Mr Demian).

Mr Foster also told the Commission that, during this conversation with Mr Stavis, Mr Stavis told him words to the effect of "when you're finished with that, get rid of that will you?". Mr Foster understood that this was a reference to the amended draft. Mr Stavis denied issuing such an instruction.

Mr Foster instead kept the annotated draft, and the draft that followed, in a drawer. He said that he did so in consultation with Mr Farleigh. Mr Farleigh was aware from speaking to Mr Foster that he kept a draft of this report in his drawer, but he did not remember the conversation specifically. The Commission has given significant weight to the fact that Mr Foster's allegation is serious, and that Mr Farleigh did not corroborate the reason he says he did not put it on the file. In weighing the different versions of Mr Foster and Mr Stavis, the Commission accepts that Mr Foster appeared at all times to be an honest witness, who was endeavouring to assist the Commission. The Commission accepts Mr Foster's evidence, and is satisfied that Mr Stavis did tell him to dispose of the draft.

Shortly thereafter, Mr Foster submitted another draft of this report to the CDC. On 2 March 2016, Mr Stavis approved the report for submission to the CDC with minor changes. The amendments included deletion of the following comment:

> *The proposal would also result in significant redevelopment outside of walking distance of a railway station an in an area with limited public transport access.*

The final assessment report that went to the Council under Mr Stavis' name also advised that Mr Annand had been engaged to provide an "independent urban design assessment in line with the DPE's [NSW Planning Department's] request". This was misleading, given the final Annand report, relied on by Mr Stavis, could not be said to be independent. Mr Stavis disagreed with this proposition, and told the Commission that Mr Annand was "happy to support a proposal in the end of 2.8:1".

In light of all of the evidence outlined above, the Commission cannot accept this evidence. It was submitted that it was a matter of semantics to describe this statement as misleading. The Commission does not accept this submission and considers the matter to be one of substance, in the context where the report to Council relied on the fact that the proposal had been assessed by an urban designer who had "recommended approval of this amended scheme from an urban design perspective". Mr Stavis accepted that this sentence overstated Mr Annand's conclusions.

It was submitted for Mr Stavis that the Council had a discretion, and that this was acknowledged in Mr Annand's report. However, the matters that Mr Stavis excised from the report had the effect of removing material that may have weighed against the exercise of the Council's discretion from consideration, including in relation to the precedent problems it posed for the Council, which was a concern flagged by Mr Annand and that he said was the Council's call.

Matthew Stewart told the Commission that the reports that went to the Council for 998 Punchbowl Road attracted attention at Bankstown Council. Having regard to the events above, and the Commission's conclusions about those events (of which the following comment forms no part of the reasoning), it is pertinent to note his observation that:

> *Punchbowl Road at that location is the boundary between the two councils and immediately across the road is a very large site called Club Punchbowl and Club Punchbowl were in conversations with our planners around a planning proposal for their site, and through a lot of work that we had been doing we were arriving at lower heights and lower FSR on a much, much larger site and it seemed unbelievable to us the recommendations that were being put and the resolutions that were coming out of Canterbury Council directly across the road on an extremely isolated site.*

Council decision

On 17 March 2016, the CDC resolved, on the motion of Mr Hawatt and Mr Azzi, to adopt the planning proposal seeking to increase the height to 25 metres and the maximum FSR to 2.8:1.

On the following day, Mr Hawatt received a telephone call from Mr Demian thanking him for the previous night. Mr Hawatt said that he received "many thanks" from the people he helped. He said the help that he provided to Mr Demian was moving the motion to increase the FSR, but that he had done so on the basis of what was permissible within the building envelope.

Corrupt conduct

Spiro Stavis

Between about June 2015 and January 2016, Mr Stavis improperly exercised his official functions as director of city planning by influencing Mr Annand to prepare a report with respect to a planning proposal for 998 Punchbowl Road, Punchbowl, to favour the developer's interests.

In or around February 2016, Mr Stavis improperly exercised his official functions as director of city planning by editing a draft report to the the Council's CDC to remove material that was critical of the planning proposal for 998 Punchbowl Road.

In or around March 2016, Mr Stavis improperly exercised his official functions as director of city planning by allowing the report about the planning proposal for 998 Punchbowl Road to be put before the CDC, relying on what was said to be independent urban design advice, knowing that the advice was not independent, and overstating the conclusions of the advice to the developer's advantage.

In each case, Mr Stavis' conduct constituted or involved the dishonest or partial exercise of his official functions and comes within s 8(1)(b) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

Having regard to all of the circumstances outlined above, the Commission is satisfied that, in each case, Mr Stavis' conduct was dishonest. The report that Mr Stavis put to the Council did not honestly reflect the circumstances as Mr Stavis knew them. In circumstances where he had set out to achieve a particular FSR, rather than assessing the merits of the proposal, he suggested that the proposal had been recommended for approval by an independent urban designer and removed from the Council's consideration material, which was adverse to the proposal.

The Commission is satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that, in each case, Mr Stavis had committed a disciplinary offence, being a substantial breach of the requirements of the applicable code of conduct, including, where relevant, the February 2016 code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 3.1(c), prohibiting acting in a way which is improper or unethical
- clause 3.1(j), prohibiting acting in a way which may give rise to the reasonable suspicion or appearance of improper conduct or partial performance of public or professional duties.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Mr Stavis was required to act honestly and with integrity. He held a very senior position within the Council, with responsibility for significant public functions relating to planning. The Council can only make a decision on the information provided to it, and is entitled to rely on the recommendations and advice of its senior officers on the basis that those officers are expected to act honestly and impartially. Mr Stavis' conduct was contrary to that expectation and undermined the decision-making process of the Council. For these reasons, the Commission is satisfied that the conduct was serious for the purposes of s 74BA(1) of the ICAC Act.

Michael Hawatt

The Commission does not make any finding of corrupt conduct in respect of Mr Hawatt's conduct.

Pierre Azzi

The Commission does not make any finding of corrupt conduct in respect of Mr Azzi's conduct.

Jim Montague

The Commission does not make any finding of corrupt conduct in respect of Mr Montague's conduct.

Section 74A(2) statement

The Commission is satisfied that, in respect of the matters covered in this chapter, Mr Stavis, Mr Hawatt, Mr Azzi and Mr Montague are "affected" persons for the purposes of s 74A(2) of the ICAC Act.

The Commission is not 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 Stavis, Mr Montague, Mr Hawatt or Mr Azzi for any criminal offence in respect of the matters covered in this chapter. The Commission has not made a finding that their conduct could constitute or involve a criminal offence.

As each of the affected persons is no longer a councillor or Council officer, the question of taking any disciplinary action against them for any specified disciplinary offence does not arise.

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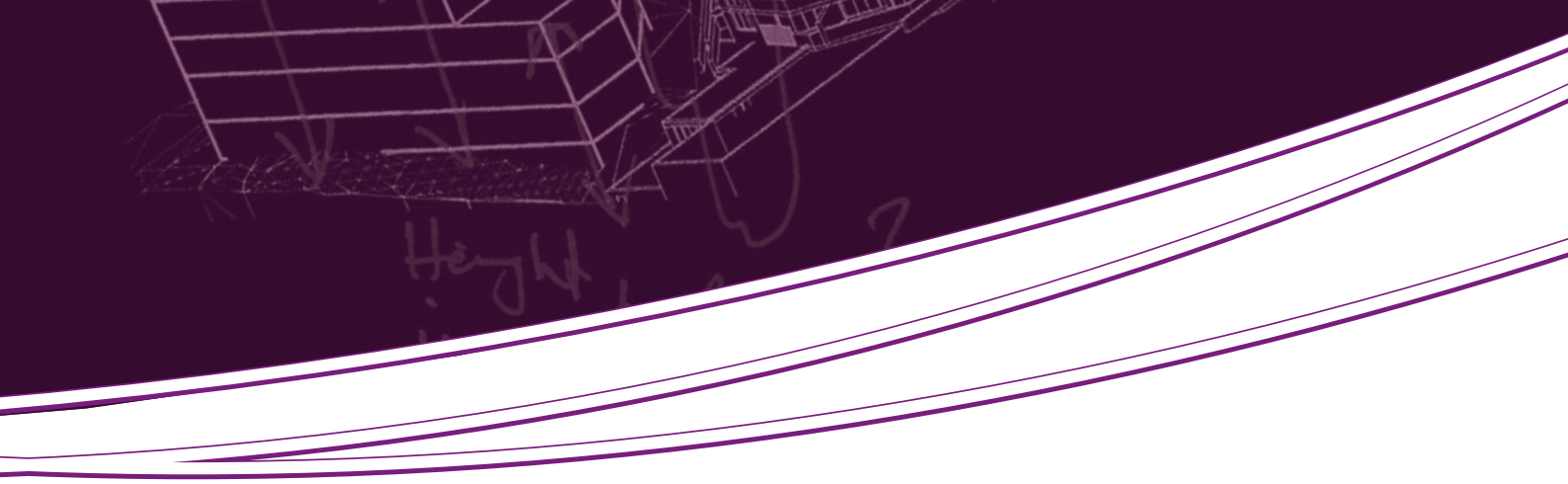


Chapter 7: Charbel Demian and Canterbury Road developments

This chapter examines conduct in connection with planning proposals and s 96 development applications concerning 548-568 Canterbury Road, Campsie, and 570-580 Canterbury Road, Belmore.

Background

Before it was developed, 548-568 Canterbury Road was occupied by a hardware store called Harrison's Timber; colloquially known as "Harrison's".

Immediately next door to Harrison's was 570-580 Canterbury Road, known as "the carpet shop" site. Both sites are near the Canterbury Hospital, approximately two kilometres from the Canterbury town centre and 1.3 kilometres from the Campsie town centre.

The proponent for the development of both sites was Charbel Demian, through Statewide Planning Pty Ltd. He had an option over Harrison's, which were funded by loan agreements that were extended a number of times. Mr Demian had similar arrangements in respect of 570-580 Canterbury Road.

On 31 October 2013, the Council voted in favour of increasing the height control that applied to the Harrison's site from 18 metres to 25 metres. In order for the height controls on the site to change, the proposal had to be publicly exhibited, and then sent to the NSW Planning Department for a Gateway Determination.

On 26 November 2013, Statewide Planning submitted a development application on behalf of Sterling Linx Pty Ltd, a special purpose vehicle used by Mr Demian, seeking approval for an eight-storey development at Harrison's (DA 509/2013). At the time the development application was lodged, the height control remained 18 metres, and the proposed development – at 25 metres – exceeded that control. There was no floor space ratio (FSR) control applying to the site.

By letter dated 31 January 2014, the former Roads and Maritime Services (RMS) advised that it had no objections to DA 509/2013 provided that, among other matters, there was sufficient car parking.

By mid-2014, the development application had been amended to a six-storey building. The application was referred to the relevant Joint Regional Planning Panel (JRPP) for determination because its capital investment value exceeded $20 million.

On 2 October 2014, the JRPP determined, consistent with the recommendation of the Council's planning staff, that the development application DA 509/2013 be approved. The JRPP noted that the proposal for six storeys exceeded the building height of 18 metres, but that this was mainly due to lift overrun (being additional space required to accommodate the lift), which had been justified under clause 4.6 of the Canterbury Local Environmental Plan 2012 (CLEP 2012).

Also on 2 October 2014 (see chapter 1), following a period of public exhibition, the Council resolved that a planning proposal should be prepared to amend CLEP 2012 to increase the height limit for 548-568 Canterbury Road from 18 to 25 metres. In August 2014, RMS had raised concerns about the potential traffic impacts of the building height increases for this site; although, RMS indicated that it would support the proposed rezoning subject to the potential traffic impacts of the maximum developable yield being considered and assessed.

The RMS comments constituted an unresolved agency objection, which meant that the Council could not make the local environmental plan (LEP) under delegation from the minister for planning. Council officers determined that the planning proposal for 548-568 Canterbury Road was be dealt with separately from the planning proposal arising out of other resolutions from 2 October 2014.

On 18 December 2014, Council staff met with RMS staff, who advised that:

…site specific planning proposals should not be allowed to progress further until the cumulative traffic impacts are considered as part of the wider Planning Proposal for LEP amendments.

Spiro Stavis advised his staff that RMS had agreed to review their position expressed in the August 2014 letter. He provided RMS with a traffic study prepared by the applicant.

On 14 May 2015, the City Development Committee (CDC) considered a report from the director of city planning, which advised that a planning proposal to increase building heights to 25 metres could be supported for both sites. Relevant considerations identified in the report included:

- the adjoining site (548-568 Canterbury Road) was currently the subject of a separate planning proposal to increase the maximum building height from 18 to 25 metres
- while building heights of from 21 to 25 metres generally do not apply along Canterbury Road, there is an opportunity for increased heights on the two sites given the industrial zone adjoining much of the sites.

The CDC resolved that a planning proposal to increase the height to 25 metres at both 538-546 Canterbury Road and 570-580 Canterbury Road should be prepared.

On 25 May 2015, RMS wrote to the Council specifically in relation to 548-568 Canterbury Road, advising that:

- RMS had concerns with cumulative traffic impacts, and that the traffic study provided had been undertaken in isolation
- the traffic study did not address likely developable yield, which should address the neighbouring sites subject of a similar planning proposal
- the traffic generation rates in the study did not represent the likely trip generation of the development described
- the traffic study should consider whether any mitigation work was required to address the impacts.

It appears that this planning proposal did not go any further, and the concerns of RMS were left unresolved.

Meanwhile, during the exhibition of the planning proposal for implementation of the residential development strategy (see chapter 1), the Council received submissions seeking to increase the height limits applicable to the sites on either side of 548-568 Canterbury Road, Campsie, including 570-580 Canterbury Road.

Relationships on the Council

Evidence of the relationships that Mr Demian had generally with Jim Montague, Pierre Azzi and Michael Hawatt in the relevant period is set out in chapter 6. In mid-2014, Mr Demian was in contact with Mr Hawatt, and later with Mr Azzi, about the Harrison's site. Mr Demian told the Commission that he continued to have contact with them to progress his development applications.

Commencing in 2013, and continuing into the period from 2014 to 2016, there was a significant number of telephone contacts between Mr Hawatt and Mr Demian. Mr Hawatt and Mr Demian both told the Commission that those contacts were essentially in the nature of enquiries about Mr Demian's development projects. Mr Hawatt also said that the calls related to Mr Demian's complaints; although he could not say what subject or issue the complaints were about.

The degree of interaction evidenced in these call charge records is consistent with Mr Hawatt going to significant lengths to ensure that Mr Demian and his interests were looked after. Mr Hawatt told the Commission that he provided the same "quality service to every person who calls me". The evidence, including the call charge records, lawfully intercepted telephone calls and records relating to the progression of his applications, suggested that the service provided to Mr Demian by Mr Hawatt went above and beyond that provided to other applicants.

There was also evidence that Mr Demian attended Mr Azzi's house from time-to-time (see chapter 6).

There was also evidence that both Mr Demian and Bechara Khouri had contacts with Mr Montague about the Harrison's project.

The Harrison's site: 548-568 Canterbury Road

Development application for two additional storeys

The development consent for the six-storey development for the Harrison's site operated from 20 November 2014.

On 26 November 2014, Statewide Planning submitted an s 96 application (DA 509/13/A modification application) seeking to amend the basement layout of the site. The application sought to add additional car parking spaces to support a pending development application which would seek to add two storeys and 70 additional units to the site.

On 16 December 2014, Statewide Planning submitted the development application for two additional storeys

(DA 592/2014 development application). The maximum building height sought was 28.8 metres. The application was accompanied by a submission seeking an exception to the development standard of 18 metres under clause 4.6 of the CLEP 2012. The submissions indicated that Council had "endorsed" the new building height of 25 metres on 2 October 2014. Mr Demian told the Commission that he had been advised that clause 4.6 could be used as an alternative to progressing the planning proposal.

Also on 16 December 2014, another development application (DA 591/2014) was submitted by Statewide Planning for a six-storey development on the carpet shop site at 570-580 Canterbury Road.

On 9 February 2015, Warren Farleigh of the Council's urban planning team provided a memorandum to Mine Kocak of the Council's development assessment team in respect of DA 592/2014 for the Harrison's site, in which he noted:

- the proposal to add additional floors to the already approved development obviously significantly exceeded the local environmental plan height limit
- clause 4.6 should not be used to consider variations of the magnitude proposed (38% in this case)
- the site is "caught up with the RMS matter" and subject to separate investigations regarding the cumulative impacts on traffic as a result of increased levels of development along Canterbury Road
- any changes to statutory height limits cannot be considered imminent or certain
- the proposed development exceeds the foreshadowed 25 metre height by 3.8 metres.

Ms Kocak told the Commission that it was her understanding that the development assessment team would have sought feedback from Mr Farleigh's team because there was a planning proposal on the site. Ms Kocak told the Commission that she "didn't end up doing any of the assessment to do with the section 96 or the two floors".

In March 2015, Mr Demian and his planner from Statewide Planning contacted Mr Stavis to discuss a number of matters, including the development applications lodged for Harrison's and the neighbouring carpet shop site.

On 12 June 2015, Mr Hawatt and Mr Demian met at Mr Demian's office. On 18 June 2015, Mr Hawatt contacted Mr Stavis and asked that he arrange a meeting for a number of sites, including for Mr Demian and his planner in relation to "Canterbury Road, Campsie".

By this time, the planner had expressed some concern about whether the development application for two additional storeys would be assessed in isolation or would be held up by RMS assessments of cumulative traffic impacts for other planning proposals on Canterbury Road.

Mr Stavis met with Mr Hawatt, as requested on 19 June 2015.

Based on SMS messages of 19 June 2015 between Mr Demian and Mr Hawatt, they arranged to meet at Mr Hawatt's home on 20 June 2015 to go through "a couple of documents and proposed strategies". This language was consistent with Mr Demian considering Mr Hawatt to be someone who would assist him in progressing his matters at the Council.

On the afternoon of 20 June 2015, Mr Hawatt texted Mr Stavis and Mr Montague and asked that they meet with him, Mr Azzi and Mr Demian the following Tuesday to discuss Mr Demian's developments on Canterbury Road. Given the timing, the Commission infers that this request arose as a result of Mr Hawatt meeting with Mr Demian that day.

Mr Hawatt told the Commission that he arranged the meeting to bring the parties together, so that they could sort it out. His recollection was that Mr Azzi was also making "representations" for Mr Demian, and had discussed Mr Demian's development application and modification application with him. Mr Azzi's involvement in this meeting is consistent with his level of involvement with Mr Demian, at a social level and advocating on his behalf at the Council. However, Mr Azzi told the Commission that his interest in the Harrison's site was limited to the issue of whether Mr Demian would provide a laneway. He said that he organised one meeting involving Mr Stavis and Mr Demian at his house after hours on this issue. He said that he attended the meeting "to understand and listen and do what [sic] the best for Canterbury".

Mr Demian told the Commission that he involved the councillors when he had not been able to schedule a meeting with Mr Stavis, and wanted the councillors to facilitate a meeting with Council staff. He said that he wanted councillors to become aware of the actual issues in the planning process. Other evidence suggests that Mr Demian's discussions with at least Mr Hawatt were more involved than just requesting that a meeting be organised, having indicated his intention to discuss proposed strategies for the site at the meeting of 20 June 2015. The Commission considers that Mr Demian also wanted Mr Hawatt and Mr Azzi to be present because of their known influence in planning matters.

Mr Stavis replied to Mr Hawatt's text message early on 21 June 2015. He advised Mr Hawatt that, in relation to the Harrison's site, "we're waiting for RMS as discussed,

but he agreed to submit further supporting info". A meeting was confirmed for the following Thursday, 25 June 2015.

In another SMS message Mr Stavis sent to Mr Hawatt on 22 June 2015, he asked Mr Hawatt if he knew what Mr Demian agreed to do at his last meeting with Mr Stavis. Mr Hawatt replied, "he has made changes but needs to discuss further. He is running out of time. His project is [nearly] 3 years of waiting". Mr Stavis replied:

> *I know Michael, I really do understand don't forget I used to represent private clients and understand their commercial pressures. I can definitely deal with his DA on Cnr of Chelmsford/Canterbury Road* [being the application for six storeys on 570-580 Canterbury Road] *if he's made the changes I recommended, but it's the Harrison site that I don't feel comfortable dealing with until I get our traffic study to say it's ok.*

In his evidence to the Commission, Mr Demian recalled that, at the meeting, he asked if he could schedule a series of meetings until some of the issues were resolved, and that Mr Montague declined the request on the basis that it was "like the tail wagging the dog". Mr Stavis recalled that Mr Montague used words to that effect.

Both Mr Stavis and Mr Montague pointed to examples of conduct, like the above, which they said indicated their resistance to attempts to influence them.

At 5.53 pm on 25 June 2015, Mr Demian sent a text message to Mr Hawatt stating, "pls call when possible". Mr Hawatt replied within about two minutes, "everything is OK. Jim will call you". Mr Demian told the Commission that he wanted to apologise to Mr Hawatt because he may have become frustrated in the meeting. Generally, there is evidence before the Commission that, on some occasions, Mr Demian could lose his temper in the course of meetings. Mr Demian denied this, and denied engaging in conduct that could intimidate an ordinary person. In his submissions, Mr Hawatt stated that Mr Demian could be a confrontational and intimidating personality, and that Mr Stavis found the personality and demands of Mr Demian to be challenging and confronting. Mr Hawatt said that, in this, Mr Stavis had his full support. The evidence tends to support a conclusion that Mr Stavis found Mr Demian difficult to deal with.

On 26 June 2015, the development director for Statewide Planning sent an email to Mr Stavis, attaching, among other things, a clause 4.6 report for the development application and advice prepared by a barrister. The legal advice, dated June 2015, was prepared for the planner engaged by Statewide Planning in relation to 548 Canterbury Road. The advice stated that there was no reason why Council could not approve the development application following on the usual assessment process and that there was no numerical limit to the degree of variation that could be approved under clause 4.6.

In early July 2015, the Council instructed its own solicitors, Pikes & Verekers Lawyers, to seek counsel's advice in relation to whether or not the clause 4.6 variation was well founded. On 6 July 2015, Mr Stavis wrote to Peter Jackson, a partner of the firm, advising that the general manager was "hassling" him to get the advice finalised, and that he wanted the advice within 14 days. The preliminary advice was that "it may be reasonably open for Council to accept the clause 4.6 variation and grant development consent subject to the DA being acceptable upon the merits".

On 15 July 2015, Mr Jackson provided counsel's written advice, which was to the effect that:

- it is open to the Council to reach the requisite state of satisfaction required to enable the Council to grant development consent for the proposal notwithstanding the breach of clause 4.3 relating to the height standard
- an approval in the circumstances would put pressure on the efficacy of the height standard and may be seen as a precedent for future development. However, future development applications would need to rely on their own circumstances and be separately justified by reference to the requirements of clause 4.6.

Mr Stavis replied on the same day that he did not believe this advice went far enough, and that he needed to know whether counsel was of the opinion that the Council should grant consent to the development application, and whether it should agree to the clause 4.6 variation on the merits.

On 22 July 2015, Mr Stavis wrote to Mr Demian to advise that he expected to receive Council's legal advice by the end of the following week, and that he was trying to expedite as much as possible. Mr Demian replied that the advice he obtained was straightforward and he would expect the Council to be able to turn around its advice within a couple of days. Mr Stavis replied that he was doing his best to expedite the matter.

On 24 July 2015, Mr Hawatt sent Mr Stavis a text message, "any news on the legal advice re Charlie Demian". Mr Stavis replied, "I've already told Charlie Demian via email 2 days ago it will be mid to end of next week. I'm sorry Michael but it's not an easy one and I'm doing my best to help". Within about three minutes of receiving the message, Mr Hawatt forwarded it to Mr Demian.

When he was asked about this correspondence during the public inquiry, Mr Stavis said that he believed he was referring to his discomfort with the application for two additional storeys at Harrison's, which substantially breached the height limit. The Commission also infers that Mr Stavis was attempting to set up a defence against Mr Hawatt forming a view that he was not doing enough to progress Mr Demian's development application. Mr Hawatt said that he understood Mr Stavis' message to refer to the pressure he was getting from Mr Demian, who was complaining to everyone (including Mr Montague) about what Mr Stavis was doing.

At 8.33 am on 4 August 2015, Mr Stavis sent a text message to Mr Hawatt advising that he was "seeing the lawyer and planning consultant on Thursday re Charlie Demian's job" and "can you please tell him to hang in there. I'll call him on Friday to arrange a meeting with him. This is a tough one mate given the Ashfield court case". At 8.35 am, Mr Hawatt forwarded this message to Mr Demian. Mr Stavis accepted that he was asking Mr Demian not to get too impatient.

At 11.22 am on the same day, Mr Stavis sent an email to Mr Demian advising that he was "still working through the issues and trying to find solutions" and advising:

> *…please understand I am doing my best Charlie to assist and to hopefully find a solution. I have a dedicated team on this and I will call you on Friday to discuss and to set up a suitable time to meet.*

Mr Stavis identified that the primary issue was how Mr Demian's proposal satisfied the requirement that the written request demonstrated sufficient environmental planning grounds "particular to the circumstances of the proposed development". Mr Stavis forwarded this email to Mr Hawatt and Mr Azzi.

On 6 August 2015, Mr Stavis emailed an external planner, with the subject line "548 Canterbury rd – URGENT URGENT". In the email he advised that:

> *…your letter needs to also say that based on the information currently provided (list in bullet points) there is not enough info to support the clause 4.6 submission (list what we need in bullet points and more detail).*

Mr Stavis indicated that he had a meeting with the applicant on the following day, and wanted to prove to him that what "we" were saying was true. In his evidence to the Commission, Mr Stavis indicated that he wanted to assemble information to demonstrate that what Mr Demian was proposing was not feasible.

At 9.37 pm on 7 August 2015, Mr Hawatt sent Mr Demian a text message which read, "10am at Pierre".

At 8.24 am on the following day, which was a Saturday, Mr Demian sent Mr Hawatt a message, "Ok see you there." Mr Demian told the Commission that he could not recall what the meeting was about. He said that he wanted to see Mr Hawatt and Mr Azzi whenever they were willing to see him to provide information. As will be seen later in this chapter, this meeting took place a few days before Mr Demian's development application for 570-580 Canterbury Road was due to be considered by the CDC.

On 17 August 2015, Mr Hawatt texted Mr Demian and asked, "are we still on tonight?" Mr Demian told the Commission that this related to a meeting, and not to a social get-together. Mr Hawatt could not say whether this was an indication of their social relationship.

On 17 September 2015, the Council received amended plans for the development application for the additional two storeys on 548-568 Canterbury Road.

On 21 September 2015, Mr Hawatt sent a message to Mr Demian informing him of an offer to purchase the Harrison's site (considered in more detail later in this chapter):

> *Hi again The offer is $56m for current approval which includes the extra units being approved. The buyer is willing to exchange with only one condition subject to the extra units being approved.*

On 22 September 2015, Mr Stavis wrote to his staff asking that they move a meeting involving Mr Demian to the following week, and he had spoken to Mr Azzi "and all ok". Mr Azzi said that, of Mr Demian's sites, he was only involved in discussing Harrison's with Mr Stavis, and that this was because of his interest in there being a laneway.

On 24 September 2015, Mr Montague emailed Mr Stavis and asked whether there was any chance the development application for Harrison's could be submitted to the October meeting of the CDC. Mr Stavis replied that the deadline had closed and he was aiming for the November meeting. Mr Stavis' evidence was that it was usual for Mr Montague to ask him whether it was possible to meet the deadline for a meeting of the Council or the CDC to consider an application.

On 6 November 2015, Mr Stavis received an email from an external consultant assessing the plans, explaining that he was having difficulties reconciling documentation and that there was a shortfall in the car parking spaces available. Mr Stavis forwarded this to his private email address, writing the following message, which appeared to be addressed to Mr Hawatt:

Hi Mike

See below. It will get sorted but this is how it is dealing with Charlie's stuff. Ordinarily I would have refused this DA long ago. I hope now you understand what I've been going through with his applns [applications]. *It's always the same story, not submitting information, ignoring issues and then pressuring us to finalise his DAs.*

I hope he appreciates the effort I put in. It's not right mate, he needs to listen and play ball!

Mr Stavis told the Commission that, was it not for the influence of Mr Hawatt, Mr Azzi and Mr Montague, he would have refused the development application. Mr Stavis told the Commission that he "went the extra mile" for Mr Demian; hwever, he denied that he was favouring Mr Demian over other applicants. It was submitted for Mr Stavis that, in the absence of clear evidence as to how Mr Stavis would have treated other applicants in the same position, the Commission would accept his evidence that he did not provide a service to Mr Demian that he would not have provided to other applicants.

Mr Stavis also gave evidence to the Commission in a compulsory examination where he said that he did not refuse Mr Demian's development application because he believed that there would be repercussions on his employment if he did so. Mr Stavis also accepted that Mr Demian was given favourable treatment compared to other applicants because nobody else got the same level of opportunity and engagement that he received from Mr Stavis. Mr Stavis said this was because he was under a large amount of pressure in relation to his employment.

Later, during the public inquiry, Mr Stavis told the Commission that he gave true evidence on the occasion of his compulsory examination, although he would not "absolutely agree" with the proposition that Mr Demian received favourable treatment compared to other applicants.

The Commission considers that the evidence given by Mr Stavis in the compulsory examination can be accepted. It is consistent with the contents of the email he wrote at the time, and the contemporaneous records of what was occurring and the circumstances in which Mr Stavis came to be employed at the Council.

Mr Stavis confirmed the position in an email to Mr Montague on the same day, also forwarding the external consultant's email. The email also suggests that Mr Stavis favoured Mr Demian over other applicants in the same situation. Mr Stavis wrote:

It will get sorted in time but I wanted you to see what I've been going through with Charlie's applns. It's always the same story, inconsistent plans, blatant disregard for councils controls and I'm left with trying to massage to an acceptable level. Quite frankly, that's not our role.

Mr Stavis accepted that the reference to "not our role" was a reference to massaging development applications to a level at which the development application could be recommended for approval. It was submitted for Mr Stavis that negotiations between developers and the Council encourage a measure of "massaging" and that to the extent that this conduct brings the application into consistency with the Council's controls, it could not be said to be improper. However, Mr Stavis' email demonstrated his knowledge that what he was doing for Mr Demian was not in the ordinary exercise of assessment functions, and went beyond negotiating on behalf of the Council.

When it was put to Mr Stavis that, if someone were submitting inconsistent plans with blatant disregard for the Council's controls, his recommendation would be to refuse the application, Mr Stavis said "I didn't see that as an option, given the context of how I was operating, under what regime I was operating, namely, the general manager and the two councillors".

The issues did get "sorted" to a degree because the development application DA 592/2014 and the modification application DA 509/2013/A were considered by the Independent Hearing and Assessment Panel (IHAP) on 23 November 2015. The director of city planning's reports to the IHAP recommended approval subject to conditions. The report for the development application set out arguments relating to the clause 4.6 application, including that the applicant had made changes to the proposed six-storey building to increase building separation and finishes, and that development was "generally" within the 25-metre height, which was endorsed by the Council on 2 October 2014. By this time, the planning proposal to increase the height to 25 metres had stalled in the face of concerns expressed by RMS earlier that year about cumulative traffic impacts from development of this scale.

The IHAP recommended that the applications be deferred to allow RMS to be fully consulted about the development of the site, and expressed the opinion that the Council could not legally determine the development applications until they had been referred to RMS pursuant to clause 104 of State Environmental Planning Policy (Infrastructure) 2007. That clause required, among other things, that the consent authority was required to give written notice to RMS and consider any submissions RMS made in response.

In addition, the IHAP noted that:

> *…it was not satisfied with the justification for a variation of the height under clause 4.6, particularly having regard to the requirements of clause 4.6(3)(a) … (b)… especially having regard to the recent cases referred to in the report. The context for the Panel's position reflects that the proposal exceeds the height limit (of 18m) by some 25-30% and involves the addition of two further basement car parks and two further residential levels to an existing non-complying building.*

Mr Stavis said that he did not see the IHAP recommendation as a considerable obstacle because both would be presented to the Council and it would be for the Council to decide. Mr Stavis told the Commission that he recalled receiving advice from senior counsel to the opposite effect of the position taken by the IHAP in relation to State Environmental Planning Policy (Infrastructure) 2007. However, the legal advice to which Mr Stavis was referring was not on this point.

On 27 November 2015, Mr Stavis sent an email to Mr Montague's assistant, stating that Mr Montague wanted to meet with him urgently on the following Monday about a number of development applications, including the two additional levels for Harrison's and the Doorsmart development (see chapter 9). On 30 November 2015 (being the following Monday), Mr Stavis advised Andy Sammut, Council's director of corporate services, of the Harrison's development application that, "The GM wants this DA to go to 3 December CDC meeting and asked for it to be circulated as a late item, notwithstanding IHAP's deferral request".

Mr Montague told the Commission he did not remember making such a request and said that, before it was shown to him in evidence, he had never seen the IHAP recommendation and did not think that he ever became aware of it. He could not recall having any contact with Mr Demian about the IHAP report or receiving any calls from Mr Hawatt or Mr Azzi.

The Commission infers from the contemporaneous records that Mr Stavis and Mr Montague did talk on 30 November 2015, and that Mr Montague instructed that the development application, along with the modification application, was to go to the 3 December 2015 meeting. Mr Montague said that he could "only assume that there was some interest from the Council, perhaps, to get this one moving, to get it up to the Council meeting at least". When asked whether there was an interest on the part of Mr Demian, Mr Montague said "it amounts to the same thing in a way". He was asked to explain what he meant by that answer, and he referred to Mr Demian having a "reasonable relationship" with Mr Hawatt. It was Mr Montague's view that Mr Demian saw Mr Hawatt and Mr Azzi as "friends at court".

It was submitted for Mr Montague that he had not seen the IHAP report, but it was not his job to assess the merits of the development application. This is not to the point. His job did involve responsibility for the day-to-day functioning of the Council. Advice that the Council could not legally determine a development application was significant in this context. In his evidence in relation to 998 Punchbowl Road, Punchbowl, Mr Montague indicated that he understood that it was his responsibility to guide the Council in relation to its legal ability to do something.

Mr Montague sought to downplay the significance of the legal issue that had been raised by the IHAP, describing it as "one solicitor's opinion". However, he took no steps to have that opinion tested and simply permitted the matter to proceed to the CDC for determination, giving an opportunity to approve the development application. Mr Montague was not able to give any explanation about why he did this but for either a decision to advance the interests of Mr Demian, notwithstanding any contact from him, or a decision to advance the interests of Mr Demian after contact from any of Mr Demian, Mr Hawatt or Mr Azzi.

It was submitted for Mr Montague that the request for the development application to go to the 3 December 2015 Council meeting was unexceptional in circumstances were the Council had been informed that there was some commercial urgency in the development application. First, the evidence that there was commercial urgency was not clear. Secondly, acceptance of that submission would involve acceptance that the question raised about the Council's ability to legally determine the application should give way to the commercial urgency said to be faced by an applicant. In the circumstances, the Commission is not satisfied that this should be described as "unexceptional".

Also on 30 November 2015, Brad McPherson, Council's group manager (governance), received advice that the matter was to go to the December CDC meeting and reminded Mr Sammut that the IHAP's opinion was that the Council could not determine either application without referral to RMS. Mr Sammut forwarded that advice to Mr Montague, confirming that the report would go to the CDC as per his instructions, but making him aware of the opinion that it could not be determined without referral to RMS.

Mr Stavis added on the email chain that "the DA was referred to RMS today" and:

> *…to overcome this issue I propose to provide you with a motion that can be moved off the floor or as a*

Memo from you to the Councillors recommending the following (or similar):

"Council is generally in support of the proposed development and delegates the determination of the DA to the GM once concurrence is obtained from the RMS"

I await your advice.

Later that day, Mr Stavis sent an email to Mr Montague setting out commentary and a motion for the Harrison's applications "as discussed". The remainder of the email set out some text that could be referred by Mr Montague to the Council to explain the position, and the text of a motion that the applications:

…be approved in principle and once the suitable concurrence is received from the RMS the General Manager be authorised to issue the consents, subject to the conditions as recommended in the Director City Planning's report and any other conditions that arise as a result of the RMS concurrence.

As drafted, this resolution was flawed. Although the Council could delegate its functions, the relevant function was to determine a development application. It could not delegate that an application be determined in a particular way.

Mr Stavis said that he had suggested this course of action because Mr Montague had expressed on numerous occasions that the matter had to go before that CDC meeting. Mr Stavis also said that he "distinctly" remembered talking to the Council's solicitor, Mr Jackson, who suggested that might be a way of moving the application along.

Mr Jackson told the Commission that he had not provided any such advice in respect of Harrison's or any other matter. He had no involvement in the Harrison's site after 29 July 2015, and was on annual leave and out of the state during the time in which the conversation would have occurred. The Commission accepts Mr Jackson's evidence, and does not accept that Mr Stavis had legal advice to support his proposed course of action.

The more likely source of the proposed motion was a suggestion Mr Stavis received from someone at Sydney Trains in respect of the Doorsmart development applications on 25 November 2015 (see chapter 9). Briefly, the Doorsmart applications were awaiting concurrence from Sydney Trains but were referred to the CDC for determination on 3 December 2015 regardless. Following a suggestion from a Sydney Trains employee that other councils had done a similar thing in these circumstances, Mr Stavis suggested to Mr Montague that:

…the only way we can progress the DAs is to recommend the following (or similar): That Council supports the proposed development and delegates the determination of the DA to the GM once concurrence is obtained from the RMS and Sydney Trains.

Mr Stavis accepted that the public interest lay in observance of the Council's IHAP policy and compliance with State Environmental Planning Policy (Infrastructure) 2007, and that Mr Demian's interests lay in the earliest possible approval of his development application.

The Commission received submissions on behalf of Mr Stavis to the effect that the public interest may also be served by efficient decision-making, the avoidance of litigation, control over development outcomes, saving costs and the Council meeting its housing targets. Submissions made on behalf of Mr Montague also highlighted that there was a need to balance multiple competing factors, but this did not mean that there was a single identifiable public interest.

In his evidence to the Commission, Mr Montague accepted that he likely had a conversation with Mr Stavis about the course of action proposed by Mr Stavis in his email of 30 November 2015, but could not recall doing so. He told the Commission that the timing of development applications was of no interest to him. The Commission does not accept this evidence in light of the contemporaneous records, and in light of what actually occurred.

On 1 December 2015, Mr Montague circulated to the mayor and councillors a memorandum with the reports concerning the development application and modification application for 548-568 Canterbury Road as late items for the CDC meeting of 3 December 2015. The memorandum noted only that "the recommendation by the Director City Planning differs from that proposed by the Independent Hearing and Assessment Panel". The memorandum did not identify, or attempt to address, the legal issue that had been raised by the IHAP.

Mr Montague denied that it was a bad call to intervene in the process in this way, and did not accept that the course advantaged Mr Demian. He said that he could not say what the Council would do when the application was placed before them. However, had Mr Montague not determined that the application should be placed before them, the CDC would not have been given the option of determining a matter with a manifest risk that determination was contrary to law. Further, and although the IHAP papers were included in the material that went to the CDC, the memorandum drafted by Mr Montague did not draw the CDC's attention to this risk or provide any advice about it, but referred only to a difference of opinion between the IHAP and Mr Stavis.

Mr Montague denied that this was because he was party to machinations to overcome Mr Demian's problems.

It was submitted for Mr Montague that, generally, in considering matters in this investigation, regard should be had to the fact that the ultimate decision-maker was not a professional planning body but the CDC, and that the statutory decision-making structure placed the ultimate decision in the hands of the community via its elected Council representatives. It was submitted that professional assessment was only part of the process, and matters of policy and judgment were an essential component of the decision-making process, and that this was a matter on which reasonable minds may differ.

However, because the decision-maker is not a professional planning body, professional assessment and advice from its staff is of particular importance. The Council would reasonably be entitled to expect that it could lawfully determine the matters referred to it for determination. The Council would also be reasonably entitled to expect, given its code of conduct, that the exercise of professional assessment functions had not been influenced by the expectations, or perceived expectations, of any particular councillor.

In the lead up to the 3 December 2015 CDC meeting, Mr Stavis continued to pursue RMS for comments in relation to the Harrison's applications. Mr Stavis used language indicating he was pleading with RMS to provide its comments, which was indicative of the pressure he was under. RMS comments were not received prior to the meeting.

On 3 December 2015, in respect of DA 592/2014 and the modification application DA 509/2013/A, the CDC resolved unanimously, on the motion of Mr Azzi, that:

> *A. The General Manager be authorised to issue the consent for* [the applications] *once concurrence is received from the RMS, subject to the conditions as recommended in the Director City Planning's report and any other conditions that arise as a result of the RMS concurrence.*
>
> *B. The Committee decided not to accept the IHAP recommendation given that the application has now been referred to the RMS, and resolved to accept the Officer's recommendation.*

Mr Hawatt and Mr Azzi voted in favour of both motions and neither declared a conflict of interest. These resolutions were different in their terms to that originally drafted by Mr Stavis; a fact which could not be explained by any of Mr Montague, Mr Stavis, Mr Azzi, Mr Hawatt or Mr Demian. It remains doubtful that the resolutions were effective under s 80 of the *Environmental Planning and Assessment Act 1979 1979* ("the EPA Act") as this provision required that a consent authority determine an application by granting or refusing consent. The motion, as passed, involved neither.

Mr Azzi told the Commission that he had a professional relationship with Mr Demian and was not doing him any favours. He also initially claimed to have discussed this issue specifically with Mr Montague (who denied having such a conversation) but then said that he had a general discussion about how to declare a conflict of interest. Mr Azzi also told the Commission that he had "too many friends in Canterbury", and that it would be a problem for him to disclose conflicts of interests if he wanted to discuss issues with everyone who came to him.

Having regard to all of the evidence, the Commission is not satisfied that Mr Azzi acted dishonestly in not declaring an interest on 3 December 2015 in the development application and modification application for Harrison's. The Commission is not satisfied that his relationship with Mr Demian, although it involved hospitality at Mr Azzi's home, reached the level of a non-pecuniary conflict of interest, having regard to its conclusions in respect of Mr Azzi's role in the attempts to sell Harrison's.

Information going to whether Mr Hawatt had a conflict of interest that he knew he should have declared is outlined later in this chapter.

The carpet shop site: 570-580 Canterbury Road

Development application for six-storey development

In December 2014, Statewide Planning lodged a development application (DA 591/2014) for a six-storey building for the carpet shop site at 570-580 Canterbury Road.

On 3 August 2015, the development application was considered by the IHAP. Mr Stavis recommended that the application be approved by way of deferred commencement.

The IHAP was concerned that the applicant had not sufficiently addressed the site isolation of a neighbouring property. It determined to allow the applicant to provide additional information, and decided to defer consideration of the development application to allow for an assessment of this additional information. This was a problem for Mr Demian because, as he confirmed in the public inquiry, it meant delay and cost. He thought that the additional information required by the IHAP had already been provided to Council officers who had not passed it on.

Call charge records show that, on the morning of 4 August 2015, Mr Demian called Mr Hawatt and spoke to him for one minute and 50 seconds. That afternoon, Mr Demian called Mr Hawatt and spoke to him for 11 minutes and 37 seconds. Given the timing, and consistent with the evidence of both parties about the reason for their contact during the period, the Commission concludes that Mr Demian spoke to Mr Hawatt about his concerns about the IHAP referral.

On 7 August 2015, Mr Demian's planner provided Mr Stavis with copies of letters indicating that there had been offers to purchase made to the owners of the neighbouring sites in Chelmsford Street. Also on 7 August, Mr Hawatt organised a meeting with Mr Demian at Mr Azzi's house for the following day.

On 10 August 2015, Mr Stavis had a conversation with Mr McPherson about the possibility of the assessment report for this development application being put as a late report to the CDC meeting that week. Mr Stavis told the Commission that the general manager and the two councillors were chasing him about Mr Demian's applications, and specifically in respect of 570-580 Canterbury Road.

On the same day, by email, Mr McPherson reminded Mr Stavis that the IHAP rules required the matter to be referred back to the IHAP before determination by the CDC or the Council, and that Council staff would be in breach of this policy if the report was submitted to the CDC. Mr Stavis replied by email that this was "a governance issue which may need to be taken up directly with the GM", blind copying his email to Mr Montague. Mr Stavis told the Commission that he would not have progressed the applications to the CDC unless he had the general manager's advice.

Mr Montague could not remember reading Mr McPherson's advice, but accepted that non-observance of the IHAP rules was prima facie a breach of clause 6.4 of the Council's code of conduct, which required that members of staff give effect to the policies and procedures of the Council whether or not the staff member agrees with or approves of them. Mr Montague said that he would not ignore advice of the nature given by Mr McPherson.

Mr McPherson told the Commission that he attended an executive meeting with the general manager and other directors, at which he raised his email to Mr Stavis. He said that Mr Montague told him that, in his view, Mr Montague had the authority to report the matter to the CDC and the CDC could then make a determination as to whether it wanted to consider the issue or refer it back to the IHAP. Mr Montague told the Commission that he had no recollection of the conversation and did not accept that it was necessarily correct. The Commission found Mr McPherson gave generally reliable and credible evidence. It was also consistent with subsequent events. In contrast, as described elsewhere in this report, there are some difficulties in accepting Mr Montague's evidence. The Commission accepts Mr McPherson's account of his conversation with Mr Montague.

Mr Montague denied that he deliberately circumvented Council policy. He suggested that it may not have been on his mind at the time. Given that Mr McPherson's advice was forwarded to Mr Montague, the Commission does not accept this evidence. Mr Montague said that he may not have taken much notice of Mr McPherson's advice, or listened to him, as he had issues with Mr McPherson. The issues cited by Mr Montague were matters of personality and hierarchy, and did not explain why Mr Montague would not take any notice of Mr McPherson, given that the advice was within his area of responsibility. Mr Montague said he had "no view" as to whether it was right not to listen to Mr McPherson. The Commission is of the view that it was wrong for Mr Montague not to accept Mr McPherson's advice.

Also on 10 August 2015, Mr Stavis sent Mr Montague an email in which he advised that Mr Hawatt had asked him to provide him with "draft conditions which change the recommendation from a deferred commencement consent to a standard approval". Mr Stavis attached draft conditions to his email to give effect that request. Mr Montague sent these by email to Mr Hawatt.

Mr Hawatt said that he had no recollection of the IHAP recommendation of 3 August 2015, and could not explain why he sought draft conditions to change the recommendation to a standard approval. Mr Demian said that a standard approval was a better outcome than the recommendation in Mr Stavis' report, but had no understanding as to why Mr Hawatt took that approach. Given the communication occurring at the time between Mr Hawatt and Mr Demian, and the evidence of both that they discussed issues relating to Mr Demian's developments, the Commission does not accept that Mr Demian did not understand why Mr Hawatt took the approach that he did.

On 13 August 2015, despite the IHAP deferral and Mr McPherson's advice, DA 591/2014 was referred to the CDC with a recommendation for approval. This occurred on the authority of Mr Montague. Mr Montague could not explain to the Commission what was motivating him at the time. He accepted that he may have been contacted by an advocate of Mr Demian, Mr Demian himself or by Mr Stavis. Mr Montague said that he also had a view that developments needed to occur and that there was not much value in having them just lying on someone's desk.

The director of city planning's report to the CDC noted the IHAP's recommendation, and recommended that the application be approved by way of deferred commencement.

On the motion of Mr Azzi, seconded by Mr Hawatt, the CDC resolved to approve the development application subject to conditions for a standard approval, rather than a deferred commencement.

The effect of both the breach of the IHAP rules and the change from deferred commencement conditions to a standard approval was to accelerate the approval process for the six-storey development at 570-580 Canterbury Road.

Planning proposal

On 6 November 2015, the planning proposal to increase the height at 570-580 Canterbury Road (along with 538-546 Canterbury Road) was forwarded to the NSW Planning Department for Gateway Determination. On 14 December 2015, the department sought clarification on a number of matters, including whether there was:

> *…any additional site specific justification for the proposal regarding its departure from and inconsistency with, Council's Residential Development Strategy 2011 and the departure from the draft height controls for the site under the Belmore Precinct of the draft Sydenham to Bankstown Urban Renewal Corridor Strategy.*

The department also asked for further information about traffic and parking demand generated by the increased dwelling yield on the sites, including the cumulative impacts of the proposal in conjunction with the planning proposal for 548-568 Canterbury Road.

In response to this request for further information, Warren Farleigh sent an email to George Gouvatsos suggesting that:

> *…it may be prudent to defer further consideration of any relevant applications pending the submission of this material to the Department and their consideration thereof in relation to any Gateway Determination.*

Mr Stavis replied to Mr Farleigh's email, advising that he had spoken to an acting director from the NSW Planning Department and that person did not seem too concerned with the "merits" of the planning proposal. Mr Stavis reported that the department representative had said it was a matter for the Council if they were to progress the development applications.

On 11 February 2016, the Council sent a response to the issues raised by the department. On 6 April 2016, the NSW Planning Department issued a Gateway Determination, which allowed the planning proposal to proceed, subject to conditions. Conditions included that, prior to public exhibition, the planning proposal was to be updated to provide further traffic and parking analysis (among other matters), and to include an urban design study to justify inconsistency with Council's residential development strategy.

Development application for two additional storeys

On 28 October 2015, Statewide Planning lodged a development application DA 510/2015 for two additional storeys at 570-580 Canterbury Road, Belmore. Similarly to the application for the Harrison's site, the applicant submitted a clause 4.6 objection to the existing development standard of 18 metres, seeking to build to 25 metres, or up to 28.85 metres, including lift overrun. Again, the clause 4.6 objection relied on the Council having resolved to prepare a planning proposal to increase the building height on the site to 25 metres.

On 8 February 2016, Ms Kocak emailed an external consultant and asked for a quotation in respect of providing a report on the development application for the additional two storeys and an accompanying modification application for 570-580 Canterbury Road (DA 592/2014/A). Later that morning, Ms Kocak advised the consultant, "this assessment is urgent so I would greatly appreciate if you could get back to me this morning so I can get approval to proceed". Ms Kocak said that her reference to urgency would have been because Mr Gouvatsos or Mr Stavis would have advised her that the applications needed to go to an upcoming Council meeting.

Ms Kocak told the Commission that:

> *…we normally didn't go to external consultants historically. And, yes, we did, well, have up to 50 applications on but we still assessed them internally. So it was a very new process to us and in the … sites that I've been involved in, once I referred the applications, a lot of the communication was between the consultant and the director.*

Ms Kocak noted that this occurred from around the 2012 commencement of the Canterbury Local Environmental Plan and its new DCP.

In his evidence to the Commission, Mr Stavis accepted that staff were given a tight timeframe for determination of this development application, and that this was "probably" because the general manager asked him to expedite the matter. He said he believed that Mr Demian and Mr Montague had a fairly close relationship, because:

> *…every time Mr Demian would make an inquiry about an application and make that inquiry of the GM, the GM would almost instantaneously call me up to his office or inquire about particular applications that Mr Demian had…*

Although Ms Kocak was allocated to assess this development application, she told the Commission that Mr Stavis was the contact with the applicant and conducted meetings with the applicant, which Ms Kocak did not attend. Mr Stavis said that he attended a number of meetings in respect of 570-580 Canterbury Road with Mr Demian at which Mr Montague was present, which to Mr Stavis:

> *…almost, in a sense,* [made] *me aware, I guess, how important his applications were and he had the backing of – by having the general manager there present, it was almost like a bit of a – I wouldn't use the word "intimidating", but a word to that effect, to me.*

Mr Stavis confirmed that he thought that Mr Montague's presence at the meetings was to pressure him. Mr Montague told the Commission that he had no recollection of attending such meetings, but that it was possible that they occurred. Mr Demian referred to such meetings occurring in a contemporaneous telephone call lawfully intercepted by the Commission, and the Commission finds that they did occur.

On 22 March 2016, Ms Kocak sent to Mr Stavis an email about 570 Canterbury Road, providing background information so that Mr Stavis could inform the general manager about the current status of the matter. The email included that:

> – *I spoke to the assessing officer who advised she still had some concerns about the Clause 4.6 submission not demonstrating a 'better environmental outcome' and not sufficiently demonstrating why the development standard would* [be] *'unnecessary or unreasonable', with which I agree…*
>
> – *the Planning Proposal (Council resolution to increase height limit to 25m) has no material weight in terms of the current application as it has not been approved by the Department and therefore this application relies on Clause 4.6 of the LEP for a variation to the 18m height limit which is currently applicable.*

Ms Kocak told the Commission that she drafted this email based on what she had discussed with Mr Stavis in a meeting about the site, and so that the text could be sent by Mr Stavis.

Mr Stavis copied and pasted Ms Kocak's email, including the unamended dot points above, in an email to Mr Montague. On that day, Mr Montague contacted Mr Hawatt to advise that they needed to meet with Mr Stavis to discuss the application. That evening, Mr Stavis telephoned Mr Hawatt and they had the following lawfully intercepted exchange about the development application for 570-580 Canterbury Road:

Stavis:	*He* [Mr Montague] *– I think he wants to run – to me to explain to you that I've got serious concerns about this DA –*
Hawatt:	*Yep.*
Stavis:	*On the corner of, you know the one next to Harrison's?*
Hawatt:	*Oh yeah the one – the carpet place?*
Stavis:	*Yeah exactly.*
Hawatt:	*Yeah – yep-yep.*
Stavis:	*Because basically the understanding was that before he lodged we all agreed that he had to do something to the approval like Jimmy Maroun did.*
Hawatt:	*Yep.*
Stavis:	*To give something back and to argue the extra two floors on the basis that it's a better planning outcome … under clause 4.6 okay? … So we just – I think we just want to run that by you and – and I think he wants to see what you think okay 'cause he's a bit sort of wary of it. Yeah so –*
Hawatt:	*What so Montague's wary of it or?*
Stavis:	*Well yeah he's – he's – he wants to – he's – I told him I can't support it –*
Hawatt:	*Oh he's not sure he will (INAUDIBLE)*
Stavis:	*– I told him I can't support it and he wants to back me but he's – he's – he's afraid that you know he might cause offence.*
Hawatt:	*No – no – no of course no way (INAUDIBLE) … There's no way in the world, look you know if it's not reasonable we don't mind supporting*

and doing things to give them a little bit here but not ridiculous so I'm not going to (INAUDIBLE).

In the telephone call, Mr Stavis referred to the fact that he was "flexible", and Mr Hawatt agreed that, "I know you're more flexible than anybody", adding "with your flexibility that's not enough … then God help us then you know". Mr Hawatt said that he would "call Pierre across as well" and tell Mr Demian "he has no choice". Mr Stavis asked Mr Hawatt to contact Mr Montague first because "he's gonna get pressure from Charlie".

On 29 March 2016, the Commission lawfully intercepted a telephone call from Mr Khouri to Mr Hawatt, in which Mr Khouri told Mr Hawatt that Mr Hawatt had a meeting with Mr Stavis that afternoon (about which Mr Hawatt did not appear to know). Mr Khouri told Mr Hawatt that Mr Demian should be there as there were "a couple of issues you need to clarify you know what I mean?", and that Mr Stavis was messing up.

Mr Khouri then put Mr Demian on the telephone, who said that he had received a telephone call from Mr Montague the previous Wednesday (being 23 March 2016), advising that Mr Stavis was not happy with the planning and wanted to change it. Mr Demian told Mr Hawatt:

I said mate look that's fine we'll change whatever he wants, but surely he could have told us like a bit earlier I mean in this – in February he tells you everything's fine it's going to you know the meeting in April now you know a few days before tells us that he doesn't like it.

Mr Demian and Mr Hawatt then had a conversation about the changes that Mr Stavis was seeking, and the history of the matter. Mr Hawatt asked Mr Demian to let him sort out "what the issues are".

Following that call, Mr Hawatt called Mr Montague and asked him about the meeting with Mr Stavis, which Mr Montague said was occurring on the next day.

On 8 April 2016, the Commission lawfully intercepted a telephone call between Mr Hawatt and Mr Azzi in which Mr Hawatt spoke about Mr Stavis' concern about Mr Demian. Mr Hawatt and Mr Azzi agreed that Mr Stavis was doing the right thing and they would "back him up". Mr Hawatt said that he was not going to pressure Mr Stavis too much. Mr Hawatt said that Mr Stavis was worried about Mr Montague pressuring him as well, and said that, "I think Jim if he knows that we're on side he – he's – he's okay alright".

The content of this conversation is consistent with an existing degree of pressure being exerted on Mr Stavis, as Mr Stavis repeatedly told the Commission he felt from Mr Hawatt and Mr Azzi.

Mr Hawatt followed up his call with Mr Azzi by calling Mr Montague. In that call, Mr Hawatt told Mr Montague that, regarding Mr Demian, he thought that Mr Stavis was doing the right thing and that he thought they needed to back him up on this one. Mr Montague said, "yeah on that particular one, some of the others no, but this one I – I think…". Mr Montague added that "we've gone far enough for Charlie I think Michael". Mr Hawatt agreed. Mr Montague said "there might be room for a little bit of minor compromise", and Mr Hawatt said, "we got to show we can't push Spiro too much you know".

Mr Montague told the Commission that when he said "we've gone far enough for Charlie", he was referring only to 570-580 Canterbury Road. However, having regard to all of the circumstances known to the Commission, including to the content of the telephone call itself, the Commission is satisfied that the reference was to all of their dealings with Mr Demian, including in respect of the Harrison's site and 998 Punchbowl Road, Punchbowl (see chapter 6).

Over the period of these contacts about Mr Stavis' concerns with Mr Demian's development applications and modification applications, Mr Hawatt was engaging in serious discussions with George Vasil and Mr Demian about offers to purchase the Harrison's site, including (on Mr Hawatt's understanding) the carpet shop site to which this application related. For the reasons set out below, the Commission rejects the suggestion from Mr Vasil and Mr Hawatt that they did not take any of these discussions seriously.

Before these matters were resolved, the Council was amalgamated with Bankstown Council on 12 May 2016, and all the councillors lost their positions.

On 24 May 2016 (after council amalgamation), Mr Demian sent to Mr Stavis amended plans "addressing the issues discussed in our last meeting". Mr Stavis and Ms Kocak emailed each other expressing some concerns about the plans. On 12 October 2016, the development application was refused on the basis that it was deficient of information to enable the amalgamated council to carry out a proper and complete assessment under s 79C of the EPA Act.

Pressure on Mr Stavis

The Commission has received conflicting evidence and submissions about how and why the application for two additional storeys on the Harrison's site progressed, in circumstances where Mr Stavis said he would ordinarily have refused the application. As will be seen in chapter 8, the decision provided a precedent for neighbouring applications, and did begin to put pressure on the efficacy of the Council's height standard in circumstances where

RMS concerns about the cumulative traffic impacts of increasing those heights had not been resolved.

It was submitted for Mr Stavis that he was under a direction from the councillors and the general manager to find a solution, and that there was a degree of coercive pressure being applied to him. Mr Stavis said, in relation to this application, that, although he did not have a relationship with Mr Demian, the general manager and the two councillors had taken a considerable interest in the application. This interest is corroborated by records of meetings and correspondence. Mr Stavis told the Commission that he would have refused the Harrison's site development application but for the influence on him by Mr Hawatt, Mr Azzi and Mr Montague.

Mr Montague said that his interest in the Harrison's site was that he wanted to make sure that the development potential of large sites across the Canterbury local government area, including that site, was dealt with effectively. He said that he received numerous contacts from Mr Demian about why the site was being held up, and Mr Montague thought this was because it imposed a financial strain on him. Mr Montague said that he also received representations from Mr Khouri about the Harrison's site; although, he said that Mr Khouri knew well that he could not influence the outcome of matters.

Submissions for Mr Montague were that he frequently intervened with his staff to press them to act with greater expedition in processing planning outcomes (although not to a particular outcome). It was submitted that any allegation that Mr Montague sought to expedite applications to approval must be rejected, in part because the allegation was based on closed answers to leading questions. Further, it was submitted that such an allegation assumes that the Council had no independent agency, and that it would be a good thing for all applicants to suffer planning delays whatever their commercial circumstances.

Mr Hawatt did not accept that Mr Stavis was trying to achieve a solution for Mr Demian because of his intervention, and denied that he had ever pressured Mr Stavis. He said that:

> *All I have done is made my representation, passed on the information, he told me what was going on, I passed it on and, and that was the continuation between the two parties.*

Submissions for Mr Hawatt were that he was adamant in his evidence that he believed that the application from Mr Demian had merits, and he denied directing Mr Stavis to do anything. It was also submitted that it is inherently unfair to attach to Mr Hawatt the uncommunicated thoughts of Mr Stavis that he would have refused the development application long ago had it not been for the pressure of Mr Hawatt and others.

In respect of this application, the direct evidence of direction or advocacy from Mr Hawatt and Mr Montague was:

- in June 2015, Mr Hawatt organised a meeting with Mr Azzi, Mr Demian and Mr Stavis at the Council, and told Mr Stavis, "he has made changes but needs to discuss further. He is running out of time. His project is nearly 3 years of waiting"
- a request from Mr Montague about listing the application before the CDC in November or December 2015.

The Commission has no direct evidence of directions or advocacy from Mr Azzi in respect of the application; although, the Commission is able to conclude that he had an interest.

In the absence of notes of these meetings or a distinct recollection of what was discussed by any of the participants, the Commission is not able to discern whether directions were given to, or influence exerted on, Mr Stavis in any meetings about how he was to manage the application.

However, Mr Stavis' evidence that he felt under pressure, and that he was influenced by the representations from Mr Hawatt about Mr Demian's developments is corroborated to an extent by the calls that followed concerning 570-580 Canterbury Road, when he indicated that even his flexibility had reached its limit. This pressure occurred in a context where he had some vulnerability to those particular councillors, given their role in securing his employment and his perception that they could take that away again. However, it is also true that, when he expressed this to Mr Hawatt, Mr Hawatt sought support from Mr Azzi and Mr Montague to stop pressuring him.

The sum of the circumstances of Mr Stavis' employment, his particular relationship with Mr Hawatt, his knowledge of Mr Hawatt's interest in the matter, the complaints he received from Mr Hawatt sourced from Mr Demian, and his understanding that his role was to provide solutions, were patently matters that could adversely affect the honest and impartial exercise of Mr Stavis' functions to oversee the assessment of development applications. The circumstances created an incentive for him to find a way to approve the application. This is of particular concern where Mr Stavis had significant discretion in the recommendations he made to the Council. However, in all of the circumstances, the Commission is not satisfied that Mr Hawatt intended to adversely affect the honest and impartial exercise of Mr Stavis' functions.

The Commission has considered whether Mr Stavis' conduct in respect of 548-568 Canterbury Road was partial, including whether he gave Mr Demian an advantage in circumstances where there was an expectation that competing claims be treated equally, for an improper purpose.

The Commission is satisfied that the first criteria is met; in that, Mr Stavis continued to progress his application towards approval in circumstances where he would otherwise have refused the application. The Commission is satisfied that he did this to meet what he believed were the expectations of Mr Hawatt, Mr Azzi and Mr Montague. Mr Stavis operated in an environment where he believed that coming into conflict with Mr Hawatt and Mr Azzi would have ramifications on his employment.

That the expectations of two of the 10 councillors, as opposed to the lawful direction of the Council as a collegiate body, should be given priority in the assessment and progression of a development application has the tendency to distort the assessment process by undermining the impartial and honest exercise of public functions. It is also, arguably, an improper purpose for the exercise of assessment functions. However, having regard to all of the evidence gathered in this matter, including the circumstances in which Mr Stavis found himself, the Commission does not proceed to a corrupt conduct finding on this basis. Further, the Commission was not satisfied that the evidence established that Mr Stavis exercised his functions in respect of this application dishonestly.

This finding, and the other findings in this report, emphasises for the Commission its concerns about the vulnerability of senior staff in local government to influence from individual councillors (despite the code of conduct) in the formation of recommendations and the way in which applications are dealt with at councils.

The Commission is not satisfied that the conduct of Mr Montague, although it added to the pressure that Mr Stavis felt, was conduct that could adversely affect the honest or impartial exercise of Mr Stavis' functions. It is not satisfied that there is sufficient evidence that Mr Montague expected this particular application to be approved such that Mr Stavis would not consider it honestly or impartially. Further, unlike Mr Hawatt and Mr Azzi, Mr Montague was entitled to give directions to Mr Stavis about the progress of the matter. That he did not draw the Council's attention to legal risk, and that he did not take the advice of his governance officer about the progression of the matter, is not in itself sufficient to proceed to a corrupt conduct finding.

Proposals for the sale of the Harrison's site

In August 2015, Mr Hawatt disclosed to the Council in his annual "disclosure of interests return" that his income was derived as a "finance broker" through Ozsecure Home Loans. He said that he had also been involved in financing various development projects over the years. During the public inquiry, Mr Hawatt was asked when he first became involved in real estate transactions, and replied:

> *It's been going from, probably from the day I was born, you know. It's something that's in our blood to, to make transactions and business transactions and, or trading developments in Morocco, I'm doing something there. It's just the way it is. It's, it's a business transaction that most people, even professionals, do. Whether that could be doctors, lawyers, everybody tries to, to try to do some, some sort of a transaction in, in this regard, including myself. But, because I'm involved in finance and I do a lot of financing for, I, I used to do a lot of financing for various projects, development projects and over the years, of course, you build up your, your connections and contacts and you see how, how people operate and how they do business based on the financing that I do, the commission I charge to finance. So it's all interlinked with my work in, in finance.*

Between 2014 and 2016, Mr Hawatt also engaged or attempted to engage in property dealings. In 2015, he became involved with attempts to sell land at Revesby (outside the Canterbury local government area) for the development of a private hospital, with the intention of obtaining payment if that sale was successful. The proposal for payment appears to have been structured as follows:

- Mr Hawatt had an agreement with the vendor, dated 2 October 2015, that if he introduced a purchaser to the vendor, and the vendor received at least $20 million for the sale of the Revesby site, the vendor would pay Mr Hawatt $5 million
- Mr Hawatt had an agreement with Galazio Properties Pty Ltd, a business owned by John Dabassis, a real estate agent, dated 10 December 2015, that if the Revesby site sold to the person introduced by Mr Dabassis, Mr Hawatt would pay Mr Dabassis $1.25 million.

Mr Hawatt told the Commission that he was acting for both the vendor and the purchaser in the transaction, because he knew both parties. In agreements, correspondence and legal files available to the Commission, Mr Hawatt's role was variously described

as "intermediary", "agent" and "consultant". The services he would provide were described in his agreement with the vendor as "networking, introduction and facilitation services to third parties in order to effect a sale of the Property on behalf of the Vendor". Mr Hawatt described the services he was providing as "consulting" and said that it included arranging financing for the potential purchaser.

The other people involved in the deal were Mr Vasil, also a real estate agent, and Laki Konistis, a school teacher with an interest in real estate. Each was to share in the commission from a successful sale. In communicating with Mr Hawatt about the potential sale, Mr Konistis expressed himself with enthusiasm and referred to their "team", being the team of Mr Vasil, Mr Hawatt, Mr Dabassis and Mr Konistis in the Revesby deal. Mr Vasil's role appears to have been as introducer, making connections between Mr Hawatt, on one side, and Mr Dabassis and Mr Konistis, on the other.

The structure and purpose of this transaction, coupled with the identities involved, sheds some light on the nature of Mr Hawatt's role in attempts to become involved in the sale of the Harrison's site.

Mr Hawatt told the Commission that he did not take Mr Konistis and Mr Dabassis seriously in his dealings with them. Having regard to the contemporaneous evidence of his dealings in respect of Revesby, the Commission cannot accept this evidence. Between September 2015 and June 2016, Mr Hawatt exchanged a significant number of messages with Mr Konistis about the Revesby deal, and later about the Harrison's site deal. He entered into an agreement with Mr Dabassis to share some of his (Mr Hawatt's) own commission if the property was sold to Mr Dabassis's contact. The Commission concludes that Mr Hawatt was happy to work with Mr Konistis and Mr Dabassis on a property deal that had the potential of earning Mr Hawatt money by way of an introducer's fee or commission.

Mr Hawatt undertook some other activities to facilitate the sale. For example, in September 2015, the potential purchaser told Mr Hawatt and Mr Dabassis that he needed letters of support for the proposed private hospital from the Bankstown Council and the NSW minister for health. Mr Hawatt made contact with both, and successfully obtained letters of support from the general manager of Bankstown Council, Matthew Stewart. In his contact with the minister for health, he sought a meeting to discuss the project as a "consultant (not lobbyist)".

After the period with which the Commission's investigation is concerned, the Revesby deal collapsed and it appears that Mr Hawatt did not receive the $5 million.

In 2015 and 2016, Mr Hawatt became involved in attempts from members of the Revesby "team" to gain access to Mr Demian for the purpose of the sale of the Harrison's site. Harrison's was used loosely in the evidence on this topic to refer to both 548-568 Canterbury Road, and to that site combined with the neighbouring carpet shop, 570-580 Canterbury Road. Relevantly, and for the purpose of attempts to introduce purchasers, Mr Hawatt understood "Harrison's" to include both 548-568 Canterbury Road and 570-580 Canterbury Road. For the purposes of this part of the report, the site will be referred to as the combined Harrison's site, to distinguish it from the Harrison's site referred to earlier.

The attempts culminated in a proposal that any commission payment received by the "team" for a successful sale would be split five ways: between Mr Dabassis, Mr Konistis, Mr Vasil, Mr Hawatt and Mr Azzi. At issue in the Commission was when Mr Hawatt became aware of this proposal, and whether Mr Azzi was ever aware of this proposal.

There were also attempts by the team to secure from Mr Demian a vendor's agency agreement for the combined Harrison's site. The obstacle to this was that Mr Demian had an exclusive agency agreement with another real estate firm, CBRE. However, once this expired, Mr Vasil was involved in getting Mr Demian to provide a limited vendor's agency agreement to Mr Dabassis.

There were different potential purchasers proposed at different times for the combined Harrison's site. Some of the purchasers were to be introduced by Mr Dabassis, and another set of purchasers was to be introduced by a NSW member of parliament, Daryl Maguire.

Contact with Mr Demian about the potential sale of the combined Harrison's site was initiated by Mr Hawatt. On 21 September 2015, Mr Hawatt sent to Mr Demian a text message, stating, "George Vasil is telling me that his people are serious and need a contract of sale". Mr Demian replied at 7.50 pm that day, "can you call me?". At 8.41 pm, Mr Hawatt sent a message to Mr Demian:

> *Hi again The offer is $56m for current approval which includes the extra units being approved. The buyer is willing to exchange with only one condition subject to the extra units being approved.*

Mr Demian replied, "thanks Michael lets talk over the next couple of days".

Mr Konistis explained to the Commission that he had approached Mr Vasil on behalf of Mr Dabassis to ask if he could assist them to "present an offer" to the owner of the combined Harrison's site. Mr Vasil said to him that "Michael" knew the owners. Mr Konistis understood

that this was a reference to Mr Hawatt, as he was already working on the Revesby deal by that stage. Submissions for Mr Hawatt made some criticisms of Mr Konistis' demeanour, noted that he had spoken about his evidence with Mr Dabassis before giving evidence and suggested that Mr Konistis was an unimpressive witness. The Commission does not accept this submission, and is of the view that Mr Konistis' evidence can be generally accepted. On the whole, his evidence was reliable and the Commission accepts that he was genuinely attempting to assist.

Mr Vasil told the Commission that it was possible that he had discussions with Mr Hawatt about the offer at the time. Although Mr Vasil said that he could not recall conveying the "offer" to Mr Hawatt, he said that the "arrangement" would have come from Mr Konistis.

The offer was expressed as being subject to "the extra units being approved". Given the timing, the reference to additional units must have been to the development application DA 592/2014 lodged for two additional storeys on 548-568 Canterbury Road.

The content of the message sent by Mr Hawatt on 21 September 2015 also indicates that there had been prior contacts between Mr Hawatt and Mr Demian about the sale of the combined Harrison's site.

On 8 October 2015, Mr Hawatt sent Mr Demian a text message in the following terms:

> *FYI message I received. Michael*
>
> *What figure will it take for owner to exchange on Harrison's? We will lose big client*

This message replicated the contents of a message Mr Hawatt had received from Mr Konistis.

Mr Demian replied:

> *Hi Michael Hope you are enjoying the party. As I explained my joint venturer is a public company just like a government agency we must sell via an expression of interest but I will get George involved when we go to the market.*

Mr Hawatt replied, "no problems. I understand. Regards".

On 3 December 2015, Mr Hawatt voted on the development application to add two storeys to the Harrison's site, without disclosing to the Council that he had been involved in contacting the development proponent to pass on offers of sale from a group he was currently working with in a similar context.

Mr Hawatt told the Commission that, at the time, the thought of potential remuneration for an introduction had not crossed his mind. It was submitted for Mr Hawatt that he did not have an obligation to disclose any non-pecuniary interest arising from his relationship with Mr Demian on the basis that:

- he shared a pro-development ideology with Mr Demian and Mr Hawatt believed in the merits of his applications
- the making of enquiries on behalf of prospective purchasers for the combined Harrison's site did not itself give rise to a conflict of interest
- Mr Hawatt honestly believed that his relationship with Mr Demian was not one that needed to be disclosed to the Council.

In considering whether a person has a conflict of interest that needs to be disclosed, it is not to the point that the person shared an ideology or belief in the merits of the issue. Mr Hawatt's conduct in making enquiries on behalf of potential purchasers had the additional elements of context that elevated it to an interest that ought to have been disclosed, since:

- at least one of the offers was subject to the approval of the development application for additional units
- the matter on which Mr Hawatt was called on to exercise his vote on 3 December 2015 was for the approval of the additional units
- some of Mr Hawatt's work involved setting up arrangements whereby he would gain a fee if he succeeded in introducing a purchaser to a property owner
- that offer came through his close friend Mr Vasil, with whom he was involved in the Revesby deal
- he was approached to make the introduction on both the combined Harrison's site and the Revesby deal because he knew both parties
- Mr Demian's response, although indicating that he had to go through a particular process, was that he would get Mr Vasil involved when they went to market.

The Commission is satisfied that these circumstances meet the test, as outlined in the Council's code of conduct, that "a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty". While the offers did not have a sufficient connection to the particular development application being considered by the Council to constitute a pecuniary interest in that application, Mr Hawatt had a non-pecuniary interest (whether or not it was significant) that should have been disclosed to the Council and managed accordingly.

The Commission is not satisfied that Mr Hawatt had an honest belief that his relationship with Mr Demian in the circumstances above did not require disclosure to Council. When he was asked by the Commission about his involvement in passing offers to Mr Demian while a councillor, he gave evidence that he only did this after he was "sacked". This evidence is set out in more detail under the s 74A(2) statement in this chapter, but it is sufficient to say here that the Commission is satisfied that this was false and/or misleading evidence.

Communications that occurred after 3 December 2015 also shed some light on the nature of Mr Hawatt's interest in the development applications for the combined Harrison's site proceeding, and his business relationship with Mr Demian.

In or around February 2016, Mr Dabassis acquired a different set of potential purchasers for the combined Harrison's site. On 19 February 2016, Mr Konistis called Mr Hawatt and said that he needed him, and Mr Vasil, "to get to … the Harrison's guy". Mr Konistis noted that it had been "DA approved" and said that they had a "serious buyer". Mr Konistis told Mr Hawatt, "we've got the buyer … we're going to put our agreement – agency agreement on top … and – and we're laughing". Mr Hawatt agreed to approach Mr Demian.

Later that evening, Mr Hawatt called Mr Konistis and told him that the owner had said he was signed up exclusively with CBRE. Mr Konistis said that he would tell Mr Dabassis to try and stall things during the exclusivity period.

On 23 February 2016, Mr Vasil called Mr Hawatt and said, "Laki wants the plans and I sent a message to Charlie ah no response". Mr Vasil accepted that this would have been in relation to the combined Harrison's site. Mr Vasil accepted that he made this telephone call to try to get Mr Hawatt to intervene with Mr Demian.

On 1 March 2016, Mr Vasil and Mr Hawatt had further discussions about the sale of the combined Harrison's site, in which Mr Vasil told Mr Hawatt that "these guys" would go up to $60 million, but to tell Mr Demian that it was $56 million because "it's best if we are buyers agent". The difference would be paid as "commission". In his evidence to the Commission, Mr Vasil denied that he intended to convey to Mr Hawatt that he would be involved as the "buyer's agent". He suggested that "we" referred to Mr Dabassis, Mr Konistis and himself. The Commission rejects this denial. It is clear from the call that, as with Revesby, Mr Vasil intended to include Mr Hawatt in the "team" who would benefit financially from the sale.

On 3 March 2016, Mr Hawatt and Mr Azzi had a conversation in which they discussed Mr Vasil and Mr Demian. Mr Azzi reported to Mr Hawatt, that:

> [Mr Demian] *doesn't want to deal with* [Mr Vasil] *directly* [because there are] *issues. There's conflict … you know, but what he promised in the early days through CBRE it's gonna be happening*

Mr Azzi then told Mr Hawatt that he explained the situation to Mr Vasil and told him that the ball was in Mr Vasil's hands. Mr Azzi reported that Mr Demian had said to him that he would "make sure George will be involved in the … sale".

It is clear that, by 3 March 2016, Mr Azzi had an understanding of the difficulty Mr Vasil had encountered in getting a vendor's agency from Mr Demian for the combined Harrison's site. However, there was no evidence that Mr Azzi had any role or knowledge of the sale prior to 3 December 2015.

On 18 March 2016, Mr Azzi called Mr Hawatt and reported that Mr Demian had not signed with CBRE but would do so at 3 pm that day, and that Mr Azzi would talk to Mr Vasil and tell him what was going on.

Mr Azzi obviously had an active role in trying to ascertain what the position was in respect of the purchasers, and whether and when Mr Vasil might be able to introduce the purchasers to Mr Demian. Mr Azzi told the Commission that he was not "officially" involved but that he did it for Mr Vasil, for no reason apart from that he was asked to by Mr Vasil, and for no other benefit. Mr Azzi denied that he wanted to get a commission or part of a commission. He said that this was because he did not want to register as a real estate agent, and thought he would have to do so if he wanted to receive commissions.

On 23 March 2016, Mr Stavis recorded in his exercise book that Mr Azzi had asked him whether the consent for the Harrison's site had been issued. Mr Azzi told the Commission that he did not know what a consent was, and that his only interest in the Harrison's site was to ensure that the development included a rear laneway. While Mr Azzi may have been interested in ensuring that rear laneways were included in developments along Canterbury Road, the telephone calls, which were lawfully intercepted by the Commission, make it clear that, by March 2016, this was not his only interest. He had also become involved at the request of Mr Vasil in communicating with Mr Demian.

Further, on 3 December 2015, Mr Azzi had moved a motion that authority be delegated to the general manager to issue consent for the very same development application. In those circumstances, the Commission does not accept that he did not understand what a consent was. In any event, the effect of the inquiry was to pursue with Mr Stavis an outcome for the Harrison's site.

Once a development consent was issued, the subject land would generally increase in value. Given his contacts with Mr Hawatt, Mr Vasil and Mr Demian in March 2016, the Commission finds that Mr Azzi was, in March 2016, trying to find out from Mr Stavis about the status of the relevant consents because of the impact on negotiations about the sale of the combined Harrison's site.

In April 2016, Mr Hawatt received another offer of "120 a site" for the combined Harrison's site, from a separate buyer, unconnected to Mr Vasil. Mr Hawatt said that he would see what he could do. On 2 May 2016, Mr Hawatt passed the offer on to Mr Demian, describing the person as a "serious buyer". Mr Demian called Mr Hawatt and told him that he had received higher bids.

On 7 May 2016, Mr Vasil called Mr Hawatt and they discussed that it was too difficult for Mr Demian to pay outside commission because he was in a joint venture with a public company. Mr Vasil said to Mr Hawatt, "if they can't pay the commission, if this, because public company can't pay the commission we organise another way". Mr Vasil asked Mr Hawatt to find out how much the vendor/Mr Demian wanted "net", being "the last price they want net without mucking around". Mr Hawatt said he would find out.

On the same day, Mr Hawatt received a telephone call from Mr Konistis in which Mr Konistis told him "we need a contract".

Mr Hawatt then sent a text message to Mr Demian, advising "I have George people chasing me re Harrison. They want a sale price and if acceptable will act quickly". Mr Demian replied, "let's meet with you and George to discuss". They arranged to meet on 10 May 2016. Mr Vasil and Mr Dabassis also attended this meeting. Although Mr Demian claimed that the meeting occurred in late May, in finding that it did occur on 10 May 2016, the Commission has had regard to the contemporaneous evidence, including the telephone call arranging the meeting and an SMS sent by Mr Dabassis on the following day, confirming that the meeting occurred.

Mr Hawatt also spoke to Mr Azzi over the telephone on the following day (11 May 2016), and confirmed that he met with Mr Demian. Mr Hawatt reported that Mr Demian was thinking about the offer but it was "no good for him". Mr Azzi said that Mr Demian was stupid if he did not think about it, and commented, "that means he didn't reject it". In talking to Mr Hawatt, Mr Azzi sounded hopeful that the offer would be accepted. The conversation is consistent, not only with Mr Azzi knowing the details of the negotiations, but Mr Azzi having an interest in Mr Demian accepting the offer.

The Commission received different versions about what occurred in the meeting from witnesses in the public inquiry. Mr Vasil said that he could not recall the meeting, but that there was a disagreement between Mr Dabassis and Mr Demian as to the amount of commission. Mr Vasil later said that he did recall that there was one meeting after the council amalgamation when Mr Demian was there "in his black car" and Mr Hawatt was there, but he did not join them sitting around the table. In light of all of the other evidence, and Mr Vasil's difficulties with remembering these events, the Commission cannot put significant weight on his version.

Mr Hawatt told the Commission that he had been at a couple of meetings over coffee to introduce Mr Dabassis and Mr Konistis to Mr Demian just before council amalgamations, but denied a recollection that Mr Demian was present at the 10 May 2016 meeting. He told the Commission that there was no one to represent the owner at the meeting, and it was "a very flimsy hot air discussion". Given the contemporaneous lawfully intercepted information, the Commission is satisfied that the meeting with Mr Demian occurred, and Mr Hawatt's lack of recollection of it means that little weight can be given to his version of events.

Although he thought the meeting occurred later, Mr Demian told the Commission that commission amounts were discussed. This is consistent with Mr Dabassis' account, with the subsequent correspondence that touched on that meeting and with subsequent events.

Mr Dabassis also told the Commission that there were discussions about additional units to be added to the approvals for the site, which he understood to be for about 17 to 20 units. Mr Dabassis said that he had found that they were trying to get additional units on the site from the Council's website. At the time, a development application had been lodged but not determined for the addition of an extra two storeys on 570-580 Canterbury Road (part of the combined Harrison's site).

Following the meeting on 10 May 2016, the "team" had a number of conversations about the commission that Mr Demian was offering, and how it would be split. Mr Konistis and Mr Dabassis understood that it was to be $300,000 split five ways. Mr Konistis was advised that someone called "Pierre" was to share in the commission, and that the other parties who would share were himself, Mr Dabassis, Mr Vasil and Mr Hawatt.

Mr Konistis initially told the Commission that he had a conversation about Pierre being involved with Mr Hawatt, but also that Mr Vasil told him that Pierre was involved in the project a couple of weeks before a meeting on 27 May 2016. Mr Konistis recalled that Mr Dabassis was upset

because he could not understand what Pierre had done to share in the payment. Mr Konistis also did not understand what Pierre had done to be involved.

In his evidence to the Commission, Mr Dabassis recalled hearing the name "Pierre" in relation to the potential Harrison's deal, but could not remember when. He said that he was introduced to Pierre by Mr Hawatt on one occasion at the Lantern Club, but could not say whether this was before or after the 10 May 2016 meeting. He said that Pierre sat separately and did not take part in discussions on that occasion. Mr Dabassis said he raised it with Mr Vasil, that "every time I go into a meeting there's somebody, a new name is coming in and he wants to make money". He said he was disgusted with the situation.

That the commission was to be split five ways, and that Mr Hawatt and Mr Azzi were to share in it, is consistent with conduct following the council amalgamations. The Commission is satisfied that discussions about commission payments for the sale of the combined Harrison's site commenced before amalgamation.

Mr Vasil told the Commission that the reason Mr Hawatt and Mr Azzi were entitled to share in the commission payments was on the basis that they might be able to get an agency agreement from Mr Demian. Mr Vasil also gave evidence that the discussions about bringing Mr Hawatt and Mr Azzi in occurred only after the council amalgamations. The Commission does not accept this evidence, given the lawfully intercepted conversations outlined above, which took place before 12 May 2016.

On 27 May 2016, after Mr Hawatt had ceased to be a councillor, he and Mr Konistis had a conversation about the "deal". Mr Hawatt reported that he had spoken to Mr Demian and asked Mr Konistis what figure he had in mind. Mr Hawatt said that his (Mr Hawatt's) position was he wanted to get the deal done "otherwise if it doesn't happen … if it doesn't happen we- we get nothing anyway you know?".

On or around 4 June 2016, Mr Dabassis signed an agency agreement for the sale of the Harrison's site (as opposed to the combined Harrison's site) nominating an agent's remuneration of $2.7 million ("the agency agreement"). The agency agreement indicated that the price at which the property would be sold was $58 million, which Mr Dabassis told the Commission came from the potential purchasers he had at the time. At some point, on or before 14 June 2016, the agency agreement was delivered to Mr Demian for his signature.

On 7 June 2016, Mr Dabassis sent a text message to Mr Hawatt, addressed to "George, Micheal [sic] and Laki" about whether the commission for Mr Hawatt, Mr Vasil, Mr Konistis and himself would be secured if the agency agreement was signed at $2.2 million, as all of that had to go to the consortium he was dealing with. Mr Dabassis expressed disappointment that "all this time you told me you control the owner and now it is up to you two to make sure he lives up to whatever promise he had made to you".

Following this text message, Mr Vasil called Mr Hawatt and they discussed the commission arrangements. Mr Vasil suggested that Mr Dabassis wanted to go ahead with it "so he can get his commission" and "lose you out, Pierre and myself right". Mr Hawatt asked, "so how do we fix that up".

On 14 June 2016, Mr Vasil collected the agency agreement that had been signed by Mr Demian. The agency agreement gave Mr Dabassis selling rights of the property for a period from 4 to 26 June 2016; the end date having been inserted by Mr Demian. The agent's remuneration had also been altered by Mr Demian, from $2.7 million nominated by Mr Dabassis to $2.2 million.

The involvement of Mr Maguire

In mid-2016, Mr Hawatt also attempted, with Mr Maguire, to obtain a commission fee through the sale of the combined Harrison's site by making introductions to another possible purchaser, Country Garden Australia Pty Ltd.

By 2016, Mr Maguire had been a member of the NSW Legislative Assembly, representing Wagga Wagga for more than 15 years. He was first appointed parliamentary secretary in 2013, and continued to hold the office in 2016. In 2016, Mr Maguire knew that Mr Hawatt was a councillor at the Council, having had some dealings with him in 2014 and 2015 over issues including council amalgamations.

In his evidence to the Commission, Mr Maguire initially denied that he had ever attempted to do business with Mr Hawatt or that Mr Hawatt had ever attempted to do business with him. He denied, in 2016, approaching Mr Hawatt with a view to making money out of a business. Mr Maguire also told the Commission that he did look for potential development opportunities for Country Garden Australia, but this was only because he had a friend who worked there. As will be seen, this evidence was not truthful.

On 9 May 2016, the Commission lawfully intercepted a telephone call between Mr Maguire and Mr Hawatt, in which Mr Maguire asked Mr Hawatt, "What have you got – what have you got on your books? Have you got anything that's DA approved?".

Mr Hawatt told Mr Maguire about a big development of about 300 units across the road from Canterbury Hospital, which belonged to a friend of his. Mr Maguire

confirmed that Mr Hawatt's friend wanted to sell the site, and told Mr Hawatt:

> *I need a few things to feed my friends … they – they want three – they want thirty projects rolling … And ideally they want something that's DA approved … A couple that are DA approved ready to go.*

Mr Hawatt and Mr Maguire discussed the price for the site, and Mr Maguire asked Mr Hawatt what his friend was going to give him to sell it. Mr Hawatt replied, "Oh probably he won't, I think he's going for around one and a half – two percent something like that if I remember".

Mr Maguire asked, "he'll give you one and a half to two percent", and Mr Hawatt confirmed, "yeah I think it'll be around that yes". Mr Maguire confirmed that he thought "you want at least a million and a half in it I mean it's a quick sale".

Later in the conversation, Mr Hawatt referred to the possibility of his friend going up to three per cent, and Mr Maguire said, "he needs to [do] that because one – one point five per cent isn't enough divided by two if you know what I'm talking about?".

In his evidence to the Commission, Mr Maguire accepted that he was talking about sharing any money to be made from the sale between himself and Mr Hawatt.

Following that telephone call, Mr Hawatt sent a text message to Mr Demian in which he said:

> *Hi Just got a call from an MP friend of mine who is well connected in China. He has a mega rich company who are seriously looking to buy 30 DA sites. Thdy* [sic] *have secured 3 but need DA approved that are ready to start. I told him about your sites including Canterbury Road. I said 160 plus per site. He is keen to talk about this and any other site you want to sell. They are keen, ready and cashed up. I need to leave* [sic] *a private discussion. Are we still on at around 4pm or after?*

Mr Hawatt then called Mr Demian and confirmed that "the guy is very serious" and arranged to meet that afternoon. Mr Hawatt followed the meeting with a telephone call to Mr Maguire, confirming that he had just met "the guy" who was willing to work with himself and Mr Maguire, including in relation to the three per cent. Mr Maguire told the Commission that this was a conversation about commissions that would flow to him and to Mr Hawatt.

On 11 May 2016, Mr Hawatt sent to Mr Maguire a list of "available sites as promised", including 548-568 Canterbury Road (353 units DA-approved) and 570-580 Canterbury Road (105 units DA-approved).

On 12 May 2016, Mr Hawatt forwarded to Mr Demian a text message he had received from Mr Maguire asking for an indication of price.

On 13 May 2016, the day after council amalgamations, the Commission lawfully intercepted a telephone call between Mr Maguire and Mr Hawatt. Mr Maguire told Mr Hawatt that he had asked the office of the minister for local government to put Mr Hawatt on the advisory committee for the council (in administration) for the next 12 months. Mr Maguire asked Mr Hawatt who else he needed to recommend. Mr Hawatt gave the names of Pierre Azzi, Con Vasiliades and a Labor councillor. Mr Maguire could not recall whether he approached anyone with the names of those people to be included on the advisory committee.

On 27 May 2016, Mr Maguire, Mr Hawatt and Mr Demian met with a representative of Country Garden Australia in a coffee shop. A photograph of the meeting was in evidence before the Commission. Mr Maguire told the Commission that the purpose of the meeting was to facilitate interest on the part of Country Garden Australia in properties that Mr Demian had available for sale.

Ultimately, Country Garden Australia did not invest in Mr Demian's developments, and neither Mr Hawatt nor Mr Maguire made any money out of the arrangement. However, as at May 2016, Mr Maguire had an expectation that he would have shared a commission with Mr Hawatt if they made a successful sale, payable by Mr Demian.

Effect of Mr Hawatt's pre-amalgamation conduct

Mr Hawatt played the role of intermediary between Mr Demian and potential purchasers, and before 12 May 2016, also engaged with Mr Stavis about the assessment of Mr Demian's development applications, which were the subject matter of the negotiations.

Mr Hawatt also volunteered Mr Demian's properties to Mr Maguire as "DA approved" for sale, with the prospect of a commission payment for himself and for Mr Maguire, while assessment of Mr Demian's applications for 570-580 Canterbury Road was ongoing.

Mr Hawatt gave evidence that had there been a signed agreement, like there was with Revesby, he would have declared a conflict of interest. However, as with his dealings with Marwan Chanine (see chapter 9), negotiations could clearly give rise to a conflict, which ought to have been declared. In fact, it is not inconceivable that involvement in negotiations could be a more serious conflict of interest than a concluded commercial agreement, given the differing incentives of the parties.

Mr Hawatt also gave evidence that he would not get involved in any attempts to introduce purchasers to the owners of property located in the Canterbury local government area because of the potential for conflict. He said that, after amalgamations, his attitude changed because he did not have anything to do with the Council. He accepted that he made an effort in respect of the contacts from Mr Dabassis and others after 12 May because he had no real obligations in regard to being a councillor anymore. Mr Hawatt said that he made the introductions between the parties before amalgamations because people were pushing him to do so, and he knew Mr Demian. However, the evidence outlined above indicates that Mr Hawatt was going to lengths to act as an intermediary in negotiations between the parties before amalgamation, and his involvement was not limited to an introduction or an exchange of telephone numbers.

He said that he kept the "enquiries" he received through Mr Maguire before amalgamations at "arm's length". The Commission is not satisfied that is the case, given that discussions about sharing in a commission payment occurred before the amalgamation was announced.

The Commission considers that a reasonable and informed member of the public would be dismayed that a councillor would engage in negotiations relating to the purchase or sale of a property, where there was a development application being assessed by their council, in circumstances where the sale price would be affected by the approval of that application.

However, the Commission does not consider there to be a sufficient basis to proceed to a corrupt conduct finding on the basis that Mr Hawatt adversely affected his own functions of deliberating and voting on development applications because the Commission cannot be sure what Mr Hawatt would have done when the matters came before the Council, and whether he would have (properly) removed himself from decision-making on that matter.

Corrupt conduct

Spiro Stavis

The Commission does not make any finding of corrupt conduct in respect of Mr Stavis' conduct.

Jim Montague

The Commission does not make any finding of corrupt conduct in respect of Mr Montague's conduct.

Michael Hawatt

On 3 December 2015, Mr Hawatt attended a meeting of the CDC at which a development application to add two additional stories to a six-storey development at 548-568 Canterbury Road and an application to modify the existing development approval were considered (DA 592/2014 and DA 509/2013/A). Mr Hawatt exercised his official functions as a councillor of the Council to vote in favour of both applications, and did not disclose to the CDC his relationship with the development proponent, Mr Demian, which included the role that Mr Hawatt had begun to play in introducing potential purchasers to Mr Demian for the sale of that site.

This conduct on behalf of Mr Hawatt constituted or involved the dishonest exercise of his official functions within s 8(1)(b) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

Mr Hawatt claimed that he was not aware of the relevant requirements of the code of conduct. As explained in chapter 1, the Commission does not accept this evidence.

The Commission is satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that, in each case, Mr Hawatt had committed a disciplinary offence, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 4.2, which required council officers to avoid or appropriately manage any conflicts of interests
- clause 4.12, which required disclosure fully and in writing of any non-pecuniary interest that conflicts with a public duty even if the conflict is not significant.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that Mr Hawatt's conduct in failing to declare his conflict of interest was serious corrupt conduct within s 74BA(1) of the ICAC Act having regard to the scale of the development, and that a failure to declare a conflict affected the probity of Council decision-making. The Commission has also had regard to the nature of the public functions affected; namely, the determination of development applications in the public interest. The Commission considers this to be a significant public function.

The Commission is satisfied that, as a councillor, Mr Hawatt engaged in misconduct as defined by s 440F of the LGA.

Pierre Azzi

The Commission does not make any finding of corrupt conduct in respect of Mr Azzi.

Section 74A(2) statements

The Commission is satisfied that, in respect of the matters covered in this chapter, Mr Hawatt, Mr Azzi, Mr Maguire, Mr Demian, Mr Vasil, Mr Montague and Mr Stavis are "affected" persons for the purposes of s 74A(2) of the ICAC Act.

Michael Hawatt

The Commission has considered whether the opinion of the Director of Public Prosecutions (DPP) should be sought with respect to the prosecution of Mr Hawatt for offences under s 87 of the ICAC Act of giving false or misleading evidence at a compulsory examination conducted on 5 December 2016, in respect of the following matters:

1. Mr Hawatt gave evidence to the effect that he only met with Mr Demian, or had contact with Mr Demian, in relation to contacts from Mr Maguire, Mr Konistis and Mr Dabassis for the sale of the Harrison's site, after the council amalgamations and when he was no longer a councillor.

   There is a quantity of admissible evidence, in the form of SMS extracted from Mr Hawatt's mobile telephone (seized under search warrant) and lawfully intercepted telephone calls, some of which is outlined above, which demonstrates that Mr Hawatt did contact Mr Demian in respect of contacts from Mr Maguire, Mr Konistis and Mr Dabassis before council amalgamations.

2. When asked whether he had any discussions with Mr Vasil about the potential sale of the Harrison's site, Mr Hawatt replied, "George, I think he has nothing to do with them, he doesn't like them either from my understanding".

   There is a quantity of admissible evidence, in the form of SMS extracted from Mr Hawatt's mobile telephone (seized under search warrant) and lawfully intercepted telephone calls, some of which is outlined above, which shows that Mr Hawatt:

   - knew that Mr Vasil was involved in the attempts to obtain an agency agreement from Mr Demian in conjunction with Mr Konistis and Mr Dabassis
   - had discussions with Mr Vasil about the potential sale of Harrison's.

3. When asked whether he had any discussions with Mr Maguire about commissions for the possible sale of the Harrison's site, Mr Hawatt said no, "because we didn't know what was going to happen".

   There is admissible evidence, in the form of lawfully intercepted telephone calls between Mr Hawatt and Mr Maguire that shows that Mr Hawatt and Mr Maguire did discuss commissions.

It was submitted for Mr Hawatt that regard could be had to the fact that he was a part-time councillor and lay witness, the period of time between the subject matter and the time he was questioned, and that it cannot be established with any degree of certainty that he knowingly gave false evidence. In this respect, it was suggested that it was well accepted that lay witnesses are often significantly inaccurate in relation to matters which include times and dates.

The Commission does not accept that the timing of his contacts with Mr Demian was something about which Mr Hawatt could reasonably have been mistaken, given the significant change in obligations that occurred when he was no longer a councillor. Further, the evidence on each topic was given in December 2016, which is not such a long time that the answers he gave could reasonably be explained by lapses in memory. Further, the Commission does not consider that there was any other circumstance personal to Mr Hawatt set out in his submissions that weighs against referral to the DPP.

The Commission is of the view that the opinion of the DPP should be sought with respect to the prosecution of Mr Hawatt for offences under s 87 of the ICAC Act in respect of evidence given on 5 December 2016 on each of the issues above.

As Mr Hawatt is no longer a councillor, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

Pierre Azzi

The Commission is not of the opinion that consideration should be given should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Azzi for any criminal offence or that consideration should be given to the taking of action against Mr Azzi for any specified disciplinary offence. The Commission has not made a finding that his conduct could constitute or involve a criminal or disciplinary offence.

Daryl Maguire

The Commission has considered whether the advice of the DPP should be sought with respect of the prosecution of Mr Maguire for criminal offences under s 87 of the ICAC Act of giving false or misleading evidence in a public inquiry on 13 July 2018 in respect of the following matters:

1. Mr Maguire's denial that he approached Mr Hawatt with a view of making money out of a business in 2016
2. Mr Maguire's denial that he approached Mr Hawatt on behalf of Country Garden Australia because there was anything potentially in it for him.

It was submitted by Mr Maguire that he had been denied procedural fairness, in that Counsel Assisting did not comply with paragraph 17 of the Standard Directions for Public Inquiries in that it was not clearly put to Mr Maguire that his evidence was false or misleading.

The Commission does not accept that there was a denial of procedural fauirness and, in making this determination, the Commission has taken into account all the circumstances of Mr Magurie's evidence.

This includes the sequence of questioning of Mr Maguire, during which he was asked clearly about his relationship with Mr Hawatt in which he denied that:

- it was in his contemplation that he might be involved in making money out of a sale of properties to Country Garden Australia
- he personally approached Mr Hawatt with a view to making money out of a business in 2016
- it was his business to scout for properties that Country Garden Australia could acquire and develop because there was anything potentially in it for him.

After further questioning, Counsel Assisting played a number of lawfully intercepted telephone calls, which clearly exposed that Mr Maguire's denials were not truthful. His subsequent answers reveal that he accepted this.

For example, during his examination the following exchange occurred:

[Commissioner]:	*So with all this commission discussion with Mr Hawatt, you were attempting to do business with him whereby you would share a commission if it ultimately was successful?*
[Mr Maguire]:	*Certainly appears that way.*
[Counsel Assisting]:	*When you say "It certainly appears that way" you're making it sound as if you're reading about something that you weren't involved in but you're the person who was involved.*
[Mr Maguire]:	*The answer is yes.*
[Counsel Assisting]:	*This is simply evidence of what happened.*
[Mr Maguire]:	*The answer is yes.*

Mr Maguire's counsel did not seek to ask any questions at the public inquiry; no questions were asked clarifying or explaining what was ultimately an admission by Mr Maguire of this conduct contrary to his initial denials.

It was submitted by counsel for Mr Maguire that the evidence of Mr Maguire would not be false or misleading in a material particular. This submission is rejected. The Commission was examining whether Mr Hawatt's conduct concerning the Harrison's site was corrupt conduct; Mr Maguire's evidence about discussions with Mr Hawatt about the site, whether commissions would be shared between the two of them, was clearly relevant to that issue.

Given the quantity of admissible evidence, the Commission is of the opinion that the advice of the DPP should be sought with respect to the prosecution of Mr Maguire for offences under s 87 of the ICAC Act in respect of his evidence:

1. denying that he approached Mr Hawatt with a view of making money out of a business in 2016
2. denying that he approached Mr Hawatt on behalf of Country Garden Australia because potentially he may gain a benefit.

Charbel Demian

The Commission has considered whether the advice of the DPP should be sought with respect of the prosecution of Mr Demian for offences under s 87 of the ICAC Act of giving false or misleading evidence at a compulsory examination conducted on 30 November 2016, in respect of the following matters:

1. Mr Demian's denial that he had any discussions with Mr Hawatt about the potential sale of 548 Canterbury Road (although he stated that Mr Hawatt was present at a meeting where an introduction had taken place).
2. Mr Demian's evidence to the effect that:

a) in the context of the meeting attended by Mr Hawatt, Mr Vasil, Mr Dabassis and Mr Demian, which occurred on 10 May 2016, Mr Hawatt had no involvement in the deal suggested by Mr Dabassis to Mr Demian, as Mr Demian understood it

b) he had no discussions with Mr Hawatt about the potential sale of his property prior to that meeting

c) Mr Hawatt had never given Mr Demian any offers from buyers interested in purchasing 548 Canterbury Road

d) Mr Demian had no discussions with Mr Hawatt about the potential sale of 548 Canterbury Road, other than a discussion where Mr Demian told Mr Hawatt that Mr Dabassis did not come across as an individual that he could do business with, and Mr Hawatt said, "look up to you. It's your decision"

e) Mr Hawatt never suggested to Mr Demian any buyer who might be interested in 548 Canterbury Road other than Mr Dabassis

f) Mr Demian never discussed with Mr Hawatt the possibility of selling any of his properties.

It was submitted for Mr Demian that his evidence on each of these matters was true. Having considered all of the matters raised for Mr Demian, the Commission does not accept this submission in respect of (1), (2)(b), (c), (d), (e) and (f).

The Commission considers that there is a quantity of admissible evidence in the form of lawfully intercepted telephone calls, SMS extracted from Mr Hawatt's mobile telephone, and emails that goes to each of the issues above.

3. Mr Demian's evidence that:

a) someone other than Mr Hawatt put him in touch with Country Garden Australia

b) he did not recall talking to Mr Hawatt about Country Garden Australia at all

c) that everyone who came to him he referred to CBRE.

It was submitted for Mr Demian that he was first introduced to Country Garden Australia by his partner in a development in the suburb of Camellia, and that his evidence on this point was accurate. It was also submitted that there is no evidence that Mr Demian talked "about" Country Garden Australia with Mr Hawatt. It was also submitted that Mr Demian referred approaches involving Mr Vasil and Mr Dabassis to CBRE, and that there was nothing to suggest to Mr Demian that the other approach involving Mr Maguire involved anything other than Mr Maguire trying to introduce foreign investors to Australia. Further, it was submitted for Mr Demian that he had no reason to believe that Mr Hawatt was involved in any potential purchase by 28 May 2016, and that his evidence was consistent with his interactions with Mr Maguire.

The Commission is not satisfied that Mr Demian's evidence, about referring everyone who came to him to CBRE, is consistent with the evidence available to the Commission. The Commission is satisfied that there is admissible evidence that goes to this issue.

Given the quantity of admissible evidence, the Commission is of the opinion that the advice of the DPP should be sought with respect to the prosecution of Mr Demian for offences under s 87 of the ICAC Act in respect of those matters outlined at items (1), (2)(b)-(f) and (3)(c).

George Vasil

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Vasil for any offence.

Jim Montague

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Montague for any criminal offence or that consideration should be given to the taking of action against Mr Montague for any specified disciplinary offence. The Commission has not made a finding that his conduct could constitute or involve a criminal or disciplinary offence.

Spiro Stavis

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Stavis for any criminal offence, or that consideration should be given to the taking of action against Mr Stavis for any specified disciplinary offence. The Commission has not made a finding that his conduct could constitute or involve a criminal or disciplinary offence.

Chapter 8: Jimmy Maroun and 538–546 Canterbury Road, Campsie

This chapter examines conduct, between 2014 and 2016, in connection with an application for a mixed-use development at 538-546 Canterbury Road, Campsie.

Background

In June 2014, Jimmy Maroun lodged an application (DA 509/2013) for the construction of a seven-storey building at 538-546 Canterbury Road. At the time, the height limit on the site was 18 metres.

Prior to development, 538-546 Canterbury Road was the site of Spoiler's carwash, and is occasionally referred to as "Spoiler's" or "the car wash". During the assessment process, the application was reduced to six storeys and approved by the City Development Committee (CDC) on 4 December 2014. Both the acting director of city planning and the Independent Hearing and Assessment Panel (IHAP) recommended the application for approval. Mr Maroun said that he reduced the height to six storeys once the Council indicated that the clause 4.6 submission supporting the increase to eight storeys would be declined. Both Michael Hawatt and Pierre Azzi voted in favour of the application, and neither disclosed that they had a relationship with Mr Maroun.

The IHAP recommended some amendments to the conditions of approval, which were adopted by the CDC on 4 December 2014, with one exception. The IHAP had recommended that "a full height slot to the northern façade be provided to allow natural light to the lift lobbies at each level". Mr Hawatt moved an amendment to delete this recommendation, and, in an email he sent to a Council officer on 7 December 2014, explained the amendment as follows:

> *Applicants spend approximately 6 and sometimes 12 month* [sic] *putting together a DA that's satisfies council. The condition of IHAP will only cause the applicant unnecessary expense and waste of time as this requires an amend to redesign the building. This is no real justification to do this in regards to our objectives and planning requirements.*

Mr Maroun's relationships on the Council

Mr Azzi and Mr Hawatt

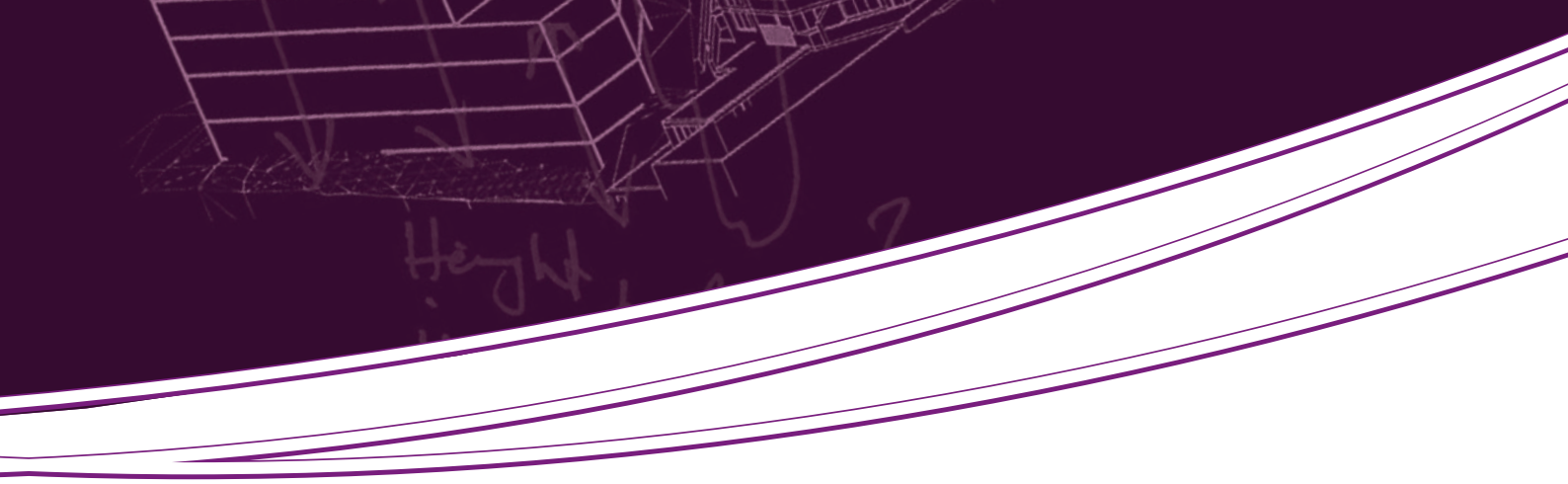
According to Mr Maroun, by 2013 to 2016, he and Mr Azzi had known each other for about 10 years, having met in the taxi industry. Mr Azzi qualified Mr Maroun's description of their relationship, saying instead that he had known of Mr Maroun when he was a taxi driver and had no contact with him until he was a councillor. He said that he called him a friend, although they had only met recently.

According to Mr Maroun, he had known Mr Hawatt for about 20 years. From around 2008 to 2010, Mr Hawatt and Mr Maroun started going to the gym together.

The Commission had in evidence a number of text messages and lawfully intercepted telephone calls that referred to Mr Hawatt, Mr Azzi and Mr Maroun meeting at the gym. Mr Maroun told the Commission that, while he had a gym at his home where the three would train together, the references to the gym could also mean his office at home. He said that "it could be for training, it could be for getting together, have a drink, have a bite or whatever".

Con Vasiliades and his brother owned Olympic Gym, which was located in Homer Street, Earlwood, from April 2014. Mr Hawatt said that he also went to this gym, and that sometimes he and Mr Maroun would have a coffee next door.

Mr Maroun considered that he had a close relationship with both Mr Azzi and Mr Hawatt during the period subject of the Commission's investigation, at least until he "broke up with them" in late 2015 or in 2016 over the way that they spoke about Jim Montague. He said that:



Like, one day you, you're with the guy, the next day you're stabbing the guy. Why are you doing that? Stop doing that. So I didn't like their relationship with Jim and I said to them, "That's it." And also I've finished what I'm doing in Campsie, so I said, "Thank you very much for what you've done for me, better if we, if we drift away from, from each other."

Mr Maroun said that in the period from 2015 to 2016 he had a meal with Mr Hawatt and Mr Azzi about once a month, and that he attended coffee shops with them on occasion. He also attended social functions with Mr Hawatt and Mr Azzi. Mr Maroun went to Mr Azzi's house once, on Christmas Eve, in 2014 or 2015. He also went to the TAB with Mr Azzi a few times while he was a councillor.

Mr Hawatt described his relationship with Mr Maroun as being "friends in Earlwood", who would socialise after hours on occasion. It was submitted for Mr Hawatt that he was unambiguous in his evidence that he was not friends with Mr Maroun in the development industry.

Mr Maroun said that he spoke to Mr Hawatt maybe four or five times in relation to 538-546 Canterbury Road, and that he did so "mainly to speed up the process". He said that he could not remember:

…whether I spoke to him or Pierre, we used to hang, the three of us used to hang around together. So they called for a meeting for me with a guy by the name of Spiro Stavis, he's the director of town planning, so that was very much it, just to speed up the process.

Mr Azzi sought to downplay his relationship with Mr Maroun, saying it was "small" and he was a "professional friend". This was inconsistent with the relationship described by Mr Maroun. Mr Azzi also said that Mr Maroun had never asked him to do anything for him. Again, this was inconsistent with Mr Maroun's evidence, that he approached Mr Hawatt and Mr Azzi to organise meetings for him at the Council, to speed up the process, because he knew them personally.

Brian Robson, mayor of the Council, also gave an account that, in mid-2013, Mr Azzi invited him to attend a barbecue at Mr Maroun's home. He said that Mr Azzi told him that the person was an "important" man in Earlwood and a friend. When Mr Robson arrived at Mr Maroun's house, he said that Mr Maroun took the opportunity to ask Mr Robson about another development he had in the Canterbury local government area.

Mr Azzi accepted that he went to Mr Maroun's home with Mr Robson, and that Mr Maroun had invited him. He denied that there was a barbeque but said that Mr Maroun provided the usual refreshments by way of soft drinks. He agreed that the meeting was about the other site in which Mr Maroun had an interest in the area. Mr Azzi said that he took Mr Robson with him because Mr Maroun had raised with him an issue, early in his time as a councillor, which he did not know how to deal with. It was submitted for Mr Azzi that he saw Mr Robson as his boss, and that his version of events is more likely than Mr Robson's, noting that Mr Robson's version was given in statement form.

The Commission accepts that this meeting occurred, and that it was about a site in the Canterbury local government area in which Mr Maroun had an interest. The Commission is satisfied that, having regard to the other evidence available, Mr Azzi told Mr Robson that Mr Maroun was an important man in Earlwood and a friend.

Call charge records obtained by the Commission demonstrate regular contact or attempts at contact between Mr Maroun and Mr Azzi, and Mr Maroun and Mr Hawatt, between 2013 and 2016. The level of contact is inconsistent with a purely professional relationship between a councillor and a developer, or even someone who was a persistent agitator about his developments with whom Mr Azzi dealt with like any other applicant. The Commission has also had regard to the content of intercepted telephone calls between Mr Hawatt and Mr Azzi where they discuss Mr Maroun

and his applications. The Commission is satisfied that, from 2013 to 2016, Mr Azzi had a social relationship with Mr Maroun, and because of that relationship, took steps to assist Mr Maroun advance his developments through the Council.

Although in his evidence to the Commission, Mr Hawatt accepted that he had a social relationship with Mr Maroun, he tried to downplay Mr Maroun's requests about his developments, in that he said that Mr Maroun "might have mentioned" the development application to him, but Mr Maroun had good planners and an architect. He could not recall speaking to Mr Stavis about the development application. As will become apparent, Mr Maroun did speak to Mr Hawatt (and Mr Azzi) about the development application, and each spoke to Mr Stavis about it.

Mr Montague

In contrast with the relationship that developed between Mr Hawatt, Mr Azzi and Mr Maroun, Mr Montague and Mr Maroun knew each other but were not friends. Mr Maroun told the Commission that it was his practice to escalate issues to the general manager if he was not satisfied with the director of city planning:

> *You go to the director of town planning first. If he doesn't reply back to you, you go to the general manager. If what I'm trying to do is what it is, in other words, I didn't, I didn't get a good answer from the, from the director of town planning as to why I, why you can get eight level, I can only do six levels, I'll report him to the general manager.*

The planning proposal

On 19 March 2015, Mr Hawatt sent a text message to Mr Stavis asking about the progress of the 538-546 Canterbury Road "section 96" and another site in which Mr Maroun had an interest, 445 Canterbury Road, Campsie. Mr Stavis sought information from George Gouvatsos, who advised him by email that 538-568 Canterbury Road was the subject of a submission to the residential development strategy (RDS) to increase the height limit from 18 metres to 25 metres, and that this planning proposal was under consideration and would shortly be reported to the Council. Mr Gouvatsos advised that "the applicant needs to wait for such a decision" and "once a decision has been made we need to wait for the LEP (local environmental plan) to be imminent and certain before we can take it into account".

On 14 May 2015, the Council resolved that a planning proposal should be prepared to increase the height limits applicable to 538-546 Canterbury Road and 570-580 Canterbury Road from 18 to 25 metres.

The director of city planning (by then, Mr Stavis) recommended that the planning proposal could be supported. Both Mr Hawatt and Mr Azzi voted in favour of this application and neither declared their relationship with Mr Maroun.

On 6 November 2015, the Council submitted the planning proposal for those sites to the NSW Planning Department.

On 14 December 2015, an officer of the department wrote to the Council requesting further information, including a status update in relation to the draft traffic impact assessment being prepared by the Council and any additional site-specific justification for the proposal regarding its departure from, and inconsistency with, Council's residential development strategy (RDS). Warren Farleigh advised Mr Gouvatsos that it may be prudent to defer further consideration of any development applications that had been submitted for the sites pending the submission of the information requested by the department.

On 5 February 2016, Mr Stavis sent an email to Mr Gouvatsos, Tom Foster and Mr Farleigh reporting that he had spoken to the acting director of the NSW Planning Department to seek his advice on the issues raised in the context of development applications for those sites. In the email, Mr Stavis said that he had asked the officer whether he had any objections if the Council were to progress the development applications, and the officer told him that was a matter for the Council. Mr Stavis then advised that he was "comfortable to continue with our DA assessment, so long as we respond to the issues raised by the department … in our assessment reports".

On 11 February 2016, Mr Stavis wrote to the NSW Planning Department and advised, among other matters, that the traffic study requested by the former Roads and Maritime Services (RMS) was with RMS awaiting its response. Mr Stavis noted that "the traffic report does not identify any issues that would be fatal to the current development applications" and "any design elements required for the existing roads in the vicinity of the sites can be conditioned as part of the development approvals".

The department responded on 2 March 2016, noting that there had been no response to the question about the proposal's departure from the Council's RDS. The department's assessment report also noted that the Council had not provided justification for this departure. However, it indicated support for the planning proposal on a number of bases, including that it was consistent with the NSW Planning Department's "A Plan for Growing Sydney", and that the adjoining site of 548-568 Canterbury Road benefitted from an approval of up to 22.4 metres in height.

On 7 April 2016, the NSW Planning Department provided the Council with a Gateway Determination permitting the Council to make the plan on a number of conditions, including updating the planning proposal to:

- provide further traffic analysis
- include an urban design study to justify the inconsistency with Council's residential development strategy and to address the suitable built form of the adjoining site at 548-568 Canterbury Road, Campsie
- address the social impacts of the planning proposal and the neighbouring approved development.

The covering letter to the Council noted the department's broad support but that further consideration of "the built form, social, traffic and parking impacts of the planning proposal and the approved development of the adjoining site at 548-568 Canterbury Road is required".

By this time, the Council had already approved the development application for an additional two storeys at 538-546 Canterbury Road (increasing the height to around 25 metres), and on 548-568 Canterbury Road (increasing the height to around 28 metres). Shortly thereafter, the councils amalgamated and it appears that, at least during the time with which the Commission's investigation is concerned, nothing further happened in respect of the planning proposal.

The development application

In June 2015, Mr Maroun's company, Jarek Holdings Pty Ltd, lodged two applications in respect of 538-546 Canterbury Road:

- DA 243/2015, a development application that sought consent to add an additional two residential floors to the already approved six-storey development, taking the height to 25 metres or 26.3 metres with the lift overrun
- DA 255/2014/A, a modification application that sought to modify the internal layouts and footprints of existing apartments in the already approved six-storey development.

The development application relied on clause 4.6 of the Canterbury Local Environmental Plan 2012 because it otherwise breached the 18-metre height control on the site.

On 17 June 2015, Mr Hawatt asked Mr Stavis to arrange a meeting regarding Mr Maroun's sites on Canterbury Road with Mr Montague as well. At the time that the applications were lodged for the site, Mr Stavis did not know that Mr Maroun had Mr Hawatt and Mr Azzi on side; although he came to know this.

In July 2015, Mr Farleigh provided comments on the development application to Sean Flahive, the Council's assessing officer at the time. The comments included that:

- there was no surety that the planning proposal for the site would receive a Gateway Determination
- additional yield on the site would impact on the current RMS study, and until the results were known it would not be appropriate to approve the application
- the use of clause 4.6 for variations of the magnitude proposed is not appropriate
- the outcome is poor in terms of design quality.

Mr Stavis did not agree that the development application should not be processed until the planning proposal was determined. It was submitted for Mr Stavis, generally, that there is no numerical limit on circumstances in which the exercise of clause 4.6 would be appropriate. The Commission accepts that this is the case, noting that it was consistent with legal advice to which Mr Stavis had access. However, the advice was also that the magnitude of a variation was a relevant consideration.

On 20 August 2015, the Council sent to Jarek Holdings a letter outlining a number of matters concerning the development application, including that the clause 4.6 application failed to demonstrate, as required, that varying the development standards will result in better environmental outcomes particular to the circumstances of this development. The letter noted that it was not sufficient merely to demonstrate that the non-complying development remains consistent with the objectives of the particular development standard or objectives for development within the zone. The Council suggested that the development application should be withdrawn and the issues raised in the letter addressed prior to resubmission.

Once Mr Flahive ceased his employment with the Council, Mine Kocak was allocated to assess the development application and the modification application. However, Ms Kocak told the Commission that Mr Stavis was the contact with the applicant and conducted meetings with the applicant, which Ms Kocak did not attend.

Mr Maroun sent Mr Stavis a text message on 24 August 2015 to organise a meeting with Mr Hawatt on the following day. Given the timing, and the pattern of his contact with Mr Hawatt and Mr Azzi, the Commission infers that Mr Maroun wished to discuss the issues raised in the Council's letter. Mr Maroun's purpose in approaching Mr Hawatt and, when he did so, Mr Azzi, was to speed up the process of getting a meeting with Mr Stavis.

On 20 October 2015, Ms Kocak sent to Mr Maroun a letter, advising that if the information requested in the Council's letter of 20 August 2015 was not submitted within 14 days, "your development application will be refused on the grounds that insufficient information has been provided to allow us to make a proper and thorough assessment of the application".

On 23 October 2015, amended plans were submitted by Urban Link on behalf of Jarek Holdings. On 29 October 2015, a meeting was held between Mr Stavis, Ms Kocak, Mr Maroun, a representative of Urban Link, and Mr Maroun's solicitor. It is possible that Mr Maroun's daughter attended the meeting.

Ms Kocak's notes of the meeting indicate that Mr Stavis advised that the proponent needed to provide a written submission addressing the issues raised in the Council's letter of 20 August 2015, and that the development application would not be determined in 2015 because of the limited number of IHAP meetings that remained, and in light of the outstanding matters.

In November and December 2015, Mr Maroun and Mr Hawatt, and Mr Maroun and Mr Azzi, continued to be in contact. In at least one call, Mr Hawatt and Mr Maroun arranged to meet to discuss some ideas that Mr Maroun wanted to talk about. In his evidence to the Commission, Mr Maroun frankly accepted that he hoped that Mr Hawatt and Mr Azzi would intervene to try and put a bit of pressure on Mr Stavis or Mr Montague to progress his applications faster than they would otherwise have been progressed.

On 25 December 2015, Mr Hawatt and Mr Azzi spoke over the telephone about Mr Maroun and had the following, lawfully intercepted, exchange:

Azzi:	*[Now I'm going to see, you and I will meet and then with Spiro he said to me, 'tell me when] next week' [I said to him], 'alright I'll call you back we'll see.*
Hawatt:	*[But this one he is pushing], he's pushing very strong ah?*
Azzi:	*Yeah.*
Hawatt:	*[(Unintelligible)] he's really pushing very hard to get [like he wants everything this one]. He wants everything.*
Azzi:	*[I'm doing like you told me to (laughs) what can I do]?*
Hawatt:	*Yeah.*
Azzi:	*[We have to go along with him, like you told me].*
Hawatt:	*Yeah – yeah [now] we have no choice, [we have to go along with him].*
Azzi:	*Mmm*
Hawatt:	*[and string him along. Like he drags us along drag him along].*[2]

Mr Azzi said that he continued to have contact with Mr Maroun when, on his evidence, he was such a difficult individual, on the basis that he saw it as part of his role as a councillor:

> *When somebody complain about any council staff or council delaying or purpose delaying or throwing this application under the table and, like, bad-mouthing to the council, you have to stop him and answer him. And we have to answer that, I'm, I'm a councillor.*

This evidence does not explain the conversation recorded above, where Mr Azzi said to Mr Hawatt that they had to go along with him, and Mr Hawatt agreed. Mr Hawatt explained the call to the Commission on the basis that he did not want any arguments with Mr Maroun, and that he was trying to tell Mr Azzi that they should appease him without having to go back and forward.

During the public inquiry, it was put to Mr Hawatt that it was difficult to understand why he and Mr Azzi would spend any time with Mr Maroun, let alone make efforts to assist him with his development applications. Mr Hawatt said that, "Oh, he's, just, he's a, he's a friendly, nice person, and I don't like to – look, my, my personal position, I always respect people…".

When asked if they had a peculiar relationship with Mr Maroun that would explain their obligation to help him, Mr Hawatt said, "we just had a friendly – look, we respected him as a, as a person, we had a, a good relationship".

These responses are indicative of the sense of obligation and loyalty arising from a friendship.

Mr Stavis told the Commission that, by early 2016, he knew that the development application for the additional two storeys on 538-546 Canterbury Road was one which Mr Hawatt and Mr Azzi (and he thought also, Mr Montague) wanted to see progressed. It was these views that led to him wanting to progress the development application to approval.

[2] The bracketed dialogue is an interpretation of words spoken in Arabic.

On 4 January 2016, Mr Stavis emailed Ms Kocak, advising that he had told Mr Maroun that he could not commit to a timeframe for determination until he knew whether the changes were supportable. Mr Stavis asked Ms Kocak to review the applications as a priority when she returned from leave.

On the same day, in a lawfully intercepted telephone call, Mr Hawatt and Mr Azzi discussed a conversation that Mr Azzi had with Mr Stavis that day. Mr Azzi reported that Mr Stavis had told him "if he [Mr Maroun] doesn't get back to me, I want to refuse it", and that Mr Azzi had told him to "hang on" and not to do anything until "we" get back to you.

Mr Stavis told the Commission he could not recall this conversation but said that this was a typical reaction for Mr Azzi. Mr Stavis said that, generally speaking, he would not take action where he had been asked not to do so by Mr Hawatt or Mr Azzi because he perceived them to have power in the Council and he thought he would be potentially risking his employment, given what happened to the previous director. Mr Stavis agreed that it was possible that Mr Azzi was giving him a direction, to which he acceded. Submissions for Mr Azzi indicated that Mr Azzi regarded the interaction as communicating a request or enquiry for the applicant and asking for an opportunity to go back, and that Mr Stavis did not regard this as an invitation to act improperly. However, it is clear from context and from the effect that this interaction had on Mr Stavis that this was, in substance, a direction.

Mr Azzi denied that he was directing Mr Stavis in the exercise of his functions; rather, he said that he was protecting the Council and Mr Stavis because Mr Maroun had accused Mr Stavis of hiding information. The suggestion that he was seeking to protect Mr Stavis is undermined by a lawfully intercepted call two days later, in which Mr Azzi and Mr Hawatt again discussed Mr Maroun's applications. Mr Azzi said:

> *Alright, [he said to me, "now] I want to forget about the 4.6 Clause [if Spiro can] approve Section 96 for me. [I called and spoke with] Spiro [he said to me], "Pierre I can't approve it for him if we're gonna come back later and put the 4.6 clause it's gonna trigger.*[3]

In their conversation, Mr Hawatt advised Mr Azzi to let Mr Stavis talk to Mr Maroun about the issue, because "every time … you say something he uses it against you". They discussed that Mr Azzi had arranged a meeting with Mr Stavis. Mr Hawatt told Mr Azzi to stay on top of Mr Maroun "because this guy is – he's slippery". Mr Hawatt suggested to Mr Azzi that he could say to Mr Maroun that he could help him, but he had to do everything in one hit.

Mr Hawatt told the Commission that he was merely giving advice to Mr Azzi as to how to manage Mr Maroun. That much can be accepted from the content of the telephone call. However, the object of the advice was to dissuade Mr Maroun from withdrawing the application for the additional two storeys.

In early January 2016, further plans were provided to the Council by Urban Link. Mr Stavis indicated in a note to Ms Kocak that he had been asked to give his initial thoughts and had marked up in red on the plans submitted for the site what changes he thought needed to be made. Mr Stavis told the Commission he could not recall who asked him to give his initial thoughts, and said that it might have been Mr Maroun or his representatives.

On 25 January 2016, Ms Kocak made a file note that the changes marked up by Mr Stavis would assist the clause 4.6 argument for the additional floors.

On 2 February 2016, in a lawfully intercepted telephone conversation, Mr Maroun and Mr Hawatt discussed the progress of his development application. Mr Hawatt reassured Mr Maroun that, "everything's on board, everything's okay. We just need to move – move forward, that's it. We're – we're ready. He's okay".

When giving evidence to the Commission, Mr Hawatt agreed that "he's okay" was likely a reference to Mr Stavis. In the telephone conversation, Mr Maroun sought to confirm that "it should be done in your first meeting in March?". Mr Hawatt told him that there would be a period of advertisement, "and then they'll look at the assessment, so we'll push it for March".

On 3 February 2016, Mr Hawatt called Mr Azzi and told him that he had not been able to see Mr Maroun. Mr Hawatt told Mr Azzi that he would have to see Mr Maroun instead.

On 4 February 2016, Mr Gouvatsos provided to Mr Stavis some advice from Mr Farleigh, to the effect that the planning proposal for 538-546 and 570-572 Canterbury Road had been submitted for Gateway Determination and the NSW Planning Department had raised some initial concerns, which they were working through. Mr Gouvatsos advised that there had been no Gateway delegation and no certainty as to the final outcome. Despite receiving this information, Mr Stavis instructed Mr Gouvatsos to refer the development application for 538-546 Canterbury Road to an external consultant for assessment.

On 5 February 2016, Mr Stavis sent an email to Mr Gouvatsos instructing him to allocate the development

[3] The bracketed dialogue is an interpretation of words spoken in Arabic.

application to Ms Kocak, rather than to an external planning consultant for assessment, as "[Ms Kocak] and I have spoken about the [changes] previously and we both agree that the proposal is now supportable given the improvements made in relation to the existing approval as well". Mr Stavis wrote in bold print that the application "Must go to March meeting". Mr Stavis told the Commission that it was Mr Montague who wanted the applications to be considered as soon as possible.

Mr Gouvatsos replied by email later that day, "I hope we have all the referrals for this to happen". Mr Stavis replied, "if not we will have to do what we did last time, delegate to GM to issue approval once received". Ms Kocak and Mr Gouvatsos both understood this to be a reference to the neighbouring site, 548-568 Canterbury Road. Mr Gouvatsos told the Commission that this was quite an irregular approach. It was an approach that Mr Stavis had adopted in relation to the development applications for 548-568 Canterbury Road (see chapter 7) and the Doorsmart development (see chapter 9), both of which he knew were of interest to Mr Hawatt and Mr Azzi.

On 9 February 2016, Ms Kocak was advised by the Council's "team leader traffic & transportation" that there were differences in the traffic report and the statement of environmental effects submitted by the applicant. The traffic report was prepared on the basis of 18 fewer units than were proposed in the statement of environmental effects.

On 10 February 2016, during a lawfully intercepted telephone call, Mr Hawatt and Mr Azzi discussed meeting Mr Montague at the Council about Mr Maroun's developments.

Independent Hearing and Assessment Panel

On 29 February 2016, the development application and modification application went before the Council's IHAP. Ms Kocak said that the Council officer reports prepared for the IHAP

> *…had to be in line with the director's views for the proposal, so in this case because the site that wraps around this particular site, which is 548 Canterbury Road, had already received approval for eight storeys and this was a six-storey building sitting in the foreground now of an eight-storey built form, that's essentially what was discussed as to what the, what the report needed to be based around, so that's the way it was drafted.*

Mr Stavis agreed that he provided guidance to Ms Kocak as to what should be in the report, and that the thrust of the report should be a recommendation for approval.

One of the relevant factors was the approval of the development application for two additional storeys on 548-568 Canterbury Road.

Ms Kocak said that she did "not necessarily" agree with the recommendation for approval because she:

> *…didn't actually agree with the approval of the neighbouring site either, or the process involved in, in the approvals in that they relied on 4.6 when we, well I believe we should have waited for the Gateway Determinations to be finalised as to planning proposals and that's a much better-informed way of making a planning decision about what the heights on a particular site should be, rather than doing it under 4.6 on a site-by-site basis.*

On 29 February 2016, the IHAP recommended approval of the modification application. However, it recommended that the Council refuse the development application for two additional storeys, on the basis that:

1) *the clause 4.6 variation submission has not adequately addressed and demonstrated that:*

   a. compliance with the 18m height limit is unreasonable or unnecessary in the circumstances of this case, and

   b. there are sufficient environmental planning grounds to justify the contravention of the 18m height limit.

2) *additional housing and lack of specific environmental harm does not address the requirements of clause 4.6(3)(a)(b).*

Mr Stavis told the Commission that his opinion differed from the IHAP's opinion, and denied that there was anything else at play in the assessment of the development application.

On 3 March 2016, Mr Maroun called Mr Hawatt to find out whether his project was going to be on the agenda for the Council meeting of 10 March 2016. In a subsequent call, Mr Maroun told Mr Hawatt that the "car wash" went before the IHAP on Monday, and Mr Hawatt told him that "we'll get the reports Friday". Mr Maroun asked Mr Hawatt to let him know if the car wash was on his agenda for the following Council meeting. In a separate telephone call, Mr Hawatt and Mr Azzi discussed whether they knew what the IHAP had recommended.

On 4 March 2016, Mr Azzi called Mr Hawatt and told him that he had learned from Mr Stavis that the IHAP had recommended that Mr Maroun's development application for two additional storeys be refused. Mr Azzi said that the IHAP had given the "excuse" that the development application did not give back to the

community (which, as can be seen from the reasons set out above, was not an accurate summary of the reasons).

Mr Hawatt told Mr Azzi, "we'll go as the officer's recommendation". Mr Hawatt told the Commission that the reference to "we" was a reference to the Council. His statement to Mr Azzi demonstrated the level of influence he possessed in respect of planning decisions at the Council. Mr Hawatt denied this to be the case, saying that it was all debated and it was up to the Council to support the argument that was put forward.

The business papers had not yet been released, and (apart from what Mr Azzi conveyed) Mr Hawatt did not know the basis for the IHAP's recommendation. Mr Hawatt told the Commission the issue was that "we" had a lot of problems with the "way IHAP were making their decisions, that they went against a number of their recommendations and supported their staff's recommendations".

Mr Hawatt's assertions about what the Council's decision would be, and the way that the Council would approach the IHAP recommendation, was consistent with the interests of his friend, Mr Maroun. Although he claimed to support the development application on its merits, when he asserted that they would approve the application, he had not received any material from the Council or the IHAP as to an assessment of the merits. When this was put to him at the Commission's public inquiry, Mr Hawatt said:

> *…just because I made a comment it doesn't mean I'm going to … support it unless I have a look at the report, and if the report stacks up as far as I'm concerned, then I would support whatever stacks up.*

Given the history and content of contacts involving Mr Maroun and Mr Hawatt about this development application, the Commission does not accept this evidence.

By 7 March 2016, Mr Hawatt had received the Council agenda and, in a lawfully intercepted telephone conversation, told Mr Maroun that "we're gonna go as the officer's recommendation. I think it's the right thing to do". Mr Hawatt told the Commission that he was giving Mr Maroun "progress feedback". However, the Commission considers the provision of this information to be consistent with the friendship that he had with Mr Maroun.

On 9 March 2016, Mr Hawatt had a conversation with another councillor, not the subject of this investigation, in which he advised him that he was going to go with the officer's recommendation on the basis that the neighbouring site (being 548-568 Canterbury Road) already had approval for that height. Mr Hawatt did not disclose his relationship with the applicant.

Council decision

On 10 March 2016, the development application and the modification application came before the CDC, with a recommendation from the director of city planning for approval. The director's report included the IHAP recommendations.

The Commission heard that these recommendations were added by another officer, outside the planning division within Council, and that the director's reports were not returned to the planning division for reconsideration following a negative IHAP recommendation.

At the CDC meeting, Mr Hawatt moved, seconded by another councillor, that the clause 4.6 submission be supported and the development application approved, subject to conditions. The modification application was also approved.

Mr Hawatt and Mr Azzi both cast a vote in support of each application. Neither made a declaration as to any conflicts of interest in relation to either application. Mr Hawatt told the Commission that he did not need to because there was no benefit to him from the application. This claim was repeated in his submissions.

At this point in his evidence, Mr Hawatt backed away from his earlier evidence about the nature of his relationship with Mr Maroun. He said that he did not socialise with Mr Maroun, and only went to Mr Maroun's house because Mr Maroun did not drive. He said that Mr Maroun was just like any other person who called him for assistance and help. This is in direct contrast with his earlier evidence that most of his contact with Mr Maroun was social and not about his developments. The Commission is satisfied that this is indicative of Mr Hawatt's willingness to change his evidence when he considered it to be in his interest to do so.

Mr Azzi told the Commission that his relationship with Mr Maroun did not affect his decision and that he had no relationship with him. He denied that he had a very clear conflict of interest in respect of the applications. As can be seen from the information set out in this chapter, Mr Azzi did have a social relationship with Mr Maroun, which was beyond a professional relationship of a developer and councillor.

The Commission does not accept Mr Azzi's evidence in this respect. It was submitted for Mr Azzi that he did not perceive that he had a conflict of interest. This submission is rejected by the Commission, as Mr Azzi gave evidence to the Comission that he knew in December 2015 that the code of conduct required him to disclose a non-pecuniary interest that conflicted with his public duty.

At Mr Robson's request, a transcript was prepared of the CDC meeting on 10 March 2016. The transcript records that Mr Hawatt put forward the following reasons for accepting the director's recommendation rather than the IHAP recommendation:

- Council officers had spent a lot of time improving the development to create a better planning outcome, and to ensure that it met the Council's requirements
- the next-door site already had approval for 25-metre height.

The transcript also recorded that Mr Robson asked some questions of Mr Stavis about the process of approving the development application while the planning proposal was outstanding, and that he was uneasy about the process and would be voting against the application. Mr Stavis said, as he said during the Commission's inquiry, that "we have an obligation to determine the application that's before us".

On the morning of 11 March 2016, Mr Maroun called Mr Hawatt and asked him how it all went on the previous night. Mr Hawatt told him "we had a little bit of controversy from our bloody Mayor the lunatic. But he voted – he voted against it and it was – he was the only one…". Mr Maroun confirmed, "so it – it passed?", and Mr Hawatt said, "yeah of course yeah". Mr Maroun thanked Mr Hawatt.

Mr Maroun's evidence was that he sought Mr Hawatt's support for his development applications, and called Mr Azzi and Mr Hawatt because he wanted them to "call someone or speed up the process". He said that he did not ever ask for anything out of line. This evidence did not appreciate that his ability to make requests of Mr Hawatt and Mr Azzi, by reason of his friendship with them, at places like his home gym, conferred a real advantage on Mr Maroun compared to other development applicants in the Canterbury local government area.

Corrupt conduct

Spiro Stavis

The Commission does not make a corrupt conduct finding against Mr Stavis in respect of the matters covered in this chapter.

Michael Hawatt

Mr Hawatt failed to disclose his relationship with Mr Maroun, and proceeded to exercise his official functions as a councillor of the Council to vote in favour of the development application with respect to Mr Maroun's property at 538-546 Canterbury Road for six storeys on 4 December 2014, the planning proposal on 14 May 2015, and the modification and development applications on 10 March 2016.

Such conduct constituted or involved the dishonest exercise of his official functions within s 8(1)(b) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

Mr Hawatt claimed that he was not aware of the relevant requirements of the code of conduct. As explained in chapter 1, the Commission does not accept this evidence.

The Commission is satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that, in each case, Mr Hawatt had committed a disciplinary offence, being a substantial breach of the applicable code of conduct, including, where relevant, the February 2016 Code of Conduct. Specifically, it could involve a substantial breach of clause 4.12, which required disclosure fully and in writing of any non-pecuniary interest that conflicts with a public duty even if the conflict is not significant.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that Mr Hawatt's conduct in failing to declare his conflict of interest was serious corrupt conduct within s 74BA(1) of the ICAC Act having regard to the scale of the development, and that a failure to declare a conflict affected the probity of Council decision-making. The Commission has also had regard to the nature of the public functions affected; namely, the determination of development applications in the public interest. The Commission considers this to be a significant public function. Further, the consequences of the applications in this particular case were significant; namely, the approval of large-scale residential development on Canterbury Road.

The Commission is satisfied that, as a councillor, Mr Hawatt engaged in misconduct as defined by s 440F of the *Local Government Act 1993* ("the LGA").

Pierre Azzi

Mr Azzi failed to disclose his relationship with Mr Maroun, and proceeded to exercise his official functions as a councillor of the Council to vote in favour of the development application with respect to Mr Maroun's property at 538-546 Canterbury Road for six storeys on 4 December 2014, the planning proposal on 14 May 2015, and the modification and development applications on 10 March 2016.

Such conduct constituted or involved the dishonest exercise of his official functions within s 8(1)(b) of the ICAC Act.

The Commission is satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that, in each case, Mr Azzi had committed a disciplinary offence, being a substantial breach of the applicable code of conduct, including, where relevant, the February 2016 Code of Conduct. Specifically, it could involve a substantial breach of clause 4.12, which required disclosure fully and in writing of any non-pecuniary interest that conflicts with a public duty even if the conflict is not significant.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that Mr Azzi's conduct in failing to declare his conflict of interest was serious corrupt conduct within s 74BA(1) of the ICAC Act having regard to the scale of the development, and that a failure to declare a conflict affected the probity of Council decision-making. Nothing turns on the fact that other councillors also voted in favour of the application. It was Mr Azzi's obligation to disclose his conflict that was relevant, and his failure to do so, which was dishonest.

The Commission is satisfied that, as a councillor, Mr Azzi engaged in misconduct as defined by s 440F of the LGA.

Jimmy Maroun

The Commission does not make any finding of corrupt conduct in respect of Mr Maroun.

Section 74A(2) statement

The Commission is satisfied that, in respect of the matters covered in this chapter, Mr Hawatt, Mr Azzi, Mr Stavis and Mr Maroun are "affected" persons for the purpose of s 74A(2) of the ICAC Act.

The Commission is not 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 Hawatt, Mr Azzi, Mr Stavis or Mr Maroun for any criminal offence in respect of the matters covered in this chapter.

The Commission is also not of the view that consideration should be given to the taking of action against any of those persons for a specified disciplinary offence. There is no basis for the taking of such action, as Mr Hawatt, Mr Azzi and Mr Stavis are no longer councillors or Council officers and Mr Maroun never was.

Chapter 9: The Chanine brothers and the Doorsmart development

This chapter examines conduct in connection to development applications at 212-218 Canterbury Road, 220-222 Canterbury Road and 4 Close Street, Canterbury (collectively known at "the Doorsmart development").

Interests in the development

Before August 2014, a property development partnership was formed involving Marwan Chanine, from time-to-time Bechara Khouri, and others. Marwan Chanine operated a development business using special-purpose vehicles for different development projects. Marwan's brother, Ziad Chanine, operated an architecture firm, Chanine Design Architects (also known as CD Architects); although, his father was the director of Chanine Design Pty Ltd.

In an email in August 2014, one of Marwan Chanine's property development partners advised their solicitor that "our group has successfully negotiated the purchase of the string of properties noted in the email below by way of a 18 month call option for $19m". The properties were:

- 212-218 Canterbury Road, Canterbury
- 220 Canterbury Road, Canterbury
- 222 Canterbury Road, Canterbury
- 2 Close Street, Canterbury (apparently later substituted for 4 Close Street).

These sites collectively became known as the Doorsmart development. Marwan Chanine told the Commission that this was the largest project he had invested in in the Canterbury local government area, so there was a lot more at stake than other projects in which he had an interest. He also told the Commission that he thought the site was "high-risk, high reward … if you could get your DA through and your justifications were accepted". The Doorsmart development was the "sixth or seventh" venture of the partnership at the time.

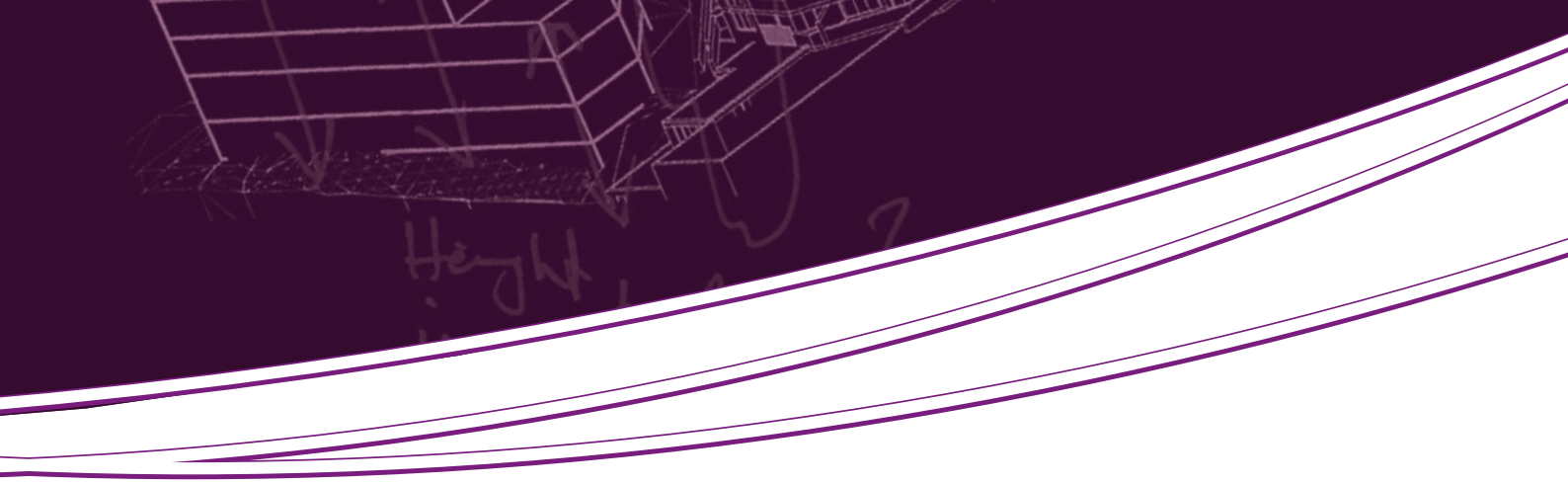
Marwan Chanine told the Commission that, if the development had been designed to comply with development controls, it would have resulted in a lower financial yield available on the site; two major controls problematic for the development were setbacks and floor space ratio (FSR).

Marwan Chanine told the Commission that he saw the FSR as vulnerable, but knew that challenging it involved risk. He thought that there was "some sound justification in order to design a project on this site with no, without looking at the FSR control". He thought the controls were inconsistent with controls for other sites on Canterbury Road. He accepted that the consequence of this strategy was that he would need to get the Council on-side. He agreed that it was part of his business model to spend his time "trying to get my message across to decision-makers", and he agreed that, in essence, he was lobbying decision-makers, including councillors, the general manager and the director of city planning in order to maximise his potential lot yield. Marwan Chanine also told the Commission that, if "a particular door was being shut in my face with regards to an application by somebody in a ranking lower than the general manager … I would turn to a general manager".

The email of August 2014 also advised that the option fee would be $250,000, with a six-month extension available for an additional fee of $250,000. In a subsequent email to the solicitors in early September, Marwan Chanine's partner advised that:

> *…we really want to get to finalise this deal asap as this is a critically urgent site for us to secure. There are many developers and agents all over this vendor for this site and I feel as* [sic] *have a very short window to close the deal.*

In September 2014, Camile Chanine (father of Marwan and Ziad) executed a unit trust deed for "BBCS Unit Trust" on behalf of Karantina Pty Ltd as trustee for



CZM Chanine Family Trust as unit holder. Two other partners in the Doorsmart development also executed the unit trust deed on behalf of the trustee company, Arguile Pty Ltd, and their own family companies and/or trusts.

On 17 September 2014, the solicitor was advised that the special purpose vehicle for the "Canterbury deal" was to be "Arguile Pty Limited ATF BBCS Unit Trust".

On 30 September 2014, Arguile as trustee for BBCS Unit Trust entered into call options with the owners of the Doorsmart sites.

The effect of these arrangements was that, on paper, the CZM Chanine Family Trust and two other parties, the identity of whom is not significant for the purpose of this investigation, had an interest in development applications to be lodged for the Doorsmart sites. The CZM Chanine Family Trust was a discretionary trust, and the named beneficiaries included Marwan Chanine and Ziad Chanine.

A spreadsheet kept by Marwan Chanine of contributions to the development records that Mr Khouri was a financial contributor to and partner in the development project from the outset. Marwan Chanine told the Commission that Mr Khouri also helped him with the day-to-day management of the development application for the Doorsmart development.

In his evidence to the Commission, Mr Khouri accepted that he made money through property investments made via trusts, including Arguile.

In August 2015, the arrangement was formalised and Mr Khouri's company, K & H Bech Pty Ltd, received 200 units in the BBCS Unit Trust.

Marwan Chanine's spreadsheet also recorded that CD Architects was remunerated, in part, by equity being allocated to the "Chanines" as a group. Marwan Chanine explained the concept to the Commission as follows:

> *…what we did in this particular project, which is not uncommon with what we do in other projects is rather than contributing cash to the joint venture and that joint venture paying Chanine Design for its fee at that point in time, in order to assist with cash flow we would use the architectural services of Chanine Design in lieu of equity to contribute our shares. So in this particular project at the time … each party agreed to contribute an amount equally and because the architectural fees were an amount higher than what each party needed to contribute equally, a payment was made from the group to Chanine Design in order to make it equal across the board in relation to what equity had been invested.*

Consistent with the spreadsheet of contributions, Marwan Chanine said that there was later a figure of $11,000, which was transferred from Karantina Pty Ltd to the joint-venture account. He told the Commission that he assumed that his personal share in the project was secured through the family trust.

In relation to CD Architects' interest, Marwan Chanine told the Commission that:

> *…the general rule of thumb that I undertake with Chanine Design is that they will put their architectural services into a project, and* [once] *that project is then realised by either onselling the project or taking the project into construction phase, Chanine Design would be paid on invoice the amount equal to their architectural services.*

Although the structure of the financial interests in the project was somewhat convoluted, what can be discerned is this:

- Marwan Chanine believed that he would obtain a benefit through his family trust if a profit was made from the Doorsmart development

- Mr Khouri had a financial interest in the Doorsmart development from the outset, which was formalised in August 2015 through his company K & H Bech
- Ziad Chanine had an interest in the Doorsmart development to the extent that, if the project was successful, the balance of his invoices (which was being used by Marwan Chanine as the "equity injection" for the CZM Chanine Family Trust) would be paid, *and* he was a named beneficiary of the CZM Chanine Family Trust, although it was a discretionary trust.

Relationships on the Council

The evidence before the Commission establishes that Mr Khouri had relationships on Council with the general manager, Jim Montague, Michael Hawatt, Pierre Azzi, Spiro Stavis and the mayor, Brian Robson. He told the Commission that he had a long-term friendship with the general manager, and that he had regular social contact with Mr Azzi. He also said that he had a relationship with Mr Hawatt in which they asked each other favours; for example, Mr Khouri asked Mr Hawatt to find out information from another council about where a development application was up to, and Mr Hawatt asked Mr Khouri to help his nephew with a business idea. Mr Khouri also had an unusual level of involvement with Mr Stavis' recruitment to the position of director of city planning, including confirming to Mr Stavis that the Council would offer him the job. However, Mr Khouri denied ever speaking to Mr Hawatt, Mr Azzi or Mr Montague about the Doorsmart site.

Ziad Chanine and Marwan Chanine also each had relationships with significant decision-makers on Council, as follows.

Mr Hawatt

During his evidence to the Commission, Marwan Chanine described his relationship with Mr Hawatt during the currency of the project as a "business association", which involved discussing items pertaining to the development application for the Doorsmart development.

From around 17 September 2015, Mr Hawatt and Marwan Chanine began exchanging text messages about a possible option arrangement for a property owned by Mr Hawatt in Kingswood. On 19 September 2015, Marwan Chanine sent a text message to Mr Hawatt stating, "Kingswood can work at $1.5m with terms as a hold for me. Let me know if you'd like to discuss further".

Mr Hawatt and Marwan Chanine continued to exchange messages into January 2016, which referred to discussions about Kingswoood. On 23 February 2016, Marwan Chanine sent Mr Hawatt a text message, stating, "our lawyer has been trying to contact yours for one week no success please have him return their call and emails". On the same day, Mr Hawatt sent his solicitor a message stating,

> *Can you response* [sic] *to the lawyer of Marwan Chanine who is purchasing the property at Kingswood. Talal* [El Badar] *and his partner have withdrawn from the sale for Marwan. Sale $1.5m.*

Contact between Marwan Chanine and Mr Hawatt fell away after that point.

Mr Azzi

Text messages exchanged by Mr Hawatt, and the evidence of Mr Hawatt at the Commission's public inquiry indicated that, on 18 December 2015, Mr Hawatt met a number of people at the Felix restaurant in The Ivy complex, including George Vasil, before moving upstairs to a nightclub at The Ivy. Marwan Chanine and Ziad Chanine told the Commission that they attended the night club with the group; although they did not attend the restaurant.

In a text message sent to Mr Hawatt when organising the evening, Marwan Chanine asked him to "push the other guys to come". Mr Hawatt replied that, among others, Pierre and Bechara were attending. Marwan Chanine told the Commission that this was a reference to Mr Azzi and Mr Khouri. Marwan Chanine said that Mr Azzi and Mr Khouri did not make it to the event in the end. A few days later, Marwan Chanine sent a text message to Mr Hawatt and referred to meeting with "boys" just after Christmas. Mr Chanine told the Commission that by "boys" he would have meant Mr Khouri and Mr Azzi.

Marwan Chanine told the Commission that he knew Mr Azzi from their community church. He said he had grown more friendly with Mr Azzi, and considered him to be a friend, which is why he wanted Mr Hawatt to push for him to be there. Marwan Chanine also said that it was not uncommon for him to attend the gatherings at Mr Azzi's house on a Friday.

In his evidence to the Commission, Mr Azzi denied that Marwan Chanine had been a friend, or that he had "a chat" to Marwan Chanine more than once.

The Commission prefers Marwan Chanine's evidence on this topic, as it is consistent with comments made by Mr Azzi in lawfully intercepted telephone calls, which indicate that he had at least three meetings with Marwan Chanine; one in December 2015 and two in March 2016.

Marwan Chanine told the Commission that, when he brought issues to Mr Azzi, Mr Azzi would "action them

immediately" in front of him by ringing Mr Montague or Mr Stavis. The Commission infers that Marwan Chanine had contacts with Mr Azzi about the Doorsmart development because he understood that Mr Azzi had influence with Mr Montague and Mr Stavis, and he hoped that by contacting Mr Azzi he could achieve a favourable outcome for his development. The Commission does not accept Marwan Chanine's denials to the contrary.

Ziad Chanine told the Commission that he primarily had contact with Mr Azzi, of all of the councillors, about the Doorsmart development. He told the Commission that he approached Mr Azzi when, in addressing issues raised by the Council with the development, he would, from time-to-time escalate those issues to the general manager and councillors. He did this when he felt they were not getting anywhere with the council officers. Ziad Chanine explained that he thought his approaches to senior people like Mr Azzi could at least result in Mr Azzi "advocating" the position that he was trying to take. He said that he would have approached Mr Azzi because his brother would have asked that he do so.

Mr Montague

As has been mentioned elsewhere in this report, as at 2015, Mr Montague had a close and long friendship with Mr Khouri. Marwan Chanine said that the biggest contribution Mr Khouri was able to make was to organise meetings for the partnership promptly, with people such as the general manager. Marwan Chanine understood Mr Khouri to be Mr Montague's friend. He told the Commission that Mr Khouri also organised meetings with Mr Hawatt and Mr Azzi.

Mr Khouri had previously been successful in getting Mr Montague to intervene with Council staff in relation to another development application for the Chanine brothers at 45 South Parade, Campsie. Mr Occhiuzzi recorded in his notebook that, on 11 February 2014, Mr Montague approached him and said that another staff member was being a "bit fussy" with the development application for 45 South Parade. Marcelo Occhiuzzi recorded that Mr Montague "showed me a message on his phone from 'Bechara' which asked the GM to get me involved as [the staff member] was being a bit 'over the top' with her demands on design issues". As explained in chapter 2, the Commission accepts that Mr Occhiuzzi's notes are generally accurate, and accepts that the incident described on 11 February occurred to the effect of Mr Occhiuzzi's record.

Mr Montague told the Commission both that he (1) did not know about Mr Khouri's financial interest in the Doorsmart development until "only recently", and that (2) Mr Khouri told him he had an interest in the Doorsmart development "in passing". In giving the first version, Mr Montague said that from 2014 to 2016 he "would have had some understanding of [Mr Khouri's] involvement with that site in Canterbury Road [being 212-222 Canterbury Road] but nothing else that I'm aware of…".

When he gave the second version, Mr Montague said that the conversation "just went straight over my head" and "I didn't take any notice at all". When he was asked why he would not take notice when his friend told him that he had an interest in a matter before the Council, Mr Montague said that he could not offer any explanation.

The Commission accepts that Mr Khouri told Mr Montague about his interest in the site. However, it has not been able to determine from the evidence when this occurred.

Mr Stavis

Mr Stavis told the Commission that he had known the Chanine brothers when he worked as a planner at Strathfield Council between August 2012 and August 2014, and had previously operated SPD Town Planners out of the same building as CD Architects.

While at Strathfield Council, Mr Stavis was involved in the assessment of Marwan Chanine's development application for a site on Liverpool Road. During this process, there was an issue, which Mr Stavis described in his evidence to the Commission as, "in relation to bulk, height and scale was the adverse, what was perceived to be an adverse impact to the adjoining properties at the rear".

Mr Stavis suggested a solution, which was, "that they remove the bulk from the rear and place it elsewhere, where it would not impact on the surrounding properties".

Essentially, Mr Stavis recommended that some of the bulk from the rear of the building be placed on top of the building, which exceeded the height limit on the site. Mr Stavis said he saw this as a "win-win" for the neighbours and for the developer. Mr Stavis left Strathfield Council prior to final approval, and started working at Botany Bay Council.

The effect of this interaction was that Mr Stavis had demonstrated to both Marwan Chanine and Ziad Chanine that he was facilitative and solutions-focused.

While he was employed at Botany Bay Council, the Chanine brothers sought to engage Mr Stavis as a consultant to prepare statements of environmental effects for other projects. One of those projects was a site in Homebush. Mr Stavis said that he was also engaged on the Liverpool Road site. Ziad Chanine accepted that, at the least, he wanted to get Mr Stavis' "take" on the Liverpool Road application.

Mr Stavis had appointments in the calendar kept on his mobile telephone for:

- "lunch with Ziad" on 28 October 2014
- "lunch Marwan" on 3 February 2015
- "lunch at frappe with Marwan" on 23 February 2015.

These lunch appointments occurred around the period of Mr Stavis' application for the position of director of city planning at the Council, during the "war", and after Mr Stavis' appointment had been confirmed. Further, these lunch appointments occurred after the partnership had committed to the development project. The spreadsheet kept by Marwan Chanine of contributions to the Doorsmart development indicates that the option fee was paid on 1 October 2014.

By 3 February 2015, it was public knowledge that Mr Montague had offered a position to Mr Stavis and withdrawn that offer. Mr Stavis had also spoken to Mr Montague and would have known that he was in a fairly strong position in respect of his employment at the Council (see chapter 2). Given that the Chanine brothers were involved in development in the Canterbury local government area, and the matter was of overwhelming significance to Mr Stavis at that point in time, the Commission infers that Mr Stavis told Marwan Chanine and Ziad Chanine what was going on about his employment.

By 23 February 2015, Mr Stavis knew that his position was confirmed and he would commence work on 2 March. Mr Stavis told the Commission that he thought it was likely that he said something to Marwan Chanine and Ziad Chanine about starting work as the director of city planning at the 23 February 2015 lunch, and that they were pleased to hear that.

Mr Stavis agreed that he occasionally had lunch with Ziad Chanine and Marwan Chanine over the years, and that he did have social interaction with both of them after he left Strathfield Council.

Mr Stavis was to be a very significant decision-maker at the Council; in the sense that, as director of city planning, he had the power to decide the recommendation to be made to the Independent Hearing and Assessment Panel (IHAP) and the City Development Committee (CDC) as to the determination of the development applications lodged for the Doorsmart development. Given that the project was designed to be non-compliant with the Council's controls, the recommendation of the director of city planning would be critical.

Development applications

Lodgement

On 27 April 2015, two development applications were lodged with the Council for proposed mixed-use developments at:

- 212-218 Canterbury Road, Canterbury
- 220-222 Canterbury Road, Canterbury
- 4 Close Street, Canterbury.

The applicant for both development applications was Ziad Chanine of CD Architects. Both applications had an estimated cost of development of just below $20 million each. Both also sought very significant variations of the permissible FSR on the site under clause 4.6 of the Canterbury Local Environmental Plan 2012 (CLEP 2012).

Ziad Chanine told the Commission that, in his experience, the estimated cost of the development was never questioned by consent authorities. At the time, development applications with a cost of more than $20 million would be determined by the relevant Joint Regional Planning Panel (JRPP), and development applications with a cost of less than $20 million would be determined by the Council.

Marwan Chanine and Ziad Chanine denied that the development applications were split across two sites so that the determining authority would be the Council.

Marwan Chanine said that the advantage in splitting the applications was to give the partnership greater flexibility, as they could sell one site, or develop both sites, depending on their financial position and the marketplace at the time. Marwan Chanine accepted that he did maximise his prospects of a favourable result because of his connections on the Council.

The Commission is not persuaded by these denials nor by the explanation proffered by Marwan Chanine. The Doorsmart development was risky. As will be seen, while the development applications were being considered by the Council, a number of significant entities involved in the assessment of the project considered that it should be refused because the significant breaches of the Council's controls had not been adequately justified, including the first consultant, who assessed the applications, and (unanimously) the IHAP.

The relationships which members of the partnership had with people at the Council were significant. They included a close friend and a person who had formerly been engaged as a consultant. Subsequently, they included a person who was negotiating to sell his property to a member of the partnership. The relationships would obviously assist the

partnership in managing their risk, and the Council was inevitably a more appealing consent authority.

The Commission is satisfied that the development applications were split across two sites so that the Council, rather than the JRPP, would be the determining authority.

The development application for 212-218 Canterbury Road bordered the train line, and was referred by the Council to Sydney Trains as the relevant authority for concurrence, as required by clause 86 of State Environmental Planning Policy (Infrastructure) 2007. Because the development applications for both of the Doorsmart development sites involved more than 75 dwellings, each was required to be referred to the former Roads and Maritime Services (RMS) pursuant to clause 104 of State Environmental Planning Policy (Infrastructure) 2007.

Assessment

Following the referral under clause 86 of State Environmental Planning Policy (Infrastructure) 2007, on 3 July 2015, Sydney Trains advised the Council that it was not in a position to make a decision as to concurrence because there was insufficient documentation submitted with the application.

Also in July 2015, Mr Stavis referred the development applications to an external consultant for assessment. Mr Stavis said that he had done this because the general manager had told him that the development applications were urgent, and because he did not have enough staff to process the development applications in-house. He also recalled, at some point, Ziad Chanine and Marwan Chanine expressing an urgency in processing their applications. This is consistent with there being a time limit on the option period held by the partnership, and with there being a cost associated with an extension of the option period.

The external consultant sub-contracted the work to another planner for assessment. On 21 and 23 July 2015, the sub-contractor advised the external consultant that she recommended refusal of the applications for the following reasons:

- the FSR was an excessive variation and not supported (54.2% for 220-222 Canterbury Road and 4 Close Street, and 105.4% for 212-218 Canterbury Road).
- excessive non-compliance had not been adequately justified under clause 4.6.
- there were issues relating to site isolation, setbacks and overshadowing in terms of compliance with the development control plan.

The sub-contractor also noted that there would be an undesirable precedent for future development in an area undergoing transition under relatively new controls. The external consultant agreed with the sub-contractor's views.

After receiving the advice of 21 July 2015, which related to 212-218 Canterbury Road, the external consultant advised the sub-contractor that he had discussed this with the Council, and the Council officer had indicated "that there was a conflict of interest, hence the reason for referring the DA for external assessment, and was not surprised by our position". Also on 22 July 2015, the external consultant advised the sub-contractor that the Council wanted to meet to discuss the position. In an email attaching an invoice to the Council, the external consultant described what followed as:

> *…a meeting held in the Council chambers on 24 July 2015 and full rewrite of our report from the original refusal determination into a recommendation for approval, subject to conditions.*

The external consultant told the Commission in a compulsory examination that, at the meeting on 24 July 2015, Mr Stavis directed him to give the applicant another chance to provide better information. In his evidence in the public inquiry, Mr Stavis agreed that he probably did do this. Mr Stavis accepted in his evidence that it was likely he was trying to find a solution. He claimed that this was not to favour the Chanine brothers, as he said he did this with everyone. It was his evidence that he was aware that the Chanine brothers, Mr Montague and, at some stage during the assessment process, Mr Hawatt and Mr Azzi, would have been unhappy with him if the development applications had been refused.

It appears from the timesheet kept by the external consultant that the Council officer with carriage at the time was Sean Flahive, who was overseas at the time of the Commission's investigation. The timesheet suggests that, in August 2015, carriage of the matter was taken over by Andrew Hargreaves.

In August 2015, the Council sent a letter to CD Architects, advising that a preliminary assessment had been conducted and a number of significant design issues had been identified. The issues included that "both proposed developments significantly exceed the permitted FSR maximum and this has not been sufficiently justified in the submitted Clause 4.6 variations".

In September 2015, CD Architects provided some additional information, including an amended clause 4.6 variation "report". The additional information was referred to the external consultant in the same month. Mr Stavis also had some contact with Mr Azzi in September about this site, which Mr Stavis said he thought was Mr Azzi following up with him.

On 14 October 2015, the external consultant asked that, "as a minimum can you please ask the applicant to provide greater justification within the FSR Clause 4.6 variation". Mr Stavis passed this request on to Marwan Chanine. On 19 October 2015, Marwan Chanine provided by email an updated clause 4.6 application in relation to the FSR. Mr Stavis replied, thanking him, and added:

> *In regards to the front setback as discussed previously the non-compliance was not adequately justified. I note our agreement that you would provide independent urban design advice in this regard. I'm not trying to be difficult Marwan and I would not ask if I didn't need. I need the ammunition. Please do so asap.*

On 22 October 2015, Mr Stavis met with Ziad Chanine. No note was kept of this meeting, but on 24 October 2015, Mr Stavis emailed Ziad Chanine to confirm their discussion. In his email, Mr Stavis advised that there were two issues remaining outstanding before the assessment could be finalised:

- justification of the proposal's non-compliance with the rear setback control under the development control plan, noting that the site adjoined the Canterbury Bowling Club site at the rear, which is the subject of an imminent rezoning proposal for high-density residential development.
- the submission of an urban design report justifying the proposal's non-compliance with the front setback control under the Council's development control plan.

The Canterbury Bowling Club site at 15 Close Street adjoined the Doorsmart site, and was owned by the Council. A planning proposal to rezone the site to R4 (residential high-density zone) had received Gateway Determination and been publicly exhibited in October 2014, before the development applications for the Doorsmart site had been lodged. The law required that an exhibited draft local environmental plan (LEP) be given significant weight when assessing development applications.

On 26 October 2015, Ziad Chanine submitted two letters to Mr Stavis seeking to address both outstanding issues:

- "urban design advice", advising that the proposal was "acceptable"
- a letter from CD Architects concerning the rear setback issue.

From 4 November 2015, the external consultant began to send through draft assessment reports, which indicated support for the development applications. Mr Stavis and George Gouvatsos both made handwritten amendments to the draft assessment reports. Mr Stavis' amendments included insertion of the following:

> *It should be noted that a proposal which complies with the setback, height and landscape controls envisaged for the site, an FSR of __ would be generated onsite which is way over the max FSR under the LEP. Consequently, it appears that there is no correlation between the FSR* [unintelligible] *& the other controls in the LEP & DCP* [development control plan].

The amendment was incorporated in the next draft of the report, which observed that a proposal complying with the setbacks, height and landscaping controls would generate an FSR of 5.8:1.

It is pertinent to note here that there was authority from the Land and Environment Court at the time, and, subsequently, to the effect that the building envelope controls perform a different function to the FSR. In *PDE Investments No 8 Pty Ltd v Manly Council*, the court noted at [48] that:

> *The question of whether a building envelope can be filled when the FSR control would produce a smaller building is one that arises from time to time in Court proceedings. The following planning principals are therefore of assistance:*
>
> *(i) FSR and building envelope controls should work together and both controls and/or their objectives should be met.*
>
> *(ii) A building envelope is determined by compliance with controls such as setback, landscaped area and height. Its purpose is to provide an envelope within which development may occur but not one which the development should fill.*
>
> *(iii) Where maximum FSR results in a building that is smaller than the building envelope, it produces a building of lesser bulk and allows for articulation of the building through setbacks of the envelope and variation in building heights.*
>
> *(iv) The fact that the building envelope is larger than the FSR is not a reason to exceed the FSR. If it were, the FSR control would be unnecessary.*

Drafts were sent back and forth until the morning of Sunday, 15 November 2015, when Mr Stavis reminded the external consultant "please don't forget I need it before 9am tmrw" and again in the evening of that day, "I cannot stress how important the 9am deadline is".

In his evidence to the Commission, Mr Montague denied that he had given Mr Stavis a deadline or asked him to commit to a deadline for reporting on the development applications. He said that he was not interested in the application and knew nothing about it. Mr Stavis told the Commission that Mr Montague had expressed to him on

numerous occasions that the development applications for the Doorsmart development had to go before a particular CDC meeting. When this was put to Mr Montague, he conceded that this was possible "if there was interest in the application from whatever source and, and they were keen to get it moving".

The Commission has found that there was interest in the application from a source very close to Mr Montague, and sources close to the councillors who were significant figures at the Council at the time, and that those sources would have been keen to get the applications moving. The Commission is not persuaded by Mr Montague's denials that he was not interested in the application and did not set a deadline, and accepts Mr Stavis's evidence that Mr Montague had told him on a number of occasions that the applications had to go to a particular CDC meeting.

It is clear that Mr Stavis took an active role in the assessment process, to put the applications in as good a position as possible. This involved seeking more information to remedy deficiencies in the application and giving the applicants more opportunities to provide that information. Mr Stavis made his intentions clear when he advised Marwan Chanine by email on 19 October 2015 that he needed "ammunition", which can only be understood as information to bolster arguments as to why the development applications should be approved by the Council.

Mr Montague's email records showed that, on 6 November 2015, he was scheduled to meet with Marwan Chanine in his office. The meeting invitation noted, "Mtg: Marwin [sic] Chanine (Bechara)", and included a mobile telephone number used by Mr Khouri. Given the consistent evidence about Mr Khouri's practice in organising meetings with Mr Montague for Marwan Chanine, the Commission concludes that this was one of those meetings.

At the time he gave evidence at the public inquiry, Marwan Chanine said he could not remember the meeting but said that, given the chronology:

> *I would have requested Bechara organise a meeting with the general manager about those two issues in late October that Spiro was raising about the setbacks, because as I stipulated earlier, I didn't like to step on anybody's toes and go to a power above them until the discussions with that party were exhausted and whilst Spiro may have a preconceived determination in his mind, there were certain conditions that he looked to imposing that I wasn't happy with, so I can only assume that that's what the meeting with the GM at that point in time would have been.*

Mr Montague also told the Commission that he was involved in one meeting about the site "where we were discussing setbacks at the rear onto a council property in Close Street", and that he had "maybe a couple" of communications with Mr Khouri about the Doorsmart development in which Mr Khouri asked him where it was up to.

Given the chronology, the Commission accepts it was likely that this meeting was about the rear setback condition (see below).

During the assessment process, as was his usual practice, Mr Stavis did not keep notes of meetings with councillors, the consultant or applicants, apart from some "prompts" in his notebooks. This disadvantaged the Council, as it made it difficult to later understand or justify the decision-making processes and made external scrutiny of the conduct of public officials more difficult.

Relevance of extent of variation

In each of Mr Stavis' assessment reports for the Doorsmart development applications, based on the consultant's reports, and, submitted to the IHAP and to the CDC, was the following sentence:

> *Council has received legal opinion that the extent of non-compliance to a Development Standard is not a relevant consideration in determining the reasonableness of a Clause 4.6 submission.*

This was not correct. On the evidence available, the Commission is not able to now determine who added that statement to the report. It is sufficient here to note that Mr Stavis accepted that he vetted reports thoroughly, and that he was happy for the reports to go ahead including the incorrect statement about the "legal opinion".

The Council had received legal advice in May 2015, in respect of another property, that, "The degree of variation from the standard is a relevant consideration but there is no bright line to decide when a variation is too great".

The email correspondence showed that the May 2015 legal advice was discussed with Mr Stavis, and was sent to Mr Stavis' Council email address on 27 May 2015. This correspondence indicates that Mr Stavis knew that the Council had received legal advice to the contrary.

The sentence was not included in any of the drafts prepared with the external consultant. The external consultant told the Commission that he did not write this statement, and that the statement was incorrect on the basis that the extent of the variation to a development standard *is* a relevant consideration.

When giving evidence to the Commission, Mr Stavis suggested that a source of the statement concerning

legal advice could be advice from senior counsel in respect of 548-568 Canterbury Road. This advice was about whether it was open to the Council to be satisfied that the application to exceed the height standard met the requirements of clause 4.6. That advice included the statement that, in the context of clause 4.6, "the magnitude of the breach may be taken into consideration but does not oblige a refusal of the application". Mr Stavis highlighted this line when reviewing the advice. Again, this advice is to the contrary of the statement in the Doorsmart assessment reports.

The effect of including that information in the report to the Council was that the Council was incorrectly advised that it *should not* consider the extent of the variations being sought in determining the development application. This was of great significance, considering that the variations to FSR being sought were over 100% for one development application and over 50% for another.

On 1 June 2016, after the Council was amalgamated with Bankstown Council, a member of the planning staff asked Mr Stavis for a copy of the legal advice to which this statement referred. Mr Stavis suggested that it could be the opinion from Sparke Helmore submitted by the applicants on 27 November 2015 (see below), but this said nothing about the relevance or otherwise of the extent of a variation sought under clause 4.6 of a local environmental plan.

When these issues were tested with Mr Stavis at the public inquiry, his responses reflected poorly on his credibility. He told the Commission that he did not accept that the advice that "the degree of variation from the standard is a relevant consideration" was the opposite of the statement that "Council has received legal opinion that the extent of non-compliance to a Development Standard is not a relevant consideration". He said that he tended to disagree "because it goes on to say 'but there is no bright line to decide when a variation is too great'".

The Commission is of the view that, in giving this evidence, Mr Stavis was not credible. Mr Stavis then told the Commission that he had not understood the question, and that he thought the sentence included in the assessment reports "probably should be worded differently". He conceded that the advice received by the Council was the opposite to the statement in the assessment reports for Doorsmart, but continued to insist that he interpreted the advice differently at the time. It was submitted for Mr Stavis that he is not a lawyer and it is entirely conceivable he was mistaken. Although Mr Stavis was not a lawyer, he was a planner who held a senior role at the Council. The Commission is satisfied that, as such, he understood the application of legal principles to planning decisions.

The IHAP

The development applications were listed before the IHAP on 24 November 2015. The IHAP recommended refusal of both. In respect of 212-218 Canterbury Road, the IHAP advised that:

> *The panel considered that the clause 4.6 objection was not properly founded. The fact that there was a 105.4% exceedance of the floor space ratio (FSR) was not justified in the opinion of the Panel. The Panel members were advised by staff that, to the best of their knowledge, an FSR exceedance of this scale had never been approved by Council in the past.*

The IHAP advised that it was:

> *…of the view that the grounds advanced by the applicant in the clause 4.6 submission are not particular only to the proposed development site; and that to accept a departure from the development standard in that context would not promote the proper and orderly development as land as contemplated by the controls applicable to the B2* [local centre] *zoned land.*

The IHAP advised that it could not recommend approval of the application in its current form but made a number of recommendations "to assist in a possible redesign".

In respect of 220-222 Canterbury Road and 4 Close Street, the IHAP commented that "an approval would set an undesirable precedent and undermine the basic planning controls", and that "the arguments put forward for justification do not comply with the objective of 4.6".

Information about the IHAP's recommendations was included in the papers for the CDC meeting of 3 December 2015.

While the Commission accepts submissions that development assessment is subjective and the decisions of the IHAP are not binding, it is satisfied that the opinion of the independent panel was adverse to the applications.

Sydney Trains concurrence

It will be recalled that Sydney Trains had been sent the development application for 212-218 Canterbury Road for concurrence.

On 25 November 2015, Mr Stavis emailed someone from Sydney Trains asking for "an URGENT favour regarding [212-218 Canterbury Road]"; namely, whether there was any way that Sydney Trains could provide concurrence to the development application before 3 December 2015 "subject to conditions even if they are deferred commencement conditions". Mr Stavis advised that his staff had not followed up the concurrence, and that

the development application "has to be determined on 3 December 2015".

The Sydney Trains representative replied that they would not be able to consider deferred commencement due to the number of issues that needed to be addressed, noting that they did not have any documentation. The representative noted that changes to the design might be required, "creating a development different to that approved by Council". The representative noted that:

> *…in other similar situations in other LGAs some Councils have decided to endorse the development as presented, but delegate the determination of the DA to their GM once concurrence was obtained and not substantial changes needed as a result.*

Reliance was placed by Mr Stavis in submissions on this "advice" about what other councils had done. It was submitted that, in those circumstances, Mr Stavis' conduct in pursuing that option could not be partial. The Commission does not accept this submission. The relevant question is why Mr Stavis acted in the way that he did.

Mr Stavis forwarded the response from Sydney Trains to Marwan Chanine with the comment:

> *FYI. Maybe you can pass onto your legal team to review and advise.*
>
> *As we said, worse case is that we add to the recommendation that Council delegates determination of the DAs to the GM once concurrence etc is obtained.*

As explained in respect of a similar recommendation for the Harrison's site (see chapter 7), Mr Stavis told the Commission that he thought he received legal advice supporting the use of this device. For the reasons outlined in chapter 7, the Commission does not accept this evidence.

On 26 November 2015, Mr Stavis emailed Mr Montague and advised that, because of the "side issue" of the absence of concurrence from RMS or Sydney Trains:

> *…technically the application cannot be determined until this is received and it cannot be conditioned. Hence, if we don't receive before the CDC meeting, the only way we can progress the DAs is to recommend the following (or similar):*
>
> *"That Council supports the proposed development and delegates the determination of the DA to the GM once concurrence is obtained from the RMS and Sydney Trains".*
>
> *I ran this idea past Marwan and he is agreeable.*
>
> *Are you okay if we proceed this way if we don't receive concurrence from RMS and Sydney Trains in time? Otherwise the DA cannot progress on the 3 December.*

On the same day, Mr Montague replied, "Spiro. Sounds good. Please proceed as proposed".

Mr Stavis told the Commission that, ordinarily in these circumstances he would have not submitted the development application to the Council, or would have withdrawn it from consideration. Other Council officers agreed that this was a very irregular approach. As was seen in chapter 7, a similar device was used in respect of a development application from Charbel Demian, also for this CDC meeting of 3 December 2015, and whom Mr Stavis perceived to also have the support of Mr Azzi, Mr Hawatt and Mr Montague.

Mr Stavis explained to the Commission that he decided not to wait for concurrence on this occasion because he had been told by the general manager that the development applications had to go to the 3 December 2015 meeting of the CDC, and because he had received enquiries from Mr Azzi, Mr Hawatt and Mr Montague. The Commission is satisfied that provision of this "solution" was preferential treatment, which must be viewed in the context of the relationships of influence within the Council at the time.

Mr Stavis denied that he saw the solution as being preferential treatment at the time. The Commission has not given significant weight to this denial, given its conclusions about the reliability and credibility of other evidence given by Mr Stavis as to how he saw his own conduct while director of city planning (see in particular chapter 3). The solution was formalised in a memorandum from the general manager to the CDC meeting of 3 December 2015, for which Mr Stavis was responsible (see below).

Setback condition (condition A1)

Since the adjoining bowling club site had been the subject of an exhibited planning proposal to rezone the site to R4, building separation standards set out in the Residential Flat Design Code needed to be taken into account. For an eight-storey residential development, the recommended separation distance was 18 metres.

Distributed equally, that would be a setback for each building from the common boundary of nine metres. If the Doorsmart development did not incorporate a setback at the relevant boundary, all setbacks would need to be incorporated into the Council-owned land at 15 Close Street. Marwan Chanine had also identified the need to accommodate setbacks as a risk, which could impact on the yield of the Doorsmart site.

Assessment reports prepared for the IHAP and the CDC recommended approval of both development applications as deferred commencement. Condition A1, recommended for both applications, was that:

> *In light of the imminent rezoning, and desired future development potential of the adjoining property at 15 Close Street, Canterbury, the development must be amended to create a 3m setback to its rear/eastern boundary (excluding basement parking levels and the location of the lift and fire stair as currently shown on the plans). While insisting on the 3m setback this does not necessarily mean a loss of floor space however, it is up to the applicant to demonstrate how this can be achieved.*
>
> *The external treatment of the development shall be appropriately designed by a project architect and the final design endorsed by a separate, independent registered architect chosen by Council. The applicant shall bear the costs of achieving compliance with this condition.*

The three-metre setback was described in the assessment report for 220-222 Canterbury Road as being a "compromise", and the report noted that:

> *This is less than what would be required under the SEPP 65 provisions, but is seen as a reasonable compromise given the status of the Draft LEP for the bowling club site, at the time of lodgement of this application. This will come at the loss* [of] *floor space within the development, but the development will still significantly exceed the maximum permitted on the site, and is still significantly more than the applicant could have expected in undertaking due diligence investigations.*

Marwan Chanine told the Commission that, once the assessment report was published, and he became aware of condition A1, he was disappointed and "would have most definitely contacted Councillor Azzi as to the issue I had with the recommendation being made". He said that he needed somebody to act and, to the best of his knowledge, apart from the general manager or a councillor, no one had the authority to amend an item in the report. He said that he would have asked Mr Azzi to look into it and see if there was any way he could have that condition removed from the report when it went up to the Council.

Mr Stavis told the Commission that, very late one night, he received a telephone call from Mr Azzi about the condition. Mr Stavis said that Mr Azzi used an aggressive tone and swore at him. He said that Mr Azzi was very angry and said words to the effect of, "you better pull your finger out. Find a solution. I don't want to see you end up like the other director". Mr Stavis believed that "they would somehow force me to leave", and that this was a reference to the circumstances in which Mr Occhiuzzi had left. He believed that Mr Occhiuzzi had been forced out by stress and pressure applied to him by Mr Hawatt and Mr Azzi. He had been given that impression by each of Mr Montague, Mr Hawatt and Mr Azzi. Mr Stavis understood this to be a threat.

Mr Azzi denied threatening Mr Stavis. Mr Azzi told the Commission that Marwan Chanine asked him to see what the problem was, as there had been a delay; although he denied that Mr Chanine asked him to intervene in the recommendation and have it changed. Mr Azzi said that he made a telephone call to Mr Stavis, and that he said words to the effect of, "mate, you know your job, do your job. You know what you have to do".

The Commission is satisfied that the telephone call from Mr Azzi to Mr Stavis occurred, and that it was prompted by Marwan Chanine raising his concerns with Mr Azzi. Because they are consistent with contemporaneous records, the Commission prefers the versions of both Marwan Chanine and Mr Stavis that the issue was about condition A1, rather than Mr Azzi's version that the issue was "delay". Further, given their respective roles in the development and assessment process, Marwan Chanine and Mr Stavis had a more reliable understanding of the issues in dispute at various points.

The Commission has also received evidence from people who worked with him that Mr Azzi could lose his temper when displeased. Mr Azzi denied that he would lose his temper but explained, "that's the way I speak … I don't mean to, to be aggressive but that's the way I speak". He also said that, "nobody likes me when I get angry because I start swearing".

Mr Stavis' evidence, that Mr Azzi used an aggressive tone and swore during the telephone call, is consistent with Mr Azzi's evidence about his own behaviour when angry. That Mr Azzi was angry about the condition is consistent with evidence that he had a relationship with people in the partnership, and that one of those people contacted him to express displeasure about the condition. Mr Stavis' evidence about the words used by Mr Azzi, in terms of finding a solution, are also consistent with the evidence of Mr Stavis' predecessor, Mr Occhiuzzi, about how Mr Azzi approached other development situations that caused him displeasure. In all of the circumstances, the Commission is satisfied that the threat described by Mr Stavis occurred.

It was submitted for Mr Stavis that this was an illustration of coercion applied to Mr Stavis during this period, and indicative of a toxic work environment, which made his pragmatic approach to planning issues readily understandable. The Commission has taken this matter into account in assessing Mr Stavis' conduct in this report.

Position for the Chanine brothers

On 26 November 2015, Mr Stavis advised Mr Montague that he had "met several times with Ziad and Marwan and they are putting together a submission which supports deletion of the condition re the rear setback".

On 27 November 2015, Marwan Chanine sent a letter to the Council under a covering email in which he formally objected to condition A1. The letter, dated 27 November 2015, was legal advice from Sparke Helmore to CD Architects. The advice set out a number of arguments as to the weight to be given to the fact that the Council had prepared a draft amendment to the CLEP 2012, which would rezone 15 Close Street to R4. The advice also noted that there was a precedent for no setback arising from the development consent for a property adjoining the bowling club site in which there was zero setback.

The advice concluded that:

> *In our opinion an examination of the development applications (and in particular the detailed plans of the proposed developments) against the current controls and the proposed rezoning of the Bowling Club would allow Council acting reasonably to conclude that the proposed developments are appropriate and maintain an environment allowing the Bowling Club to be redeveloped to its full potential.*

Mr Stavis did not obtain independent legal advice about the arguments put forward on behalf of the Doorsmart partnership.

The external consultant engaged by the Council to prepare the development assessment report for the Doorsmart development applications did not recall seeing the Sparke Helmore legal advice.

By late November 2015, the partnership in the Doorsmart development was facing some significant issues, as follows:

- the Doorsmart applications had been listed (with some urgency) for the last CDC meeting of the year. Any deferral would push the applications into the following year, which would start to encroach on the date for the extension of the option agreements, being March 2016
- the partnership had on-sold the option to another developer on 13 November 2014
- deferred commencement conditions, which had been recommended in the assessment reports, would likely reduce the value of the improvement to the properties, as more work would need to be done to satisfy the conditions
- as with many development applications in large commercial projects, delay in obtaining consent added to cost
- the absence of concurrence from Sydney Trains created the prospect of further delay.

Marwan Chanine told the Commission that "there was a big push at the backend of 2015 from us to get these matters dealt with and it had to do with timing based on our contractual obligations".

General manager's memorandum

On the evening of Friday, 22 November 2015, Mr Stavis sent an email to a staff member, advising that the general manager wanted to meet with Mr Stavis urgently on the following Monday to discuss the IHAP reports for 212-222 Canterbury Road, and another two development applications, including Harrison's.

At 2.53 pm on Monday, 30 November 2015, Mr Hargreaves sent to Mr Stavis a memorandum "from the GM to All councillors about changing the recommendations for 212-218 & 220-222 Canterbury Rd on Thursdays CDC Meeting". The Commission is satisfied that Mr Stavis directed Mr Hargraves to put this memorandum together, having discussed the issues with Mr Montague that day, and having received approval from Mr Montague to take that course of action. Both Mr Montague and Mr Stavis told the Commission that neither of them suggested obtaining independent legal advice.

It was submitted for Mr Stavis that it was entirely within his discretion whether he sought an additional legal opinion, and that it was not his role to do so where Mr Montague had failed to recommend it. It was submitted for Mr Montague that his role was not to obtain legal advices for planning matters, but this was a matter that fell within Mr Stavis' responsibilities. This is not particularly satisfactory.

However, the Commission is not able to be satisfied, having regard to all of the evidence available, including as to the circumstances in which both men were acting, that this conduct involved knowledge that what they were doing was wrong or intentional dishonesty such as to constitute corrupt conduct. Mr Stavis may have thought that he had the imprimatur of the general manager, and Mr Montague may have thought that he was acting on the impartial advice of his director. The Commission has not been able to resolve this issue on the evidence.

It was a function of the general manager to determine which matters would be listed before which meeting of the Council. The general manager's memoranda were used to draw the Council's attention to developments between an IHAP meeting and the next CDC meeting.

The draft memorandum that Mr Hargreaves sent to Mr Stavis noted that:

- the Council had obtained legal advice, which prevented the development applications being considered for deferred commencement
- a determination could not be made without concurrence from Sydney Trains and Roads and Maritime Services (RMS), including deferred commencement
- since matters were considered, the Council had received a legal opinion that increasing the setback from nil to three metres was unreasonable and this position was supported by the director of city planning.

It is worth noting at this stage that the legal advice, which was the applicant's own legal advice, was *not* that it was unreasonable for the Council to increase the setback to three metres; rather, the effect of the advice was that it was open to the Council to conclude that the condition was not required. The difference is significant.

The draft memorandum recommended that the CDC determine each item as an "approval in principle", whereby, once concurrence is received, each application be approved by delegating authority to the general manager.

The draft memorandum enclosed a "response to legal opinion from Sparke Helmore". The "response" noted that:

- the three-metre setback, already compromised from nine metres, is intended to allow suitable building separation for any residential development of 15 Close Street
- the greater setback from the common boundary for each development will allow increased development on the Council's site, should it be rezoned and developed
- a nil setback for each development will require any development on our site to increase its setback correspondingly, which impacts on the yield on the Council's site
- a precedent had been set in approving the development at 6-8 Close Street with a nil setback
- at the time of lodging the two development applications, the rezoning was not imminent, as it is now. *However, the owners of these two sites had been advised before each DA was lodged that the rezoning of 15 Close St was proposed and further that planning legislation requires us to consider the policies, including any Draft LEP, at the time of determination and not* [at] *time of lodgement*
- *the opinion concludes that our existing controls (ie: excluding the 3m setback) allows* [sic] *for the reasonable, orderly and economic development of our site, as well as the two DA sites. This is reasonable and the 3m setback from our common boundary should be removed.*

At 3.33 pm on 2 December 2015, Mr Hargreaves emailed Mr Stavis a new version of the memorandum, which had been redrafted but made effectively the same recommendations. The "response to legal opinion from Sparke Helmore" was now drafted as coming from Mr Stavis, as director of city planning. The response did not include the information that the owner had been advised at the time of lodgement that the rezoning was proposed and that the Council would be required to consider any draft LEP at the time of determination and not at lodgement.

Council decision

On 3 December 2015, the development applications came before the CDC.

On the same day, the general manager's memorandum, with some amendments from the version prepared by Mr Hargreaves on 2 December 2015, was circulated to the mayor and councillors. The "response to legal opinion from Sparke Helmore" from Mr Stavis had been incorporated into the memorandum as comments from the director of city planning. The memorandum recommended that the general manager be authorised to issue the consents for the development applications subject to the conditions outlined in the director of city planning's report to the CDC (excluding condition A1) and any additional conditions arising as a result of Sydney Trains and RMS concurrence. The memorandum was signed by Mr Montague.

It was submitted for Mr Montague that, although he signed the memorandum, he did not draft it, and his role in submitting this memorandum to the Council could not be characterised as interference in the planning process. The Commission accepts this submission, to the extent that the memorandum was drafted by the planning division of the Council, it was not an interference in their processes. However, the Commission does not accept any suggestion that Mr Montague's role was only to be a conduit between Mr Stavis and the Council.

Mr Stavis contributed to the content of the memorandum in the "Director City Planning's comments", but was also responsible generally for its contents. In crafting a solution that involved delegating the Council's determination to the general manager, and deleting condition A1, he acted to the advantage of the Doorsmart partnership in two ways. First, if the recommendation was accepted, the

development applications would be approved more quickly as the partnership did not have to wait for concurrence to be considered by the Council. Secondly, condition A1 would impact on the development yield, and its removal was to the economic advantage to the partnership.

The Commission has received submissions to the effect that planning is a matter about which reasonable minds may differ, and that there may have been good planning reasons why the land on the bowling club site was not to be developed by the Council to the full extent of its planning controls. Further, it was suggested that Council had all of the information before it to make a decision. The problem with such submissions is that the information that went to the Council tended in one direction, and no attempt was made to check that the Council's interests were adequately protected in light of the Sparke Helmore legal opinion.

The memorandum that eventually went to the Council included an argument that another site had been approved for redevelopment with a nil setback from the bowling club site. It stated that, at the time of lodging the development applications, the rezoning of the Council's site was not imminent. It did not include the comment that the owners were advised before each development application was lodged and that planning legislation required the Council to consider the policies, including any draft LEP, which applied at the time of determination and not at the time of lodgement.

On all of the evidence before it, the Commission concludes that Mr Stavis' motivation for endorsing this course of action, and for failing to seek legal advice, was that he was seeking to assuage the concerns of the Chanine brothers and Mr Azzi.

A subsequent review of planning decisions conducted by a law firm instructed by the newly amalgamated council noted with concern:

> *…the reliance upon legal advice provided by the Applicant in relation to the setback of the development from the adjoining Council land without that advice being reviewed by Council's own legal advisers.*

The review also noted the lack of records of meetings with the applicants kept on the hardcopy files relating to the matter, which is a concern expressed elsewhere in this report by the Commission.

In respect of the proposal for a nil rear setback, Mr Montague also told the Commission:

> *I would have expected the implications of that – that is, a nil setback – to be reported in the normal way when, when the application or the proposal went to council, because it's a critical head of consideration, of course, and the legal team would be involved, the property team would be involved, the planners would be involved and there'd be advice given to the council, and the council would make the decision. That's how it works.*

Given that evidence, and the extent of non-compliance evident in respect of the Doorsmart applications, coupled with the impact on the Council-owned bowling club site, and the lack of legal advice prepared for the Council, it is difficult to understand why Mr Montague endorsed the memorandum recommending that he be authorised to issue consents for the development and excluding condition A1.

As general manager, charged with leadership within the Council and required to act in the public interest, rather than in the interest of particular development interests, Mr Montague was obliged to ensure that independent legal advice had been obtained about the contents of the opinion submitted on behalf of the applicant. He was aware that there was considerable community interest in the fate of the bowling club site, and was concerned about the ability of the Council to redevelop the site. Mr Montague accepted that it would have been improper to intervene to the prejudice of the Council. However, by endorsing the approach set out in the general manager's memorandum, circulated on 3 December 2015, that is the effect of what he did. Mr Montague could not explain why he did endorse the memorandum, and tried to suggest that it was "informal", "just for information" and "not an official council business paper". This was a mischaracterisation.

In exercising their official functions, councillors would ordinarily be entitled to rely on the contents and recommendations in a general manager's memorandum. Mr Montague's explanation, that it was the Council's decision, and that he was just providing the Council with "background", was disingenuous. There was nothing in the memorandum that considered the adverse impact on the Council's interest in the bowling club site, and Mr Montague could not explain why that was the case.

It was submitted for Mr Montague that the proposition that the Council was prejudiced relies on unsound mathematical analysis, and was unsupported by expert evidence. The Commission had evidence from the planner involved in assessing the matter outside the Council that a reduction of the setback to nil would certainly have an impact on the neighbouring development (in this case the Council's property); although he did not know whether it would affect the economic potential of the site. Further, the analysis prepared for the general manager's memorandum initially flagged the potential impact on yield for the Council's site.

Further, another Council officer, who considered the development application for 212-218 Canterbury Road in April 2016, commented:

> *Given that the rezoning and reclassification of 15 Close Street, Canterbury is imminent, we request that the 9 metre setback for the adjoining property at 212-218 Canterbury Road, Canterbury be adhered to. The previous DA which was recently approved by Council for the adjoining development at 220-222 Canterbury Road, Canterbury will be built to the boundary of the property. This may cause issues with the side setback for 15 Close Street, Canterbury as the Department of Planning's Apartment Design Guidelines state that "for buildings five to eight storeys require 18m setback between habitable rooms/balconies". The masterplan for 15 Close Street, Canterbury allow[s] for an eight storey building adjacent to 212-218 Canterbury Road, Canterbury which suggests that an 18 m setback would be required on 15 Close Street in order to comply with Department of Plannings guidelines.*

Although this comment was made in circumstances where the NSW Planning Department had advised that it had received an opinion from parliamentary counsel and that the plan to rezone 15 Close Street could legally be made, the rezoning proposal was also considered to be imminent by Mr Stavis in October 2015 (as it had received Gateway approval).

In any event, Mr Stavis accepted in his evidence to the Commission that it was for the owners of 15 Close Street to make adjustments to accommodate the fact that they could not start building until it was 18 metres from the common boundary.

It was submitted for Mr Stavis that, in circumstances where the Council had no plans to develop the property next door, it could not be said that a three-metre setback had an adverse impact. The Commission does not accept this submission. There was evidence that the neighbouring site was to be imminently rezoned to high-density residential. Further, there was evidence that the Council's masterplan provided for an eight-storey building on the site. As with all of the matters considered in this report, the yield that could be achieved on the site within the applicable controls could conceivably impact on value. Whether the Council wanted to sell the site or develop it itself is immaterial.

It is not to the point that there was no evidence that the Council's solicitors would come to a different view to the applicant's solicitors. The point was that no attempt was made to seek advice from solicitors acting in Council's interests.

However, the Commission is not able to be satisfied, having regard to all of the evidence available, including as to the circumstances in which both Mr Stavis and Mr Montague were acting, that this conduct involved knowledge that what they were doing was wrong or intentionally dishonest such as to constitute corrupt conduct.

On the motion of Mr Azzi for 212-218 Canterbury Road, the CDC resolved on 3 December 2015 that:

a) the general manager be authorised to issue the consent for DA 168/2015 subject to the conditions as recommended in part B of the director of city planning's report and any additional conditions that arise as a result of Sydney Trains and RMS concurrence

b) the committee decided not to accept the IHAP recommendation based on legal advice provided by the applicant concerning the three-metre setback and resolved to accept the officer's recommendation.

On the motion of Mr Azzi for 220-222 Canterbury Road and 4 Close Street, the CDC resolved on 3 December 2015 that:

- 1. the general manager be authorised to issue the consent for DA 169/2015 subject to the conditions as recommended in part B of the director of city planning's report and any additional conditions that arise as a result of Sydney Trains and RMS concurrence
  2. condition A(2) of the director of city planning's report be transferred to a dot point in condition 1.1 of "Part B" in the same recommendation
- the Committee decided not to accept the IHAP recommendation based on legal advice provided by the applicant concerning the three-metre setback and resolved to accept the officer's recommendation.

The terms of these resolutions confirm that the legal advice submitted by the applicant was a moving force in the Council's determination. However, the IHAP recommendation concerned the non-compliance with the FSR control and not the rear setback. The legal advice submitted by the applicant concerned only the rear setback, and not the IHAP recommendation.

During this period, from at least September 2015 and continuing until January 2016, Marwan Chanine was negotiating with Mr Hawatt in relation to the sale of Mr Hawatt's property at Kingswood.

The Council records show that Mr Hawatt and Mr Azzi both voted in support of the motions that the general manager be authorised to issue the consent

for the development applications. Neither Mr Azzi nor Mr Hawatt made any declaration to the Council at the meeting as to the relationships each had with partners in the Doorsmart development.

Neither Mr Montague or Mr Stavis declared their pre-existing relationships with partners in the development to the Council, as required by clause 4.12 of the code of conduct.

Outcome of negotiations with Mr Hawatt

Following the CDC resolutions of 3 December 2015, the Council remained a significant decision-maker in respect of the development applications because the consents were in abeyance pending the issuing of concurrence, and the resolution of any issues that would be raised by Sydney Trains and RMS.

Text messages exchanged between Marwan Chanine and Mr Hawatt, and in evidence before the Commission, indicate that, on 13 December 2015, Marwan Chanine arranged to meet Mr Hawatt to discuss, among other matters, the Santley Crescent, Kingswood, property. In a lawfully intercepted telephone call on 16 December 2015, Mr Hawatt told his son-in-law, Talal El Badar, that Marwan Chanine was talking to an accountant or lawyer about putting a structure in place.

Both Mr Hawatt and Marwan Chanine told the Commission that, on 18 December 2015, they attended The Ivy nightclub together, along with others. Records obtained from Mr Hawatt's solicitor indicated that, in early 2016, the solicitor drafted an option agreement whereby the Santley Crescent property would be sold to another entity, Nifitsa Pty Ltd, which Mr Hawatt said was introduced to him by Marwan Chanine.

In February 2016, Marwan Chanine asked Mr Khouri to deliver a message for Mr Hawatt, via Mr Azzi. In a telephone call lawfully intercepted by the Commission, Mr Azzi reported the message to Mr Hawatt, as follows:[4]

> – *[the] lawyer [for the others, the ones that bought the site off you up there. Are ringing your lawyer and he isn't answering their calls]. You talk to your lawyer to contact them*
>
> – *Marwan doesn't want to – you'll have to – to stop calling Marwan you know this – this time you know because … through Bechara. Because (unintelligible) [yesterday, he sent the] list [with] Bechara. Bechara said to him, don't come, I will talk. Because it's gonna be more [work] and [are scared from that] bastard Brad McPherson.*

[4] The bracketed dialogue is an interpretation of words spoken in Arabic.

Mr Hawatt replied that he agreed "a hundred percent just let everything be transparent and be at arm's length". Brad McPherson, was the Council's group manager (governance) at the time and responsible for coordinating complaints under the code of conduct. The Commission concludes from this message that there was a concern about there being obvious links with Mr Hawatt, which might disqualify him from participating in consideration of their development applications.

On 23 February 2016, Mr Hawatt provided instructions to his solicitor, which confirmed that, at that stage, Mr Hawatt still believed that Marwan Chanine was purchasing his Kingswood property for $1.5 million. By 23 March 2016, Mr Hawatt indicated to Mr El Badar that he was doing a direct sale with "this guy"; meaning Marwan Chanine's friend.

On 28 April 2016, Marwan Chanine used Mr Azzi's telephone to ask Mr Hawatt to chase up his lawyer. He told Mr Hawatt that "the buyer of your property has been calling me they've been chasing for an exchange since last week" and "once he gets his hands on it I want to try and turn it over a lot quicker". The Commission concludes that Marwan Chanine continued to have an interest or role in developing Mr Hawatt's property. Consistently, CD Architects prepared the plans for a development application at the Kingswood property lodged with Penrith Council by Marwan Chanine's friend.

Outcome of development applications

Marwan Chanine's advocacy at significant decision-making levels at the Council converted a situation that could have been adverse to the Chanine brothers to one which was favourable to them. Ziad Chanine accepted that, if he and Marwan had not had the relationships they did have with people on the Council, "it would have been a completely different path from the beginning" and the applications would have been "probably less ambitious".

To some extent, events were overtaken by the council amalgamation and by Sydney Trains requiring some amendments to the development application for 212-218 Canterbury Road.

220-222 Canterbury Road and 4 Close Street, Canterbury

On 14 December 2015, RMS wrote to the Council to advise that it would raise no objection to the development application for 212-218 Canterbury Road, subject to conditions.

On 8 March 2016, Sydney Trains indicated its concurrence to the development application being approved for deferred commencement.

212-218 Canterbury Road, Canterbury

On 15 February 2016, Mr Stavis' handwritten notes record that he had a meeting with Marwan Chanine, Ziad Chanine and Mr Hargreaves, regarding the Doorsmart site. The notes indicated that there would need to be changes to the approval or design, and that the Chanine brothers were advised to provide amendments for advice.

On 22 March 2016, solicitors for Arguile wrote to solicitors for the owners of 212-218 Canterbury Road extending the call option period, at a cost of $250,000.

On 5 April 2016, CD Architects wrote to the Council to advise that they had modified the design of the building as a result of discussions with Sydney Trains. CD Architects proposed a voluntary planning agreement with the Council to provide the setback required in the redesign "as a publicly accessible through site link". CD Architects also submitted new plans for the Council's consideration.

On 11 May 2016, CD Architects wrote to withdraw the offer of a voluntary planning agreement on the basis that the Council could impose conditions that an easement for right of way in favour of the Council be created over the through site link.

On 13 May 2016, a consultant planner wrote to CD Architects, advising that he had assessed the plans as an independent planning consultant and that, "the proposed variations to maximum building height and floor space ratio development standards are not well-founded".

In or around September 2016, the amalgamated council refused the development application for 212-218 Canterbury Road for a number of reasons, including that the applicant had not demonstrated that strict compliance with the height and FSR standards was unnecessary or unreasonable.

Corrupt conduct

Spiro Stavis

The Commission does not make a corrupt conduct finding against Mr Stavis in respect of the matters covered in this chapter.

Jim Montague

The Commission does not make a corrupt conduct finding against Mr Montague in respect of the matters covered in this chapter.

Pierre Azzi

Threat to Mr Stavis

In or around November 2015, Mr Azzi misused his position as a councillor of the Council by threatening Mr Stavis that he would be out of a job if he did not "fix" a deferred commencement condition requiring a three-metre setback from the rear boundary recommended in respect of development applications for 212-218 Canterbury Road, 220-222 Canterbury Road and 4 Close Street, Canterbury.

By this, Mr Azzi engaged in conduct that constituted or involved conduct that adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial exercise of Mr Stavis' official functions, within the meaning of s 8(1)(a) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

Further, this conduct could constitute or involve conduct which could adversely affect the exercise of Mr Stavis' functions and could involve blackmail or an attempt to blackmail, within the meaning of s 8(2)(c) and 8(2)(y), for the reasons set out below. The elements of blackmail are set out in chapter 2.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider the offence of blackmail, under s 249K(1)(b) of the *Crimes Act 1900* ("the Crimes Act"). Mr Azzi's conduct involved the making of an unwarranted demand, with menaces (being the loss of Mr Stavis' job), with the intention of influencing Mr Stavis in the exercise of his public duties (being his duties in respect of the assessment of development applications).

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Azzi committed an offence under s 249K(1)(b) of the Crimes Act.

It is also relevant to consider the common law offence of misconduct in public office, the elements of which are also set out in chapter 2. Mr Azzi threatened Mr Stavis with the inappropriate use of Mr Azzi's role as a councillor to obtain Mr Stavis' dismissal. The conduct is sufficiently serious, having regard to the functions which Mr Azzi sought to influence, and that it comprised wilful misconduct.

The Commission is satisfied, for the purposes of s 9(1)(a) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Azzi committed misconduct in public office.

The Commission is also satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Azzi had committed a disciplinary offence, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 3.1(j), prohibiting acting in a way which may give rise to the reasonable suspicion or appearance of improper conduct or partial performance of public or professional duties
- clause 3.1(d), prohibiting acting in a way which is an abuse of power or otherwise amounts to misconduct
- clause 3.1(e), prohibiting acting in a way which causes, comprises or involves intimidation, harassment or verbal abuse
- clause 3.1(h), is unreasonable, unjust or oppressive
- clause 3.5, requiring council officers to always act in the public interest
- clause 5.9, prohibiting council officers from using their position to influence other council officials in the performance of their public or professional duties to obtain a private benefit for themselves or someone else
- clause 5.10, prohibiting council officers from taking advantage (or seeking to take advantage) of their status or position with council in order to obtain a private benefit for themselves or any other person or body
- clause 6.2 and clause 7 of the procedure for "Interaction between Council Officials" under the code of conduct, prohibiting councillors from:
  - directing council staff other than by giving appropriate direction to the general manager in the performance of council's functions by way of council or committee resolution,
  - in any public or private forum, directing or influencing or attempting to direct or influence any other member of the staff of council in the exercise of their functions.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that Mr Azzi's conduct in threatening Mr Stavis was serious corrupt conduct within s 74BA(1) of the ICAC Act. The Commission considers it to be extremely serious for a public official to be threatened with adverse consequences for performing their public duty. The Commission has also had regard to Mr Azzi's position as a councillor and a member of the Council's collegiate body with responsibility for participating in decision-making in local government in the public interest.

The Commission is satisfied that, as a councillor, Mr Azzi engaged in misconduct as defined by s 440F of the *Local Government Act 1993* ("the LGA").

Failure to disclose personal relationship with Marwan Chanine

Mr Azzi knew that he had a personal relationship with Marwan Chanine, because Mr Chanine had socialised at his house, and knew that Marwan Chanine had an interest in the Doorsmart development, because he had been lobbied by Marwan Chanine to that effect. Mr Azzi's personal relationship with Marwan Chanine represented a conflict of interest with the exercise of his official functions as a councillor of the Council to vote on a development application in which Marwan Chanine had an interest, although it was a non-pecuniary conflict.

On 3 December 2015, Mr Azzi failed to disclose his relationship with Marwan Chanine, and proceeded to exercise his official functions to vote on the development applications with respect to the properties at 212-218 Canterbury Road, 220-222 Canterbury Road and 4 Close Street, Canterbury, being properties in which he knew Marwan Chanine had an interest.

Such conduct constituted or involved the dishonest exercise of his official functions within s 8(1)(b) of the ICAC Act.

The Commission is satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Azzi had committed a disciplinary offence, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 4.2, which required council officers to avoid or appropriately manage any conflicts of interest, noting that "the onus is on you to identify a conflict of interests and take the appropriate action to manage the conflict in favour of your public duty"

- clause 4.12, which required disclosure fully and in writing of any non-pecuniary interest that conflicts with a public duty even if the conflict is not significant.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that Mr Azzi's conduct in failing to declare his conflict of interest was serious corrupt conduct within s 74BA(1) of the ICAC Act, having regard to the scale of the development, and that a failure to declare a conflict affected the probity of Council decision-making. The Commission has also had regard to the nature of the public functions affected; namely, the determination of development applications in the public interest. The Commission considers this to be a significant public function.

The Commission is satisfied that, as a councillor, Mr Azzi engaged in misconduct as defined by s 440F of the LGA.

Michael Hawatt

Mr Hawatt also had a personal relationship with Marwan Chanine, and, concurrent at significant times with the assessment and determination of the Doorsmart development applications, was in negotiations with Marwan Chanine for the sale of a property that Mr Hawatt owned. His relationship with Marwan Chanine represented a conflict of interest with the exercise of his official functions to vote on a development application in which Marwan Chanine had an interest.

It was submitted for Mr Hawatt that there was no business relationship between Marwan Chanine and Mr Hawatt, and therefore no declaration needed to be made. The Commission does not accept this submission, having regard to the evidence that negotiations were occurring.

On 3 December 2015, Mr Hawatt failed to disclose his relationship with Marwan Chanine, and proceeded to exercise his official functions to vote on the development applications with respect to the properties at 212-218 Canterbury Road, 220-222 Canterbury Road and 4 Close Street, Canterbury, being properties in which he knew Mr Chanine had an interest.

Such conduct constituted or involved the dishonest exercise of his official functions within s 8(1)(b) of the ICAC Act.

The Commission is satisfied, for the purposes of s 9(1)(b) of the ICAC Act, that, if the facts as found were to be proved on admissible evidence to the requisite standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Hawatt had committed a disciplinary offence, being a substantial breach of the requirements of the code of conduct. Specifically, it could involve a substantial breach of the following clauses:

- clause 4.2, which required council officers to avoid or appropriately manage any conflicts of interests, noting that "the onus is on you to identify a conflict of interests and take the appropriate action to manage the conflict in favour of your public duty".
- clause 4.12, which required disclosure fully and in writing of any non-pecuniary interest that conflicts with a public duty even if the conflict is not significant.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied that Mr Hawatt's conduct in failing to declare his conflict of interest was serious corrupt conduct within s 74BA(1) of the ICAC Act, having regard to the scale of the development, and that a failure to declare a conflict affected the probity of Council decision-making. The Commission has also had regard to the nature of the public functions affected; namely, the determination of development applications in the public interest. The Commission considers this to be a significant public function. Further, in determining that the conduct was serious, the Commission has had regard to the nature of the relationship between Mr Hawatt and Marwan Chanine, including that the negotiations were for the sale of a significant piece of property owned by Mr Hawatt; at one stage for an offered price of $1.5 million.

The Commission is satisfied that, as a councillor, Mr Hawatt engaged in misconduct as defined by s 440F of the LGA.

Section 74A(2) statements

The Commission is satisfied that, in respect to the matters covered in this chapter, Mr Stavis, Mr Montague, Mr Azzi, Mr Hawatt, Marwan Chanine and Ziad Chanine are "affected" persons for the purposes of s 74A(2) of the ICAC Act.

Spiro Stavis

The Commission is not of the opinion that consideration should be given should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of Mr Stavis for any criminal offence or that consideration should be given to the taking of action

against Mr Stavis for any specified disciplinary offence. The Commission has not made a finding that his conduct could constitute or involve a criminal or disciplinary offence.

Jim Montague

The Commission is not of the opinion that consideration should be given should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Montague for any criminal offence or that consideration should be given to the taking of action against Mr Montague for any specified disciplinary offence. The Commission has not made a finding that his conduct could constitute or involve a criminal or disciplinary offence.

Pierre Azzi

The Commission has considered whether the opinion of the DPP should be sought with respect to the prosecution of Mr Azzi for threatening Mr Stavis in the exercise of his functions. In finding that this occurred, the Commission has relied on evidence given in its public inquiry, which is not admissible in a criminal prosecution. There is no admissible evidence in respect of this conduct that could be referred to the DPP. For this reason, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP in respect of this conduct.

As Mr Azzi is no longer a councillor, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

Michael Hawatt

The Commission is not of the opinion that consideration should be given should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Hawatt for any criminal offence. The Commission has not made a finding that his conduct could constitute or involve a criminal offence.

As Mr Hawatt is no longer a councillor, the question of taking any disciplinary action against him for any specified disciplinary offence does not arise.

Marwan Chanine

The Commission has considered whether the opinion of the DPP should be sought with respect to the prosecution of Marwan Chanine for an offence under s 87 of the ICAC Act of giving false or misleading evidence at a compulsory examination.

On 28 February 2018, at a compulsory examination conducted by the Commission, Marwan Chanine gave the following evidence:

[Q]:	*Did Mr Khouri have an interest at all in 212-218 Canterbury Road?*
[A]:	*Not that I'm aware of, no.*
[Q]:	*What about 220-222 Canterbury Road?*
[A]:	*No.*

The evidence before the Commission showed that Mr Khouri did have an interest in the partnership, and had from the outset. Marwan Chanine knew this, and had maintained a spreadsheet recording the partners' interests in the development project, including Mr Khouri's.

Marwan Chanine told the Commission that he did not give evidence that he knew to be false. He said that:

> *…to the best of his knowledge at the time I couldn't recall whether Bechara was or was not involved and my recollection at the time was that he wasn't involved because there are multiple projects that I've undertaken with this group of people where some Bechara has been involved and some he hasn't been involved.*

He also said, "I couldn't recall whether on that project he was an actual partner or whether he was actually consulting".

Submissions lodged on behalf of Marwan Chanine were to the effect that the question of motivation to lie had not been dealt with, and that the most obvious explanation (consistent with the evidence given by the witness during the public inquiry) was that he was confused. The submissions noted that witnesses in Commission compulsory examinations are not given advance notice of the subject matters or topics for their examination, and that Marwan Chanine corrected the position in the public examination, which bespeaks of honesty and not an intention to mislead. The submissions also stated that the witness clarified that he had been confused and corrected his error.

There was no obligation to put to Marwan Chanine, or explore with him, his motivation to lie. In any event, it was put to Marwan Chanine that he was trying to conceal from the Commission Mr Khouri's financial interest, and he denied it. Further, the compulsory examination was conducted before the evidence gathered by the Commission became publicly known through the Commission's public inquiry. The Commission can give little weight to a correction in light of that evidence becoming known in a public inquiry in terms of determining an intention to be honest.

Marwan Chanine's legal representatives correctly identified that a court would need to be satisfied that

Marwan Chanine gave evidence that was false and misleading, knowing it to be false, misleading or not believing it to be true. The Commission has admissible evidence that goes to this issue in the form of Marwan Chanine's evidence in his compulsory examination, his evidence in the public inquiry, and the spreadsheet recording interests in the development kept by him.

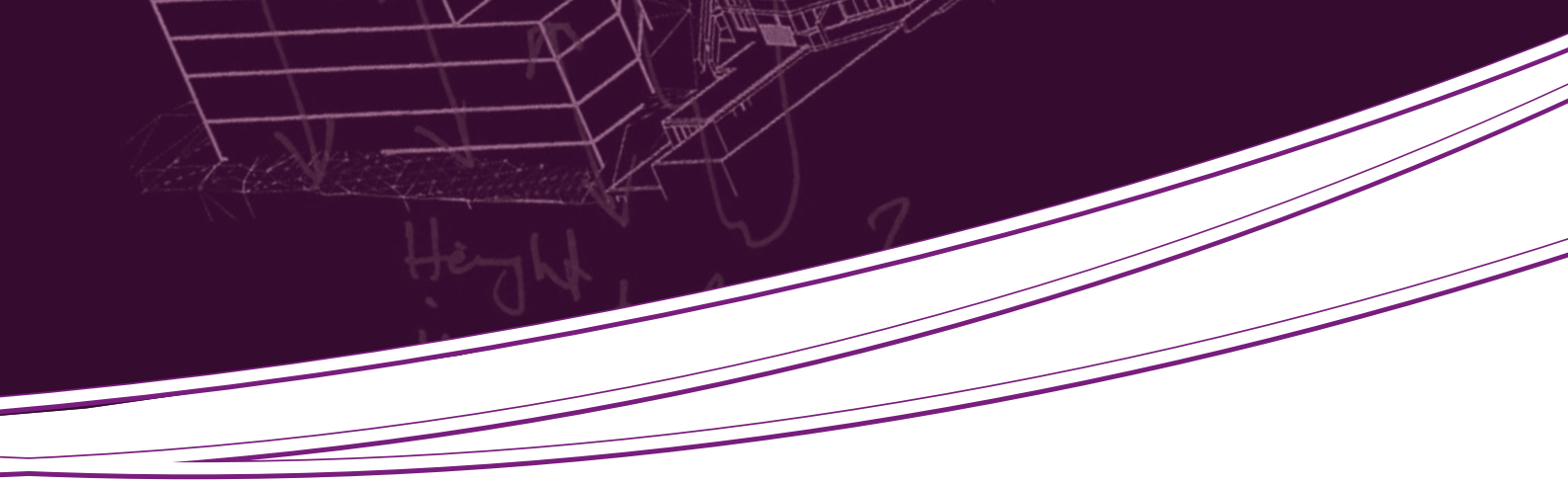
The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Marwan Chanine for an offence under s 87 of the ICAC Act in respect of his above evidence given on 28 February 2018.

Ziad Chanine

The Commission has considered whether it should refer to the NSW Architects Registration Board evidence that Ziad Chanine was providing architectural services and representing himself to be an architect while not being registered as an architect. Mr Chanine accepted that "to a certain extent", he represented himself to be an architect from 2014 to 2016. He was not registered as an architect during this period.

Mr Chanine gave evidence under s 38 of the ICAC Act, which prevents his evidence from being used against him in civil, criminal or disciplinary proceedings.

The Commission is not satisfied that there is otherwise sufficient evidence available for the matter to be referred to the NSW Architects Registration Board.



Chapter 10: Corruption prevention

Enhancing integrity in NSW councils

Leadership and corruption prevention

A leader's demeanour, attitude and reputation may all contribute to preventing corruption. Any executive seeking to instil integrity in their organisation must model observable "tone at the top" if they expect this behaviour among their staff. As such, an executive seeking to promote an ethical culture should ensure:

- they are not exempted from policies and procedures that apply to other staff
- compliance with both the spirit and letter of the law
- a "speak up" culture is fostered, where staff can voice concerns about unethical conduct and suspected corruption
- they disclose and manage their own conflicts of interest.

Jim Montague had significant experience as a senior local government administrator. As general manager of the former Canterbury City Council ("the Council"), Mr Montague also had a particular responsibility for promoting and facilitating compliance with the Council's code of conduct. He was responsible for making enquiries into complaints about Council staff and for determining the outcome of such complaints. Although he had held the position, or its equivalent, for 30 years, he could not recall ever having instituted an enquiry concerning a misconduct complaint.

Planners at the former Council told the Commission that they had concerns with the conduct of Spiro Stavis but were reluctant to speak out. Some came to this decision because Mr Montague "appeared unapproachable" and others believed that Mr Stavis' approach was supported by Mr Montague.

There are existing mechanisms that can be used to provide staff with an avenue to raise concerns and allow councillors to assess a council's ethical culture. For instance, anonymous staff surveys, when well designed and conducted regularly, can provide an independent insight into a council's organisational health, including possible misconduct. The promotion of the *Public Interest Disclosures Act 1994*, and the provision of information about how to report to the Commission and similar bodies, may also help encourage staff to report wrongdoing, such as suspected corrupt conduct.

In its submissions, the Commission proposed that City of Canterbury Bankstown Council amend future general manager performance agreements to include performance indicators specifically relating to the conduct and outcomes of staff surveys regarding ethical culture and the promotion of whistleblowing procedures among staff.

The City of Canterbury Bankstown Council submitted that it broadly supported the proposed recommendation and noted that there does not appear to be any reason for the proposed recommendation to be limited to that council.

The Commission agrees with the council that there is no reason that the recommendation should not be implemented sector-wide, and considers that this could be addressed by amendment of the *Guidelines for the Appointment and Oversight of General Managers* of the NSW Department of Planning, Industry and Environment (DPIE).

Recommendation 1

That the DPIE amends the *Guidelines for the Appointment and Oversight of General Managers* to recommend that the performance agreements of general managers include performance indicators related to ethical culture. Specific measures that could be promoted include the conduct and

measurement of outcomes from staff surveys and the promotion of whistleblowing procedures.

Employment contracts for general managers

Mr Montague's employment contract was consistent with the Standard Contract of employment for general managers mandated by the former Office of Local Government.

Terminating a general manager's employment

The Standard Contract sets out six circumstances in which a general manager's employment may be terminated:

- by written agreement between council and the general manager
- the general manager resigning and providing four weeks' written notice to council
- the general manager being incapacitated for a period of not less than 12 weeks and his/her entitlement to sick leave being exhausted, or the general manager being affected by an extended incapacity
- council conducting a performance review and concluding that the general manager has not substantially met the performance criteria or the terms of the performance agreement
- summary dismissal due to breach of contract, misconduct or related reasons
- dismissal without explanation by providing 38 weeks' written notice to the general manager, or alternatively by providing a termination payment pursuant to subclause 11.3 of the Standard Contract.

The dismissal-without-explanation provision of the Standard Contract is often referred to as the "no reason" provision. As discussed in chapter 2, it was this provision that Michael Hawatt and Pierre Azzi sought to use to terminate Mr Montague's employment between December 2014 and January 2015.

"No reason" employment terminations lack constraints

There are several reasons why invoking the no reason provision to terminate the employment of a general manager may appeal to councillors. First, the only administrative constraints on the use of the no reason termination provision appear to be the procedural rules relating to the conduct of council meetings, including rules around rescinding or altering resolutions.

Second, because no reasons need to be provided to the general manager or the ratepayers, the provision lacks transparency and could hide ulterior or improper motives, including corrupt conduct.

Third, the no reason option is a fast process. At the former Council, enacting the termination process for Mr Montague's employment took 21 working days; from the day Mr Azzi and Mr Hawatt submitted a written request to mayor Brian Robson for an extraordinary meeting on 24 December 2014 to the day the Council came together for the extraordinary meeting on 27 January 2015.

Finally, securing a simple majority of votes of councillors present at a meeting is all that is required to terminate a general manager's employment. A small number of influential councillors, or even a single influential councillor, can have a significant role in determining whether a general manager keeps his or her job.

The potential impact of the no reason termination provision on the proper functioning of a council

General managers are appointed directly by a council. It should be no surprise that general managers will be attuned to the ambitions of councillors and understand that their tenure depends in part on their ability to navigate intra-council politics. This situation, combined with the threat of no reason termination, can make it difficult for general managers to resist bullying or to provide frank and fearless advice. It may also create an incentive for general managers to acquiesce to the personal demands of influential councillors, as opposed to acting on the direction of council as a collegiate body. Mr Montague suggested that the no reason provision had been used inappropriately to terminate the employment of general managers for providing frank and fearless advice:

[Counsel Assisting]: *What can you tell us about the extent to which general managers had been terminated without reasons?*

[Mr Montague]: *Oh, look, there's, there's a litany of them if you go back in history. I can't think of any examples but there are numerous ones who were, who were close friends of mine, who finished up on the chopping block because they went against the council. They, they stood up – I, I can think of, oh, well, one that springs to mind is the former general manager at Wollongong. There, there, there were other examples where*

general managers stood on a principle and said, no, that's not correct, it's ultra vires, it's beyond power, we're not going to do that. You look at the paper next week and there's his job advertised and that's all it takes, the mayor and the council have that enormous power. There's no appeal, there's no tribunal, there's no one that says, yes, we think Mr Montague should be dismissed. You're gone.

While the Commission is satisfied that Mr Hawatt and Mr Azzi took advantage of the no reason termination option to pressure improperly Mr Montague, there are good reasons for the provisions to exist. In its July 2011 publication, *Guidelines for the Appointment and Oversight of General Managers*, the former Division of Local Government explained that the general manager's role within a council is "pivotal" and that the relationship between the elected body and the general manager is of utmost importance for good governance and a well-functioning council. Any breakdown in this relationship typically resonates throughout a council, creating a toxic atmosphere and a dysfunctional working environment.

The Commission accepts that, when such a significant relationship deteriorates beyond repair, there ought to be an available mechanism to provide a circuit breaker. However, the Commission is also satisfied that the vulnerability of general managers to termination without reasons – by simple majority of council vote – is a corruption risk. This has led the Commission to consider recommending that the Standard Contract should be amended to require a two-thirds majority of a council to terminate the employment of a general manager.

The City of Canterbury Bankstown Council submitted that an unanimous vote should be required to terminate a general manager's employment on a no reason basis, noting that Mr Azzi and Mr Hawatt could marshal a significant majority of votes and that a two-thirds majority may not have acted as a barrier to the corrupt conduct identified in this investigation. The City of Canterbury Bankstown Council also submitted that any amendment to the Standard Contract ought to be properly reflected in the *Local Government Act 1993* ("the LGA"). In addition, it submitted that the requirement to provide 38 weeks' notice, or a payment in lieu of notice, ought to be extended to 52 weeks' notice, or payment in lieu, to provide a further disincentive to terminate a general manager on a no reason basis.

The DPIE did not support the Commission's proposed recommendation. It submitted that councils make many important decisions by simple majority and have done so for many years. Second, it noted that adopting the proposed recommendation would lead to a general manager being able to retain his or her position based on the ongoing support of just over a third of the council despite being responsible for council decisions resolved by a simple majority. The DPIE also contended that further consultation with interested parties in the local government sector should occur before the Standard Contract is amended.

As reflected in the submissions in reply, the termination of a general manager's employment for no reason is a complex and fraught issue. Nevertheless, the Commission holds the view that public confidence in the integrity of the actions of general managers would be enhanced by establishing more onerous procedures for terminating their employment and highlighting the availability of alternative options. Given that any such reforms should be proportionate and not have unintended consequences, including undermining the stability of a council, the question then arises of where to draw the line.

Options for reforming the no reason termination provision include:

- requiring a unanimous vote (as proposed by the City of Canterbury Bankstown Council in its submission to the Commission)
- requiring a two-thirds majority vote (as proposed by the Commission in its submissions)
- requiring an absolute majority vote
- providing the DPIE a veto power over all no reason terminations
- prohibiting use of the no reason option more than twice during the term of the council
- introducing a mandatory cooling off period
- mandatory consideration of mediation.

The Commission believes that the unanimous vote proposed by the City of Canterbury Bankstown Council is too high a threshold. There is a considerable risk that a requirement for a unanimous vote would certainly lead to the situation raised by the former Division of Local Government; namely, unresolved conflicts entrenching organisational dysfunction within a council.

The Commission still contends that requiring a two-thirds majority to dismiss a general manager for no reason may be a suitable response. While this approach would be a significant reform, it is worth bearing in mind that the current inquiry is not the only example that the Commission is aware of concerning an inappropriate threat to a general manager's employment under the no reason provision. However, the Commission acknowledges that one difficulty with a two-thirds

majority approach is that an underperforming or dysfunctional general manager could hold their position by retaining the support of just over a third of the elected council.

There are less stringent approaches available that would not jeopardise the proper functioning of a council. One option outlined above could be to require an absolute majority to dismiss a general manger under the no reason provision. This reform would prevent councillors trying to convene a meeting to dismiss a general manager while another councillor is away. As an added benefit, there would be no point in moving a rescission motion after a resolution has been passed to terminate a general manager's employment, thereby reducing instability at a council.

Another option would be for the Standard Contract to be amended to highlight a requirement for mediation to be considered before the elected body seeks to terminate a general manager's employment using the no reason provision. Although there is currently a dispute resolution clause in the Standard Contract that either party can request in relation to any matter, the clause is rarely used.

Specifically, subclause 10.3.5 of the Standard Contract could be amended to refer to the need for the elected body (not just the mayor) to consider mediation prior to invoking the no reason provision. However, while councillors should be required to show evidence that they had considered the option of mediation (for example, by debating the option in closed session), it would be inappropriate to force parties to go to mediation.

Inserting a specific requirement to consider mediation in subclause 10.3.5 would provide greater clarity around this issue. An added benefit of this requirement would be the potential cooling off period that would arise if mediation were undertaken. This provides councillors time to pause and consider the appropriateness of using the no reason provision and avoid rash decisions.

Recommendation 2

That the DPIE conducts a review into the no "reason" termination provision in the Standard Contract, which should canvass options such as requiring a two-thirds majority vote of a council, an absolute majority vote or the availability of mediation.

Recruiting and appointing senior staff

Chapter 2 outlines the requirements under the LGA for the employment of senior staff. The NSW Government has also mandated the use of a standard contract for the employment of senior staff. This standard contract bears some similarity to the Standard Contract used to employ general managers.

Other than these controls, the processes involved in recruiting senior staff are established by a council's internal procedures and policies.

The Council did not have a recruitment and selection policy that applied to senior staff appointments

In October 2014, at the time Marcelo Occhiuzzi resigned, the Council had a Recruitment and Selection Policy, Procedures and User Guide. This document did not cover the recruitment and selection of senior staff. Mr Montague explained to the Commission that he had had no need for such a policy:

> *I took a hands-on approach to the appointment of directors because of the need to have, to ensure that we got people who were compatible with the council and that had the sort of values, I'm not, not talking about qualifications now, the values to be effective in our, in our organisation, in our structure.*

The absence of a policy governing the appointment of senior staff afforded Mr Montague a wide discretion in respect of decisions such as the composition of interview panels, allowed inconsistent practices to evolve and exposed the process to unnecessary risk of corruption. For example, Mr Montague did not declare or ask other interview panel members to disclose any conflicts of interest. Mr Montague also did not use anyone with planning expertise to assist in assessing candidates' suitability for the role.

The Commission submitted that the City of Canterbury Bankstown Council should ensure that it has a recruitment policy that applies to the appointment of senior staff. Both the DPIE and the City of Canterbury Bankstown Council supported the proposed recommendation. The City of Canterbury Bankstown Council also suggested that it would be appropriate and preferable for the DPIE to produce a guideline for councils on the appointment and oversight of senior staff. Recommendation 5 and the standard contract for senior staff largely address this suggestion.

Recommendation 3

That the City of Canterbury Bankstown Council ensures that it has a recruitment policy that applies to the appointment of senior staff, which is consistent with the relevant provisions of the LGA.

Councillor involvement in appointing senior staff

Section 337 of the LGA provides that "the general manager may appoint or dismiss senior staff only after consultation with the council". It is not clear what is

meant by consultation. For the reasons set out in chapter 2, the Commission is not satisfied that Mr Montague sought to satisfy the requirement to consult by including councillors on the interview panel for the director of city planning position.

However, the Commission considers that it should be made clear across the sector that including individual councillors on the interview panel does not satisfy the requirement to consult under s 337. Additionally, the circumstances of the recruitment of Mr Stavis and the way in which the interviews were conducted gives rise to concerns about the use of councillor-dominated panels to recruit staff who do not report to those individual councillors. Such panels are liable to create confusion around who is responsible for the appointment, as well as sending the wrong message to the employee as to who may give directions about the exercise of their functions.

There are alternative means of satisfying the requirement to consult with councillors. For example, Circular No 19-17 The *Appointment and Dismissal of Senior Staff* on 14 August 2019 ("the Circular") provides:

> *Under section 337 of the Act, general managers are also required to consult with the council before appointing or dismissing the holders of "senior staff" positions. While this need not necessarily occur at a formal council meeting, where consultation occurs outside of a council meeting, the requirement to consult with the "council" under section 337 necessarily requires that this be undertaken in a way that ensures that all members of the governing body are informed of the proposed decision and have the opportunity to provide comment.*
>
> *When consulting the council in making a decision to appoint or dismiss a senior staff member, the general manager should consider the views of councillors. However, the ultimate decision to appoint or dismiss senior staff rests with the general manager and not the governing body. It is therefore not open to the governing body of the council to direct the general manager on the appointment or dismissal of senior (and any other) staff.*

The City of Canterbury Bankstown Council submitted that consideration should be given to defining the term "consultation" within s 337 of the LGA, as opposed to reliance being placed on circulars or guidelines issued by the DPIE. The City of Canterbury Bankstown Council further submitted that consideration should be given to removing the requirement for the general manager to consult with councillors altogether.

The DPIE submitted that the Circular satisfactorily addressed concerns about how consultation should occur. While the Circular does provide a clearer explanation of what is required by consultation, the Commission considers that it should also clearly indicate that the requirement to consult is not satisfied by including individual councillors on interview panels. It would also be appropriate to caution councils about the risks inherent in using councillor-dominated interview panels for the appointment of senior staff. Further, the clarification in the Circular is at a general level, and would be enhanced by a clearer outline or examples of processes and procedures which the DPIE considers to be acceptable. The Commission is of the view that this matter can be satisfactorily dealt with by a circular as opposed to amending the LGA.

Recommendation 4

That the DPIE clarifies what constitutes "consultation" with council by the general manager for the purpose of appointment and dismissal of senior staff as required by s 337 of the LGA. The clarification should:

- **detail acceptable consultation processes and procedures**
- **in the absence of compelling reasons to the contrary, recommend restricting or, preferably, prohibiting councillor-dominated interview panels.**

Measures to enhance the integrity of recruitment practices for senior staff

As senior staff hold significant leadership positions within a council, and are responsible for a number of high-risk functions, it is important that these positions are filled on merit. The LGA also mandates merit appointments. There are a number of measures that councils can implement to help ensure merit-based appointments.

Recruitment experts

Judith Carpenter's involvement in the recruitment process and her individual actions ultimately helped highlight the integrity problems in the recruitment process for the position of the director of city planning. Ms Carpenter's engagement demonstrates the inherent value in councils using the expertise of human resources professionals during recruitment exercises for senior staff positions, including the position of general manager. Such professionals could be engaged externally or drawn from a council's internal human resources department.

Subject matter experts

No one on the interview panel for the appointment of the director of city planning had formal qualifications in planning or a related field such as architecture,

urban design or law. While councillors might have an interest in planning, they cannot be considered subject matter experts.

Recruitment panels for senior staff positions in councils, particularly where those positions require specialist skills, should include suitable, impartial subject matter experts. Combined with relevant and rigorous questions, subject matter experts have an important role in ensuring that candidates have both suitable experience and the technical knowledge to perform a role.

Internal audit

Councils can use their internal audit function to provide a level of independent assurance over recruitment and employment processes for senior staff through the conduct of periodic reviews. Internal audits can also add value by recommending ways to improve a council's recruitment processes. Additionally, internal audits also help deter corruption by letting staff know that transactions, processes and actions are subject to review and check.

Guidelines

The Commission has considered whether there is a need for sector-wide guidelines concerning the appointment of senior staff in local government. The City of Canterbury Bankstown Council broadly supported the introduction of guidelines subject to the following submissions:

- any guidelines should require an independent and external human resources expert to be involved in all senior staff appointments
- the independent expert should be drawn from a panel maintained by the DPIE
- the above panel proposal would eliminate the need for an internal audit, noting that any internal auditor would report to the general manager
- any guidelines issued should require mandatory reporting to the DPIE by the independent human resources expert, should any concerns arising compliance or corruption arise.

The DPIE did not support such a recommendation, arguing that is has not been shown to be necessary or desirable to have whole-of-sector guidelines concerning the appointment of senior staff. It also submitted that such matters are appropriately addressed by individual councils.

Having considered these submissions, and the evidence gathered during this inquiry, the Commission is of the view that the introduction of generally applicable guidelines is warranted given the significance of senior staff positions in councils and the desirability of consistency across the sector. While the Commission supports the engagement of external human resources experts, many small councils would find this requirement cost-prohibitive. It is appropriate to provide the alternative of allowing councils to utilise their in-house human resources expertise. The Commission also believes that councils are capable of identifying and, if required, engaging their own subject matter experts.

The Commission is satisfied that periodic reviews of staff appointments should be conducted as part of a council's internal audit plan. This does not mean that every senior staff appointment should be subject to an internal audit. It should also be noted that it is better practice for a council's audit function to be independent from management by reporting administratively to the general manager and functionally to a council's audit and risk committee.

The Commission considers that there is merit in providing guidance to external human resources experts as to avenues to report any concerns regarding non-compliance or corruption. However, the Commission does not consider it necessary for those persons to be subject to mandatory reporting requirements. Rather, the guidelines should make clear the avenues already available for reporting concerns (including complaints about suspected corrupt conduct to the Commission) and a copy of the guidelines should be made available to all members of the interview panel. The Commission considers it is a matter for the DPIE whether it creates a panel of independent external human resources experts to assist local councils with the recruitment of senior staff.

Recommendation 5

That the DPIE introduces guidelines under s 23A of the LGA concerning the appointment of senior staff. The guidelines should address the following:

- **that a senior human resources manager, or external recruitment consultant, be involved in recruitment processes, and have a role in verifying that council processes and procedures were followed in the appointment of senior staff**
- **the inclusion of subject matter experts on interview panels for the appointment of senior staff, especially for high-risk positions that require specialised technical knowledge**
- **the provision of independent assurance through the involvement of internal audit in conducting periodic reviews into senior staff recruitment processes**
- **the appropriate avenues for reporting concerns about process or complaints about suspected corrupt conduct.**

Disclosing conflicts of interest

The LGA and Council's code of conduct required councillors to disclose and manage conflicts of interest. This investigation highlighted serious failures to do so.

In 2016, the NSW Government introduced a requirement for a prescribed oath or affirmation for councillors to be made at the first meeting of the council after the councillors are elected. The reason given to the NSW Parliament for this amendment by the then minister for local government was to "reinforce [to councillors] the serious nature of their role". This oath or affirmation is given once in the four-year term that a councillor is elected to office.

Positive reinforcements of this type are part of an emerging trend drawn from psychology, cognitive science and economics that seeks to use low-cost, behavioural insights to realise positive public policy outcomes. This is popularly known as "nudging".[5] There are currently over 200 public sector agencies worldwide that have applied behavioural insights to influence decision-making. In NSW, a Behavioural Insights Unit was established by the NSW Department of Premier and Cabinet and now sits within the NSW Department of Customer Service.

Irrespective of whether they use the term nudging or not, some councils in NSW apply low-cost behavioural insights to deliberately influence councillors to disclose conflicts of interest. These councils nudge councillors to better comply with the requirement to disclose conflicts of interest. This is achieved by using the introductory section of business papers to remind councillors of their obligations in respect of disclosing and managing conflicts of interest. These sections often involve a reminder that restates the definition of pecuniary and non-pecuniary interests and when a non-pecuniary interest may be characterised as significant or not significant. The Commission is aware that one council even provides a copy of a blank disclosure form to allow councillors to submit a formal disclosure at a council meeting. At the former Council, there was nothing in the business papers that would have acted to remind councillors of their obligations to disclose conflicts of interests.

The inclusion of a copy of the oath or affirmation within council business and briefing papers, along with information regarding councillors' conflict of interest obligations, is a simple, low-cost practice that has three potential values as a corruption prevention measure. First, it reminds councillors of the conduct expected of them and helps them to make the right decisions. This can be useful for newly elected councillors or in situations where an otherwise ethical councillor has, until that point, overlooked a conflict of interest. Second, it may provide honest councillors with the moral authority to encourage their peers to comply with the requirements for disclosure. Third, it helps ensure councillors cannot claim ignorance regarding the rules that govern their conduct.

The Commission invited parties to respond to a potential recommendation that councillors should be reminded of their oath or affirmation and their conflict of interest obligations in business papers. The City of Canterbury Bankstown Council supported such a recommendation.

The DPIE did not support the proposed recommendation, submitting it was not necessary as "no councillor should need to be reminded of these fundamental obligations and no councillor should be taken seriously if he or she pleads ignorance of the obligations, in any forum". The DPIE also noted that it was open to any council to implement these measures if a council considered such a reminder appropriate.

Although councillors are responsible for understanding their conflict of interest obligations, the fact remains that there is evidence of failures to comply with these obligations which adversely affect confidence in public administration. There is a growing body of research that suggests ethical nudges can influence decision-making. The Commission considers this to be a low-cost reform with a significant potential to improve the integrity of and confidence in decision-making in local government.

Recommendation 6

That the DPIE amends the Model Code of Meeting Practice for Local Councils in NSW to require that council business and briefing papers include a reminder to councillors of their oath or affirmation, and their conflict of interest disclosure obligations.

Addressing lobbying in local government

Lobbying of government officials is a common feature of government. It involves individuals or groups of individuals communicating with public officials for the purpose of seeking to influence decisions.

The lobbying of public officials may be about raising awareness of the positive or negative impacts arising from a current or proposed policy position. Similarly, lobbying activities may be aimed at clarifying the impacts of a particular administrative decision. Lobbying can, however, be conducive to corrupt conduct. For example, corrupt conduct can occur where lobbyists seek to improperly affect the honest or impartial exercise of official functions. The risk of corrupt conduct is exacerbated by lobbying that occurs in secret.

[5] As coined by R Thaler and C Sunstein in *Nudge* (2008).

The *Lobbying of Government Officials Act 2011*

The *Lobbying of Government Officials Act 2011* ("the LOGO Act") provides for a register of third-party lobbyists. A third-party lobbyist is defined as "an individual or body carrying on the business (generally for money or other valuable consideration) of lobbying government officials on behalf of another individual or body". Lobbying is defined as:

> *…communicating with* [a Government official] *for the purpose of representing the interests of others in relation to any of the following:*
>
> *(a) legislation or proposed legislation or a government decision or policy or proposed government decision or policy,*
>
> *(b) a planning application,*
>
> *(c) the exercise by the official of his or her official functions.*

The LOGO Act establishes a Lobbyists Code of Conduct for third-party and other lobbyists, bans all lobbyists from receiving success fees, and provides for a Lobbyists Watch List to be maintained by the NSW Electoral Commission.

Only two parts of the LOGO Act cover lobbying of local government officials: the ban on success fees, and a restriction that former ministers and former parliamentary secretaries may not lobby government officials in the 18 months immediately after ceasing to hold that office.

The Commission is satisfied that there were examples of lobbying occurring at the Council during the period of its investigation, and that close relationships had developed between public officials and people who were engaged in lobbying activities.

Revisiting lobbying regulation in local government

In November 2010, the Commission released its Operation Halifax report, titled *Investigation into corruption risks involved in lobbying*. At the time the report was released, it was noted that at a local government level, lobbying activities primarily involved contact between a development applicant and a council officer. Witnesses in the Operation Halifax public inquiry "pointed directly at the small to medium developer as the source most likely to engage in lobbying that led to overtly corrupt conduct with council officers".

The Commission noted in its report that small to medium developers do not use professional registered third-party lobbyists in local government and that these lobbyists had not made inroads into local government. With regard to a register of lobbyists, the Commission concluded that registering third-party lobbyists in local government served no useful purpose and did not address the risk of corrupt lobbying.

The Commission is satisfied that its earlier views should be re-evaluated. Since the release of the Operation Halifax report, the risk profile of the local government sector in relation to lobbying has been altered. Since October 2012, the power to make local environmental plans (LEPs) has been handed to local councils in many cases, reducing the oversight role of the NSW Government. This change has the potential to increase lobbying activities in local government, and creates greater incentives for corrupt conduct to occur in that sphere.

The lobbying activities exposed during the investigation also suggest a change in the complexity of the local government lobbying landscape. For example, various witnesses confirmed that Bechara Khouri lobbied for third-party interests. Mr Occhiuzzi made notes while director of city planning about how Mr Khouri raised his concerns with the assessment of Marwan Chanine and Ziad Chanine's development application for the site at 45 South Parade. Mr Khouri also frequently met with Mr Montague to discuss development matters. Furthermore, Mr Stavis gave evidence that Mr Khouri lobbied him and others at Council in relation to Mr Demian's development applications.

Mr Khouri's lobbying activities were not limited to the former Council. Matthew Stewart provided evidence that Mr Khouri was engaged in lobbying at Bankstown Council. Mr Stavis also gave evidence that he had encountered Mr Khouri in "some sort of advocacy role with applicants" when employed at Strathfield Council. Ziad Chanine confirmed this, saying his business was helped by Mr Khouri's relationships with councillors and senior staff at a number of different councils. Elements of Mr Khouri's conduct would have been captured by the provisions of the LOGO Act had it generally included local government officials. An added complexity exposed in this investigation is that council officers could not be certain whether Mr Khouri was acting as a paid lobbyist and/or whether he had a direct financial stake in the development.

While some lobbying risks may have been reduced by the creation of local planning panels resulting from amendments to the *Environmental Planning and Assessment Act 1979* ("the EPA Act"), which commenced on 1 March 2018, these panels do not operate across all of NSW. Even if they did, staff in local councils will continue to prepare assessment reports for development applications where the local planning panel is the consent authority. There remains a risk that the contents of these reports could be adversely affected by

lobbying activities which would not be disclosed to the local planning panels.

The City of Canterbury Bankstown Council indicated in submissions that it supported extending the LOGO Act to local government, noting that the *Integrity Act 2009* (Qld) extends to the local government sector. The DPIE also supported this approach, although it observed that it was an area of responsibility of the special minister of state. The Commission consulted with the NSW Department of Premier and Cabinet, which noted that the Commission held a contrary view in Operation Halifax. For the reasons above, the Commission's view has changed. The Commission is satisfied that there are corruption risks inherent in lobbying in local government such that the LOGO Act should be extended to local government.

Recommendation 7

That the NSW Government amends the *Lobbying of Government Officials Act 2011* to ensure all provisions apply to local government.

Current Commission investigation into lobbying

The Commission is currently conducting an investigation into the regulation of lobbying, access and influencing in NSW. The investigation includes an examination of whether enhancements to the LOGO Act may be required. This examination includes the duties that apply to all lobbyists in undertaking lobbying activities, whether sanctions should be limited to third-party lobbyists and whether certain professionals should be excluded from requirements such as architects and town planners. Accordingly, these issues are not dealt with as part of this report.

Transparency of councillor lobbying activities

The Commission's investigation exposed numerous examples of councillors meeting with development applicants in private settings to discuss their applications. Some of these relationships developed to the extent that they posed a conflict of interest in respect of the exercise of councillor functions, such that they should have been disclosed to the Council. Most of the provisions of the LOGO Act (even if extended to local government) would not apply to these relationships because they did not involve third-party lobbyists but the proponents themselves.

The conduct exposed by this investigation demonstrates that there is a need to enhance transparency and promote honesty around the lobbying of councillors, particularly when it involves people with planning applications before the Council. The Commission is of the view that appropriate lobbying of councillors is normal and an acceptable feature of the relationship between citizens and their elected representatives. However, it is in the public interest that lobbying is fair, transparent and does not undermine public confidence in impartial decision-making.

The Commission proposed a recommendation that the DPIE should issue guidelines regarding measures to enhance transparency around the lobbying of Councillors. Section 23A of the the LGA provides for the issuance of guidelines relating to the exercise by a council of any of its functions, and requires that a council take such guidelines into consideration before exercising any of its functions. The particular measures that the Commission proposed could be addressed in such guidelines are:

- providing council meeting rooms to councillors to encourage them to meet in a formal setting with parties who have an interest in a development matter
- requiring councils to provide a member of council staff (where practical) to prepare an official file note of meetings between councillors and parties with an interest in a development matter
- suggesting councils conduct formal onsite meetings for controversial developments to which all councillors are invited
- requiring council officers to disclose in writing to the general manager any attempts by councillors to influence them over the contents or recommendations contained in a planning report.

The City of Canterbury Bankstown Council supported aspects of this proposal, and suggested the following additional matters be included in such a guideline:

- a designated member of council staff who is employed in the council's planning department must be present at any meeting between a councillor and parties that have an interest in a development matter
- any meetings between a councillor and parties that have an interest in a development matter are to be noted on the file
- any notes kept by the member of council staff and/or the councillor (irrespective of whether any official file note is created) be kept on the file or part of the City of Canterbury Bankstown Council's records.

The City of Canterbury Bankstown Council did not support the proposal that councils conduct formal onsite meetings for controversial developments, as councillors are not involved in determining development applications

in many councils as a result of the recent amendments to the LGA. It also submitted that council officers should be required to disclose in writing any attempts by councillors to influence them over the contents or recommendations contained in a report about any matter; not simply matters related to planning.

The Commission has accepted some parts of the City of Canterbury Bankstown Council's submissions. However, the Commission considers that its recommendation in respect of onsite meetings should be made, as there remains a risk of adverse influence being exerted in respect of the exercise of the functions of council staff responsible for assessing the development application, whether or not the council is the consent authority. Additionally, councils will retain functions in respect of LEPs, which also attract corruption risks.

The DPIE submitted that the proposed recommendation should not be accepted in its terms, but instead that the DPIE should consult with interested parties in the local government sector to determine the appropriate form and substance of any new measures to enhance transparency. The DPIE also submitted that it is otherwise open to any council to implement transparency measures to address specific concerns about lobbying activities.

The Commission agrees with the DPIE that there is merit in consulting with the local government sector, particularly as there may be additional measures that could be implemented to enhance transparency around lobbying activities that have not been identified in this report. However, the Commission considers that its investigation evidences that there is a need for guidelines on this topic to be issued to improve public confidence in local government decision-making, and that there are some key areas which the guidelines should address. It is a matter for the DPIE if, following a period of consultation, it identifies additional matters that such guidelines could usefully address. The Commission is of the view that a sector-wide approach rather than a council-by-council approach on this issue is necessary so that, as with the *Model Code of Conduct for Local Councils in NSW*, there is consistency in the standards expected in local government across NSW. The Commission has therefore determined that the recommendation should be made to the DPIE.

Recommendation 8

That the DPIE, following a reasonable period of consultation, issues guidelines under s 23A of the LGA to introduce measures to enhance transparency around the lobbying of councillors. The guidelines should require that:

- **councils provide meeting facilities to councillors (where practical) so that they may meet in a formal setting with parties who have an interest in a development matter**
- **councils make available a member of council staff to be present at such a meeting and to prepare an official file note of that meeting to be kept on the council's files (any additional notes made by the member of council staff and/or the councillor should also be kept as part of the council's records)**
- **all councillors be invited when a council conducts formal onsite meetings for controversial re-zonings and developments**
- **council officers disclose in writing to the general manager any attempts by councillors to influence them over the contents or recommendations contained in any report to council and/or relating to planning and development in the local government area.**

Alternatively, subject to the implementation of recommendation 7, the guidelines could be issued by, or in consultation with, the NSW Electoral Commission, which has responsibility for administering the *Lobbying of Government Officials Act 2011*.

Strengthening recordkeeping requirements

Recordkeeping in local government

Making and keeping accurate and comprehensive records is central to public administration. It is a means by which public officials demonstrate that they have acted within established rules and made decisions in the interest of the public they serve. In the NSW planning system, such records may show how discretion was exercised, which helps to promote public confidence in government decision-making. This is particularly important given that planning is a high-risk function that often places councils in dispute with affected parties.

This investigation has exposed inadequate recordkeeping at the Council and raised concerns about an instruction to destroy records in circumstances where there has been corrupt conduct. For example, in relation to 998 Punchbowl Road, Mr Stavis directed that Tom Foster destroy his draft report (chapter 6). In addition, Mr Montague told the Commission that his workload meant that keeping records was "quite tiresome" and he "didn't see any value in it".

The making and keeping of public records in NSW is subject to the *State Records Act 1998* ("the State Records Act"), which requires that each public office, including local councils, must make and keep full and accurate records of the activities of the office. Section 21 of the State Records Act also creates an offence of abandoning or disposing of a state record, or damaging or altering a state record, which has a maximum penalty of $5,500. Proceedings for this offence must be commenced not later than two years from when the offence was alleged to have been committed.

There is no offence in the State Records Act for a wilful or dishonest failure to keep records, or a failure to keep records in circumstances involving corrupt conduct. The Commission is also concerned about the adequacy of existing penalty provisions and limitation periods in circumstances where corrupt conduct has occurred. A two-year limitation period in which to commence prosecution proceedings is insufficient for complex matters of the type uncovered in this investigation.

The financial penalty for the offence is also small when compared to the sanctions for similar conduct in other jurisdictions in Australia. Queensland, Western Australia and South Australia impose a financial penalty that is greater than that imposed in NSW. In South Australia, the maximum available penalty includes imprisonment of up to two years.

In those circumstances, the Commission has considered recommending a review of the State Records Act to determine the adequacy of offence provisions, limitation periods and penalties for offences in circumstances where there has been corrupt conduct. The NSW Department of Premier and Cabinet indicated that it supported this recommendation.

Recommendation 9

That, where there has been corrupt conduct as defined in the *Independent Commission Against Corruption Act 1988*, the NSW Government reviews the *State Records Act 1998* in relation to the appropriateness of:

- **offence provisions, including where there has been a wilful failure to keep records required by the *State Records Act 1998***
- **time limitation for the commencement of a prosecution for an offence**
- **penalties for offences.**

The need for robust planning reports

Combined with other legal instruments and documents, the EPA Act sets out mandatory criteria and guidance for consideration when determining development matters. It is fundamental to the integrity of the planning system that robust reports are prepared and made publicly available to support planning decisions – not least because planning reports inform decisions that may produce irreversible changes to the environment.

Some of the planning reports examined as part of the investigation lacked rigour. For example, there was limited evidence to suggest that the Council had independently considered criteria for varying development standards or whether an objection to a development standard was justified under clause 4.6 of the Canterbury Local Environmental Plan 2012 (CLEP 2012). Some statements supporting increases to building heights and floor space ratio (FSR) were not justified by evidence. This lack of rigour meant that reasons for decisions were not clearly documented. Moreover, the discretion afforded by the planning system, coupled with the low transparency and accountability that resulted from poor planning reports, created an environment that was conducive to corruption.

At times there was a lapse in ensuring mandatory matters were properly, genuinely and realistically considered. For example, the Council's report concerning the development application for 548-568 Canterbury Road provided to the Sydney East Joint Regional Planning Panel (JRPP) failed to mention an existing planning proposal to amend CLEP 2012. As the planning proposal had been publicly exhibited, it was a mandatory matter for consideration in determining the development application under the EPA Act.

In a draft available to the Commission, the DPIE's Canterbury Bankstown Special Audit conducted in 2016 ("the draft audit report") described the Council's planning reports in the following terms:

> *Very few of the assessment reports prepared by the Council and reviewed in the audit gave any more than a cursory acknowledgement to the need to assess whether the proposed variation* [to development standards] *had environmental planning merit, considered the basic tests of whether the standard being varied was unnecessary or unreasonable, or made assessment of whether the objective was well founded. Stronger assessment of the variations only tended to occur when the JRPP was the determining authority, where external oversight required greater rigour to the assessments.*

The draft audit report contrasted the Council's assessment reports with those produced by Bankstown Council, noting that there were a number of examples of best practice assessment identified in Bankstown's files.

The Commission proposed a recommendation that the City of Canterbury Bankstown Council ensures it

conducts a regular review of processes and procedures associated with drafting planning reports and that staff involved in preparing reports are provided with sufficient training on evaluation and decision-making criteria.

The DPIE supported the recommendation but stated that its implementation was a matter for the City of Canterbury Bankstown Council .

The City of Canterbury Bankstown Council submitted that it has already adopted a regular review of its processes and procedures for drafting planning reports as well as conducting continual professional development. The Commission is also aware that it has introduced measures to enhance the integrity of planning reports, including the use of best practice templates and peer review of assessment reports. In those circumstances, the Commission is satisfied that this recommendation is not necessary.

The City of Canterbury Bankstown Council also submitted that the DPIE has a responsibility to define what represents best practice for the broader local government sector. The Commission agrees, and considers that some of the recommendations in the remaining sections of this report will help address this issue, including the recommendations concerning the auditing of councils' use of clause 4.6 of their LEP and the publication of new guidelines on varying development standards.

Oversight of the NSW planning system

The NSW planning system is complex and highly discretionary. These factors generate significant corruption risks; for example, complexity can disguise the improper exercise of functions, and the exercise of discretion can deliver significant financial benefits to a development applicant, creating incentives for corrupt conduct.

These risks call for robust oversight, both to identify potential corrupt conduct and as a deterrent to such conduct. The Commission is of the view that the DPIE, the agency with overall responsibility for the planning system (and now with responsibility for local government), should adopt an active approach in overseeing planning matters at a local level. This investigation highlighted deficiencies in oversight of the use of clause 4.6 of the Council's LEP, and of the making of LEPs. These deficiencies are not limited to the Canterbury local government area, but have implications for local government across NSW.

Clause 4.6: varying development standards

There is an underlying tension in the planning system between the need for certainty and a desire for flexibility to respond to unusual or unforeseen circumstances. Mechanisms such as clause 4.6 seek to provide that flexibility. The Standard Instrument Local Environmental Plan (SILEP) sets out the standard form and content of LEPs for all local councils in NSW.

Clause 4.6 of the SILEP permits a council to grant consent for a development that contravenes a development standard in the council's LEP. The council is required to consider a written request from the applicant seeking to justify the contravention of the development standard by demonstrating that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances of the case
- there are sufficient environmental planning grounds to justify contravening the development standard.

The objectives of clause 4.6 are to:

- provide an appropriate degree of flexibility in applying certain development standards to particular development
- achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6 provides that a council is not permitted to grant consent for a development that contravenes the development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated, and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

Clause 4.6(5) requires that:

…in deciding whether to grant concurrence, the Director-General must consider:

(a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

(b) *the public benefit of maintaining the development standard, and*

(c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

The favourable exercise of a council's discretion under clause 4.6 can deliver significant financial benefits to a development applicant. In the case of residential development applications, it is possible to obtain approval for a development application that exceeds development standards such as building heights and FSRs, which control bulk and scale. There were several examples of this occurring in this investigation.

Limited oversight of councils' use of clause 4.6

As far back as March 1989, councils were advised that they may assume the concurrence of the then director-general of the NSW Planning Department for the purpose of the predecessor to clause 4.6; namely, State Environmental Planning Policy 1 ("SEPP 1"). This assumption continued for the period with which this investigation was concerned. One effect of assumed concurrence is that the matters set out in clause 4.6(5) are not considered on each occasion that the clause is relied upon, removing a potential safeguard against its misuse.

The DPIE submitted that the evidence in this investigation did not establish that the director-general failed to consider the matters in clause 4.6(5) when deciding to provide assumed concurrence. It also submitted that clause 4.6(5) does not require a consideration of each individual contravention in deciding whether to grant concurrence.

The language of clause 4.6(5) does not easily support this conclusion, referring as it does to consideration by the director-general of various matters in respect of "*the* development standard" However, the Commission does not consider it necessary to determine this issue. The very nature of assumed concurrence, whether or not intended by the SILEP, means that the matters set out in clause 4.6(5) are not considered on each occasion in respect of the particular development standard sought to be varied.

Consistent with the DPIE having a limited role in overseeing the application of clause 4.6, it had not withdrawn assumed concurrence from any council since issuing a May 2008 circular on the topic. There was evidence before the Commission that a team leader at the NSW Planning Department advised Mr Stavis that "the Department does not have involvement in the operation of clause 4.6, this is a matter managed by Council".

George Gouvatsos also gave evidence that he was unable to recall a circumstance where the NSW Planning Department raised concern with, or provided advice to, the Council about the use of clause 4.6 in relation to a specific development application. The DPIE submitted that it provided advice on the use of clause 4.6 through numerous publications; however, this is not the same as advice directly to the Council on the use of clause 4.6 in particular circumstances.

Simon Manoski, who at the relevant times was a senior officer at the NSW Planning Department, agreed that only "good faith" operated to ensure that local councils do not misuse clause 4.6.

[Counsel Assisting]:	*But that* [the secretary's concurrence] *had been made, effectively, a dead letter by the 2008 planning circular, that qualification?*
[Mr Manoski]:	*Dead letter, I'm not following, sorry.*
[Q]:	*Well, it meant that although it was there in writing, in clause 4.6, the requirement for concurrence, there was no effective requirement for concurrence?*
[A]:	*No.*
[Q]:	*You agree with my proposition?*
[A]:	*I agree. I do.*
[Q]:	*In those circumstances and leaving aside Canterbury City Council or what you might know of Canterbury City Council, that left open a potential for abuse if the council did not exercise its power under 4.6 in good faith. Would you agree?*
[A]:	*That's a possibility.*
[Q]:	*And thinking now of what you know about clause 4.6, as you sit there in the witness box, have there been allegations or suggestions of which you're aware that clause 4.6 or SEPP 1 has been abused by consent authorities?*
[A]:	*Yes.*

[Q]: *Particularly councils?*

[A]: *Yes.*

Varying development standards operates as a de facto rezoning process

As explained in chapter 1, clause 4.6 has the potential to operate as a de facto plan-making device, although it is not (as outlined by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [21]):

> *…a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

The cumulative impact of approving clause 4.6 variations also undermines the legal certainty of an LEP, resulting in "development standard creep".

A problem with using clause 4.6 as an alternative to rezoning is that the strategic studies that are typically required to justify a planning proposal may not be undertaken. It is also possible that broader considerations, such as how the proposed LEP amendment is consistent with state and regional planning strategies, are not taken into account. Compared with a rezoning, this situation generally allows a development outcome to be achieved with less scrutiny.

At the Council, there was evidence that development applications relying on clause 4.6 were used as an alternative to rezoning, and that relying on clause 4.6 in a non-compliant development application would produce a faster outcome than waiting for a planning proposal to be finalised.

The Commission proposed a number of recommendations to mitigate corruption risks inherent in the use of clause 4.6, while preserving necessary flexibility in the planning system. These included recommending that the DPIE:

- reviews the concept of "assumed concurrence", including the avenues that exist for assumed concurrence to facilitate de facto plan-making
- identifies the circumstances and establishes the criteria to determine when the secretary's assumed concurrence will be granted and when it will be withdrawn from councils
- prepares and makes public new guidelines on varying development standards for councils that establish clear criteria for assessing variations to development standards that are applicable to clause 4.6
- establishes a clear process to ensure that guidelines for councils on varying development standards are subject to regular review and can accommodate advice or changes arising from decisions of the NSW courts.

The City of Canterbury Bankstown Council supported the Commission's proposed recommendations in principle, noting that some were matters for the DPIE.

The DPIE submitted that the secretary's assumed concurrence is dealt with under a planning circular, *Variations to Development Standards* (PS18-003), issued on 21 February 2018. On 5 May 2020, PS18-003 was replaced by planning circular *Variations to Development Standards* (PS20-002). Both planning circulars contained a provision requiring councils to follow monitoring and reporting measures, namely:

- proposed variations to development standards cannot be considered without a written application objecting to the development standard and dealing with the matters required to be addressed
- the establishment and maintenance of a publicly available online register of all variations to development standards by the council
- the provision of a report on all variations approved to the DPIE
- the provision of quarterly reports on all variations to development standards approved under council delegation to the council.

The circulars also advised that the DPIE would continue to carry out random audits to ensure compliance with monitoring and reporting measures.

The measures outlined above are not novel. A reporting requirement on variations to development standards has been in place since 1989. The planning circular issued on 14 November 2008 also required councils to establish a publicly available register of development applications determined with variations in standards and to provide a report to each council meeting on these applications. The requirement for written requests to vary development standards is already provided by clause 4.6.

The DPIE submitted that the introduction of local planning panels, combined with revised restrictions on the secretary's concurrence introduced via PS18-003, have significantly reduced the corruption risks associated with variations to development standards.

The principal change in PS18-003, which is now contained in PS20-002 is that the secretary's concurrence may not be assumed by a delegate of a council if the development contravenes a numerical standard by greater

than 10 per cent or the variation is to a non-numerical standard. This restriction does not apply to decisions made by local planning panels. The restriction also does not apply where development applications will continue to be determined by the council in those situations where local planning panels are not mandatory.

At the time of writing, local planning panels were mandatory for all Sydney councils, Wollongong City Council and Central Coast Council. This means that the secretary's concurrence will be assumed for all decisions by councils outside these areas to vary development standards pursuant to clause 4.6. The risks of corruption in the NSW planning system are not limited to the Sydney, Wollongong or Central Coast areas.

Furthermore, the previous and current circulars do not address situations in which the use of clause 4.6 is inappropriate. For example, the issue of clause 4.6 being used as a de facto plan making device has not been specifically addressed. For these reasons, the Commission considers that the circulars and the introduction of local planning panels do not dispense with its concerns about existing corruption risks.

The Commission's recommendations do not require the DPIE to provide concurrence on each occasion a request to vary a development standard is made. Rather, the aim is to ensure that the DPIE has an oversight role for those categories of development seeking to vary development standards that represent a high risk of corruption. The Commission also notes that the DPIE has indicated its intention to commence a review into the content of the August 2011 publication, titled *Varying Development Standards – A Guide*.

Recommendation 10

That the DPIE reviews the concept of "assumed concurrence", including the avenues that exist for clause 4.6 in each council's LEP, to be used as a de facto plan-making device when concurrence is assumed.

Recommendation 11

That the DPIE identifies the circumstances and establishes criteria to determine when the secretary's assumed concurrence will be granted and when it will be withdrawn from councils, which takes into account:

- **the potential for clause 4.6 to be used as a de facto plan-making device**
- **that the risk of the improper use of clause 4.6 extends to all local government areas in NSW.**

Recommendation 12

That the DPIE prepares and, following a period of public consultation, makes public new guidelines on varying development standards for councils that consider the criteria for assessing variations to development standards that are applicable to clause 4.6.

Recommendation 13

That the DPIE establishes a clear process to ensure that guidelines for councils on varying development standards are subject to regular review and can accommodate advice or changes arising from decisions of the NSW courts.

Audits of variations to development standards

Properly conducted audits provide independent assurance that systems are operating effectively while also helping to create a credible threat that improper conduct will be detected.

The NSW Planning Department implemented an audit program on the use of clause 4.6 and its predecessor in response to a 2008 Commission investigation into allegations affecting Wollongong City Council (Operation Atlas). Until recently, these audits were irregular. At the time the public inquiry in this matter commenced, the department had undertaken:

- general compliance audits of various councils in 2009, 2011 and 2016
- the draft audit report (the report of which was available to the Commission in draft) as a consequence of a request from the administrator of the City of Canterbury Bankstown Council.

The general compliance audits provided limited assurance because:

- councils were selected randomly as opposed to being selected based on risk (a risk-based approach would have ensured that the department's resources were aligned to those councils that represented a higher risk of non-compliance)
- the 2009 and 2011 audits relied on small sample sizes that were not expanded when anomalies were found
- it is unclear whether the staff nominated to complete the audits had appropriate or sufficient training or skills in conducting compliance audits
- there were no internal guidelines specifically relevant to conducting the audits.

A consequence of this audit method was that context was not provided for wider trends or potential problems. It was not possible to use the analysis of the audited councils to inform wider recommendations about the variation of development standards.

A further audit was undertaken in 2018, which examined 183 applications from 18 councils. The 2018 audit sample size increased (up from 12 councils in 2016), and the DPIE proposes to continue to expand the scope of its audits. The DPIE has also indicated that it is working closely with the Commission to refine the processes around its compliance audits.

The Commission proposed recommendations to the DPIE dealing with the:

- development of clause 4.6 audit guidelines
- regular review and oversight of the clause 4.6 audit program by its senior management
- provision of advice to councils regarding the inclusion of clause 4.6 in the cycle of audits conducted by local audit and risk committees.

The City of Canterbury Bankstown Council supported the recommendations concerning the development of guidelines and the oversight role of the DPIE's senior management, subject to consideration being given to the DPIE appointing suitably qualified auditors. The City of Canterbury Bankstown Council only partially supported the proposed recommendation concerning council audit and risk committees, submitting that internal audits are of limited value in relation to clause 4.6.

The DPIE submitted that the recommendation concerning the guidelines should be reformatted to take into account:

- its continued work with the Commission to review its audit process
- increases in the number of councils audited
- the commencement of introductory briefings for its audit staff
- its advice to councils in response to issues identified in the audits
- the inclusion of a section on undertaking clause 4.6 audits in an internal procedures manual.

The DPIE also submitted that it is not necessary for its clause 4.6 audit program to be subject to regular review and oversight by senior management. It noted that responsibility for audits has been allocated to a business unit that is responsible for monitoring other processes. The DPIE supported the provision of advice to councils about including clause 4.6 in the cycle of audits undertaken by local audit and risk committees.

The Commission would be concerned if the DPIE continued to randomly select audit participants. It is also concerned that the audit program implemented by the DPIE after the investigation into Wollongong City Council was limited and irregular. Given this background, the Commission is satisfied that the proposed recommendation dealing with clause 4.6 guidelines should be made. The Commission does not have a concern about a specialised business unit in the DPIE overseeing audits as opposed to senior management.

While input should, ideally, be sought from qualified auditors in developing the audit programs, the highly technical nature of the subject matter should also be acknowledged. The draft audit report serves as an example of a better practice audit that was undertaken by a planning specialist. The Commission does not consider it necessary to recommend that audits be undertaken by qualified auditors.

However, the Commission does consider it appropriate for local audit and risk committees to include clause 4.6 in their audit cycles given that councils share responsibility for local planning matters with the DPIE.

Recommendation 14

That the DPIE prepares and publicises guidelines that establish a framework for conducting risk-based audits on the use of clause 4.6 by consent authorities. These guidelines should include:

- **the scope and frequency of audits conducted to monitor the use of clause 4.6, including the circumstances for conducting any special audits**
- **a requirement that the matters to be examined in an audit reinforce the objectives of conducting the audit**
- **an outline of the audit methodology**
- **clear instructions for the staff undertaking the audit**
- **a requirement to publish ongoing records of the audits and their results, observations and recommendations**
- **the necessary skills required by staff conducting the audits.**

Recommendation 15

That the DPIE provides advice to councils regarding the inclusion of clause 4.6 in the cycle of audits conducted by the audit and risk committees of councils.

Development standards and council LEPs

The two principal development standards provided in the SILEP that control the bulk and scale of a building are:

- height of building (in metres), which is the vertical distance from the existing ground level to the highest point of the building
- FSR, which is the ratio of the gross floor area of all buildings within the site to the site area.

The application of FSR and height of building controls to a specific site

On 30 January 2008, the department issued *Height and Floor Space Ratio* (PN08-001) to guide councils on the use of development standards for building heights and FSRs in LEPs. PN08-001 described development standards for height and FSR as "valuable planning tools for implementing strategic planning objectives and providing certainty to the community and land owners about the acceptable bulk and scale of development".

PN08-001 encouraged councils to consider the use of FSR and height of building development standards in small local centres "where increased densities are planned or where density controls will have a substantial impact on the economic value of land". It also encouraged councils "to consider the merit of applying height and FSR controls in other areas particularly where urban growth is planned".

Additionally, PN08-001 advised that, in general, if councils wished to adopt a building height development standard, then an FSR control should also be applied. PN08-001 also allowed that application of height and FSR controls may not always be practical and that a departure from the guidelines may be justified.

CLEP 2012 came into effect on 1 January 2013. While it introduced a height of building development standard, it did not provide a corresponding FSR control for land within four business zones, including the B5 Business Development zone. These zones introduced residential apartments above a non-residential use, known as "shop top housing". The permissibility of shop top housing signified that business zones were intended to be locations for increased housing density and urban growth. A number of development applications considered in this investigation, which relied on clause 4.6 to vary the height standard, were in the B5 Business Development zone, and were therefore unconstrained by an FSR standard in CLEP 2012.

CLEP 2012 was made by the director-general of the NSW Planning Department (as the minister for planning's delegate). At the time CLEP 2012 was made, the department was aware that it did not include an FSR control in business zones. A department document observed:

> *The draft LEP and its controls was discussed and agreed to by the Department prior to being exhibited. The approach of relying on building envelopes in a DCP* [Development Control Plan] *instead of using a FSR standard in the LEP is not peculiar to Canterbury with a number of SILEPs proposing to do the same (e.g. Randwick). It is not proposed to change this approach given the detailed work provided to achieve specific outcomes (e.g. DCP 54 Town Centres) and the endorsement by the Department of the approach taken in the draft LEP.*

The departure from a general policy position of including FSR controls in strategic centres meant a key constraint on the intensity of development in business zones was absent in CLEP 2012. The failure to enforce the pairing of height and FSR controls was identified as problematic in the draft audit report:

> *It is apparent that the variations are the result of the cumulative impact of the lack of FSR controls in the B5 Business Development zoning along Canterbury Road. In the absence of FSR controls height is the only limitation to development potential, encouraging developers to maximise gross floor area.*

The Commission proposed a recommendation that the DPIE:

a) considers the circumstances in which it should mandate the pairing of maximum building height and maximum FSR development standards

b) establishes criteria to determine when it is impractical to do so

c) identifies the measures that will ensure future LEPs will comply with PN08-001.

The City of Canterbury Bankstown Council, while recognising that the matter was within the DPIE's remit, generally supported the recommendation but stated that, without knowing the details of measures to ensure LEPs comply with PN08-001, it could not support them.

The DPIE opposed the proposed recommendation, submitting that it is problematic to mandate the matters referred to in a generally applicable standard instrument. It also argued that inflexible rules will lead to poor planning outcomes and it is likely there will continue to be circumstances that justify departure from any position outlined in a practice note. Instead, its preference is for decisions to be made on a case-by-case basis about pairing maximum building height controls with maximum FSR controls. The DPIE also submitted that LEPs governing areas that do not contain FSR controls constrain built forms through alternative means, such as SEPPs and DCPs.

The DPIE noted that:

> *…work undertaken by the City of Canterbury Bankstown Council collaboratively with the Department, to review the planning controls for Canterbury Road has concluded the existing height controls must be complemented with floor space ratio controls.*

It also noted that the controls used to manage built form outcomes and development in place of FSR for the sites considered in the current investigation were located in the DCP. The DPIE also advised that "the Government proposes to introduce a standard DCP across NSW so that development controls structure and formatting within both LEPs and DCPs are more consistent state-wide".

The Commission agrees that there should be some scope for flexibility in the pairing of building height and FSR controls. However, the Commission is satisfied that flexibility is not precluded by its recommendations, and that there is a need for clearer guidance as to the circumstances in which the height and FSR should be matched, and the circumstances in which it is impractical to do so.

The Commission is of the view that establishing criteria represents a middle of the road approach. However, the Commission does accept that the PN08-001 is intended to provide guidance rather than mandate compliance, and does not go on to make part (c) of its aforementioned proposed recommendation.

The Commission does not accept that the inclusion of controls to manage built form outcomes in DCPs is generally appropriate given that the provisions in these guidelines are not statutory requirements, and having regard to the evidence in this investigation that Council's DCP was considered inconsistent with its LEP. Further, many relevant SEPPs – such as *Design Quality of Residential Apartment Development* ("SEPP 65") – are not site-specific and consequently do not contain explicit development standards controlling the built form for a given parcel of land. An LEP remains the most appropriate mechanism to control the built form for a given site.

Recommendation 16

That the DPIE:

- **considers the circumstances in which the application of both maximum height of building development standards and maximum floor space ratio (FSR) development standards should be mandatory in LEPs**
- **establishes clear, robust and objective criteria to determine when it is impractical to pair maximum height of building development standards with maximum FSR development standards in LEPs.**

Reduced oversight of LEP amendments

On 1 March 2018, amendments to the EPA Act came into force that allowed LEPs (including LEP amendments) to be made by the minister for planning or a council if so authorised by a Gateway Determination. This statutory change consolidated the handing of plan-making powers to councils which had been occurring under ministerial delegation since 14 October 2012 ("the October 2012 delegation").

As part of introducing the October 2012 delegation, the NSW Planning Department issued planning circular *Delegations and Independent Reviews of Plan-making Decisions* ("PS12-006"). PS12-006 identified six circumstances in which councils would be routinely delegated powers to make LEPs following a Gateway Determination, including:

- spot rezonings consistent with an endorsed strategy and/or surrounding zones
- matters of local significance as determined by a Gateway Determination.

Issued in April 2013, the NSW Planning Department's *A Guide to Preparing Local Environmental Plans* ("the LEP Guide") further clarified that the circumstances where powers were routinely delegated to councils to make LEPs included:

- LEPs that will result in a relaxation of a development standard on a site to promote development including potential increases to FSR and height of building controls and reduced minimum lot sizes
- spot rezonings that will result in an upzoning of land in existing areas zoned for residential, business and industrial purposes.

The LEP Guide also noted that the NSW Planning Department's primary function was "administrative in nature" when a planning proposal was delegated to a council. PS12-006 and the LEP Guide are consistent with a preference by the NSW Planning Department to grant powers to councils to amend LEPs.

A risk-based approach

The corruption risks associated with planning proposals are significant. These risks are similar to those associated with the use of clause 4.6 to vary development standards,

including the capacity to make large windfall profits from an LEP amendment.

The DPIE informed the Commission that it took a risk-based approach in developing criteria for the delegation of plan-making functions that considered the risks of poor planning outcomes, as opposed to corruption risks. The DPIE submitted that:

> *Other levels of government such as councils should have in place appropriate governance arrangements and procedures to enable them to carry out their functions in an appropriate manner. Council staff have the same protections for public interest disclosures as State government employees, as well as the same obligations and duties to report corrupt conduct.*

It also submitted that, in exercising its planning functions, it is primarily a planning authority and not a regulator of councils, but it would consider options to address the risks associated with authorising a council to be the local plan-making authority and may include a further review of the authorisation.

Capacity to revoke LEP delegations to councils

Despite having the power to do so, the NSW Planning Department rarely revoked or modified a council's plan-making delegation in respect of LEPs and did not have a process in place for being informed when a government agency objected to a proposal.

The DPIE's role in verifying Gateway conditions

The evidence in this inquiry suggested that the NSW Planning Department had limited capacity for verifying that councils had complied with gateway conditions. The Commission proposed a recommendation that the DPIE:

- applies a risk-based approach that considers corruption risks prior to the drafting of Gateway Determinations authorising councils to make LEPs
- takes measures to verify that councils have complied with Gateway Determination conditions
- establishes a program of regular risk-based auditing of council processes relating to making LEP amendments.

The City of Canterbury Bankstown Council supported the proposed recommendation while noting that it was a matter for the DPIE.

The DPIE submitted that it had demonstrated an appropriate level of engagement in plan-making processes for LEPs that were the subject of the investigation.

The Commission is satisfied that there is a lack of systematic approach to assessing corruption risks prior to authorising a council to make an LEP or ensuring that its gateway conditions are met. A robust system of oversight, scrutiny and assurance is warranted given the corruption risks inherent in the NSW planning system.

Recommendation 17

That the DPIE:

- **applies a risk-based assessment that considers corruption risks prior to the drafting of Gateway Determinations authorising councils to make LEPs**
- **takes measures to verify that councils have complied with Gateway Determination conditions**
- **establishes a program of regular risk-based auditing of council processes relating to the making of LEP amendments to help provide assurance over systems and to establish whether gateway conditions were met (the outcome of audits should inform future Gateway Determinations authorising councils to make LEPs).**

Improving the integrity of planning operations

The Commission's investigation also identified a number of areas where operational controls in the NSW planning system can be improved to mitigate corruption risk. These areas include:

- calculation of development application fees
- manipulation of development applications to avoid the scrutiny of some planning panels, and
- engagement of independent planning consultants and their interactions with staff.

The value of a development

The two main methods for calculating the value of a development are the estimated cost of works (ECW) and the capital investment value (CIV).

For developments involving the erection of a building, the ECW relates to costs associated with constructing the building and the costs involved in preparing the building for its purpose. Local development application fees are calculated with regard to, among other things, the ECW of a development.

CIV is concerned with the costs necessary to establish and operate a project. It is used as a threshold measure to

determine whether a development application should go to a Sydney district or regional planning panel.

Calculating the estimated cost of development

The Environmental Planning and Assessment Regulation 2000 ("the EP&A Regulation") provides that the ECW of a development is the amount indicated in the application form unless the consent authority is satisfied the cost indicated is neither genuine nor accurate.

Issued on 14 March 2013, the Department's *Calculating the Genuine Estimated Cost of Development* ("PS13-002") recommends that for:

- a development up to $100,000, the cost should be estimated by the applicant or a suitably qualified person with the methodology used to calculate that cost submitted with the application
- a development between $100,000 and $3 million, a suitably qualified person should prepare the cost estimate and submit it, along with the methodology, with the application
- a development more than $3 million, a detailed cost report should be prepared by a registered quantity surveyor verifying the cost of the development.

Problems with verifying ECWs

Calculating the ECW value for developments is a difficult task that often leads to inconsistencies. Many councils lack clear processes to conduct additional checks to confirm the accuracy of ECW. Staff at the Council confirmed that ECW values were either checked in limited circumstances or not all.

In situations where ECW exceeds $50,000, a proportion of the application fee is required to be remitted to the secretary of the NSW Planning Department. The fees are provided to the secretary for services associated with, among other things, monitoring and reviewing:

- practices and procedures followed by consent authorities when dealing with development applications
- the provisions of environmental planning instruments.

A lack of systems to verify ECW raises the prospect that the NSW Government has forgone revenue. The fact that a development's ECW is used to calculate development application fees also provides an obvious incentive for an applicant to understate the monetary value.

In these circumstances, it is desirable to implement an alternative method for determining fees. The calculation criteria should be clear, robust, objective and easily verifiable. Suitable criteria might include the type of land use proposed by the development and the gross floor area of a development.

As an alternative approach to ECW, the Queensland model for development fee calculations depends on the nature and scale of the development proposed. For instance, fees for residential apartments incorporate a base fee plus an additional fee per unit.

The Commission proposed a recommendation that the method for calculating fees associated with local development applications be changed so that ECW values are no longer relied on. The Commission also proposed an alternative approach that is based on clear, robust and objective criteria that is capable of easy verification.

The City of Canterbury Bankstown Council agreed that the method for calculating fees should meet the criteria outlined in the recommendation. It also submitted that councils should be given the opportunity to make submissions on this issue.

The DPIE advised the Commission that it proposes to undertake a review of fees. It will engage the Independent Pricing and Regulatory Tribunal to review the local development fees prescribed under the EP&A Regulation. It also advised that it could consider expanding the scope of its review to include alternative methods of fee calculation. This review should provide an opportunity for consultation with councils. In those circumstances, the Commission is satisfied that the recommendation should be made and could be dealt with as part of such a review.

Recommendation 18

That the method for calculating fees associated with local development applications be reviewed by the DPIE with the aim that estimated cost of works is no longer relied on. Instead fees should be:

- **determined by criteria that are clear, robust and objective**
- **capable of easy verification by consent authorities.**

Development splitting

For the reasons set out in chapter 9, the Commission is satisfied that the development applications for the Doorsmart project were split across two sites so that each application had a CIV of just below $20 million, with the consequence that the Council – rather than the relevant JRPP – would be the determining authority. The Council was a more appealing consent authority because the development proponents had existing relationships with Council officials.

It was also possible to avoid JRPP scrutiny of significant modifications to development applications with a CIV of more than $20 million by using development applications (which were assessed on their individual CIV of less than $20 million) rather than modification applications (which would have been referred back to the approving JRPP) to add additional stories to a site.

For example, as set out in chapter 7, within weeks of the Sydney East JRPP granting conditional approval for a six-storey dwelling at 548-568 Canterbury Road, a new development application was lodged to add an extra two stories to the site. The Council determined the application, rather than referring it back to the JRPP for consideration.

The draft audit report made available to the Commission expressed concern about the manipulation of development proposals to avoid the relevant JRPP's scrutiny. That report referred to this practice as "development splitting".

The problem of development splitting is exacerbated by the fact that CIVs, as is the case with ECW, can be imprecise and are largely determined by information provided by applicants.

Five Sydney district planning panels now operate in the greater Sydney region and four regional planning panels operate across NSW, which are the equivalent of the old JRPPs. The role of these panels as consent authorities continues to include thresholds based on CIVs.

The Commission proposed recommending that the DPIE consider an alternative to CIV thresholds as a trigger for referrals to Sydney district and regional planning panels. The Commission also proposed that the DPIE strengthen guidance to help ensure development applications are not split into multiple applications, or used instead of modification proposals, to avoid the scrutiny of Sydney district and regional planning panels.

The City of Canterbury Bankstown Council stated that the Commission's proposals were matters for the DPIE, but supported the recommendations in principle.

The DPIE submitted that it could review the categories of development that are referred to Sydney district and regional planning panels to identify alternatives to CIV. An option could be to adopt the approach used to categorise high-impact projects (known as "designated" development), which considers the type, scale and location of a proposal.

The DPIE also noted that neither ECW or CIV is a trigger for referral to a local planning panel, where they exist, which will determine development applications where they involve:

- a conflict of interest
- more than a specified number of objections
- a breach of a development standard by more than 10 per cent or a non-numerical standard, or
- sensitive development (including apartments to which SEPP 65 applies).

The DPIE submitted that the creation of local planning panels minimised incentives to split development applications to avoid referral to district or regional planning panels as these would now, in any event, go to local planning panels. The DPIE stated that it will, however, consider amending the *Local Planning Panels' Direction* to stop development splitting.

Additionally, the DPIE submitted that it would be unreasonable to introduce provisions to enable a consent authority to reject a development application on the basis that it should more properly be lodged as a modification application. It noted that s 4.55 of the EPA Act (formerly s 96) requires consent authorities to be satisfied that a modification proposal is "substantially the same" as the original approval. The Commission accepts that there are difficulties in such an approach, and has not proceeded with its proposed recommendation in respect of encouraging modification applications in appropriate circumstances rather than development applications.

However, the Commission is satisfied that there is a need for clearer guidance for councils and planning panels to address the issue of development splitting, and has proceeded with the balance of its proposed recommendation.

Recommendation 19

That the DPIE considers a clear, robust and verifiable alternative to capital investment value as a jurisdictional threshold for planning panels.

Recommendation 20

That the DPIE strengthens guidance for councils and planning panels to help ensure development applications are not split by development proponents into multiple applications to avoid referrals to planning panels.

Independent planning reports

The DPIE can require councils to provide additional information (for example, in the form of an urban design study) as part of its initial review of planning proposal documents prior to issuing a Gateway Determination. It can also require councils to obtain urban design studies as part of a gateway condition.

Planning consultant's terms of engagement

During the period examined by the Commission, the Council engaged planning consultants to undertake urban design studies. The professional services contracts used for these studies differed from each another. In addition, the contracts did not:

- identify that the consultants were public officials for the purposes of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act")
- specify how the Council's code of conduct applied to the consultants
- refer to a statement of business ethics for suppliers or other similar document
- provide information about how to make disclosures under the *Public Interest Disclosures Act 1994*.

The Commission proposed a recommendation that the City of Canterbury Bankstown Council develop standardised provisions for consultancy services agreements and a statement of business ethics for suppliers. It supported the recommendation to the extent that these matters are not already reflected in its existing documentation.

Recommendation 21

That the City of Canterbury Bankstown Council develops standardised provisions for consultancy services agreements and a statement of business ethics for suppliers. The agreements and statement of business ethics should advise consultants about:

- **how to make disclosures under the *Public Interest Disclosures Act 1994***
- **the City of Canterbury Bankstown Council's ethical obligations**
- **their ethical responsibilities**
- **the jurisdiction of the ICAC Act.**

Obtaining external consultant reports

As set out in chapters 5 and 6, the Commission is satisfied that the director of city planning improperly sought to influence the contents of reports from external consultants. There was also some disagreement amongst Council staff about when a report from an external consultant should be "independent", and what that meant. Not all interactions between consultants and council planners over the substance of a report are inappropriate. For example, it is acceptable practice for council planning officers to seek clarity around a consultant's position or request additional information to support an expressed view.

The Commission proposed a recommendation that the DPIE should introduce a practice note on the topic of specialist advice covering interactions between councils and consultants, and when it is appropriate for studies to be independent of proponents. There is no doubt that obtaining advice from an expert who is independent both of council and of the development proponent about a complex planning issue could greatly assist a consent authority in the proper exercise of its functions. However, there are also risks that such studies may be obtained in circumstances where, absent a transparent process, they could be geared towards a pre-determined outcome.

The City of Canterbury Bankstown Council supported the proposed recommendation while noting that it was a matter for the DPIE.

The DPIE submitted that the recommendation was not necessary because the current employment framework for local and state government staff is sufficiently robust to address concerns about inappropriate interactions between government planners and third parties. This framework includes codes of conduct and requirements concerning conflicts of interest.

The DPIE submitted that the EPA Act enables directions to be made to a landowner or council to provide studies relating to a planning proposal. It also noted that *A Guide to Preparing Planning Proposals*, released in December 2018, provides guidance on planning proposals. The DPIE indicated that it may undertake a review of existing guidance material to ensure clarity around when further expert advice may be sought.

The Commission believes there is scope for the issuing of a practice note, or similar guidance, to draw together and clearly explain the existing web of obligations and frameworks as they apply to council staff obtaining external consultant reports. Not only would such a practice note assist those attempting to honestly exercise their official functions, but it would provide a clear framework against which to measure improper interactions.

The Commission also observes that *A Guide to Preparing Planning Proposals* does not squarely address the issue of obtaining independent advice following the issuance of a Gateway Determination, but instead deals primarily with the preparation of planning proposals. The guide also does not address when it is appropriate to verify a proponent's information or obtain information that is independent of a proponent as part of the planning proposal documents submitted prior to a Gateway Determination. The Commission considers that this information would assist councils to develop a consistent approach to the circumstances in which external consultant reports should be obtained.

Recommendation 22

That the DPIE issues a practice note, or other similar guidance, on the topic of local councils obtaining specialist advice about planning matters, including obtaining urban design studies. The practice note should address:

- **what constitutes proper interactions between councils and consultants engaged to provide advice**
- **when specialist advice, independent of a development proponent, should be requested and relied on.**

Design quality of residential apartment developments

Design standards and requirements are applied to residential apartment developments via SEPP 65 and the EP&A Regulation. In 2015, the minister for planning also released new Apartment Design Guidelines (ADG), which superseded the Residential Flat Design Code. An associated part of the design principles is a requirement for design verification statements that include:

- an explanation of how the principles and objectives of the ADG have been met
- a statement that a registered architect designed or directed the design of the proposal.

The Council did not have a process in place to confirm that the person who signed a design verification statement was suitably qualified to make or direct the design of a residential apartment. Nor did it have a formal process in place to check compliance with SEPP 65, relevant clauses of the EP&A Regulation regarding design requirements and the ADG.

The Commission proposed a recommendation that the City of Canterbury Bankstown Council ensures compliance with design requirements for residential apartment developments. The City of Canterbury Bankstown Council supported the recommendation, submitting that it should be applicable to all councils. It also noted that its current development assessment processes enforce the design requirements.

Recommendation 23

That the City of Canterbury Bankstown Council ensures that its development assessment procedures assess and verify compliance with design requirements for residential apartment developments, including provisions relating to design verification statements.

These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and, as required by s 111E of the ICAC Act, will be furnished to the DPIE, Department of Premier and Cabinet, the City of Canterbury Bankstown Council, the NSW Government and the responsible minister.

As required by s 111E(2) of the ICAC Act, the relevant minister and general manager of the City of Canterbury Bankstown Council must inform the Commission in writing within three months (or such longer period as the Commission may agree to in writing) after receiving the recommendations, whether they propose to implement any plan of action in response to the recommendations and, if so, details of the proposed plan of action.

In the event a plan of action is prepared, the relevant minister and general manager of City of Canterbury Bankstown Council are required to provide a written report to the Commission of their progress in implementing the plan 12 months after informing the Commission of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the first report.

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

Appendix 1: The role of the Commission

The Commission was created in response to community and Parliamentary concerns about corruption that had been revealed in, inter alia, various parts of the public sector, causing a consequent downturn in community confidence in the integrity of the public sector. It is recognised that corruption in the public sector 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 Commission's functions are set out in s 13, s 13A and s 14 of the ICAC Act. One of the Commission's principal functions is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

i. corrupt conduct (as defined by the ICAC Act), 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.

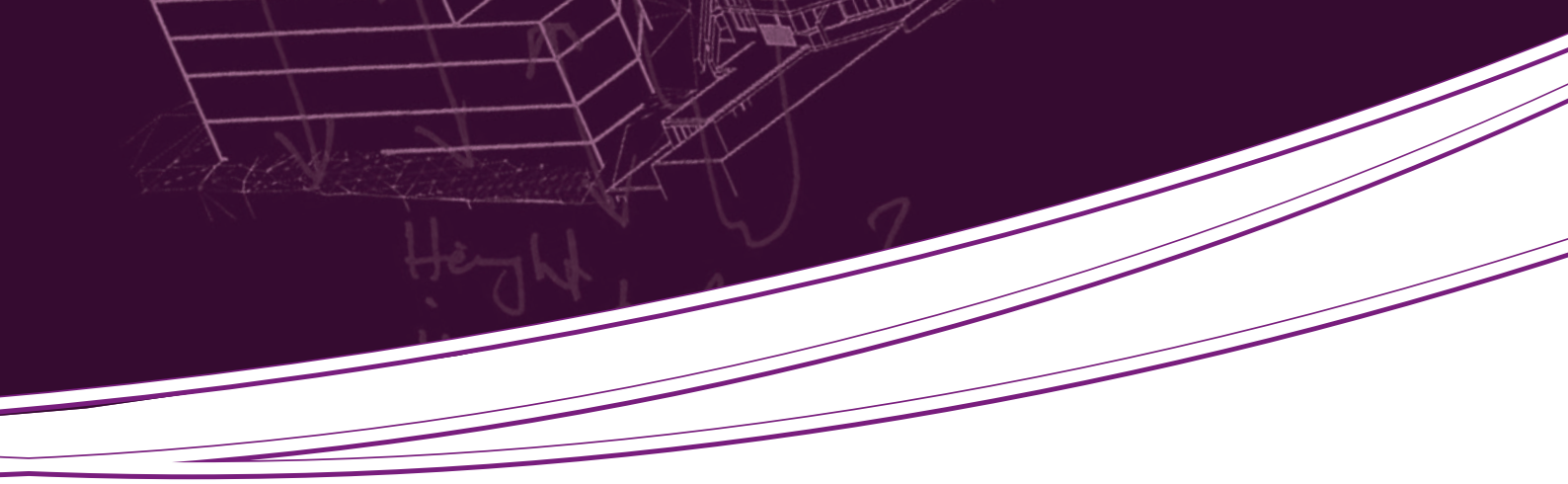
The Commission may also investigate conduct that may possibly involve certain criminal offences under the *Electoral Act 2017*, the *Electoral Funding Act 2018* or the *Lobbying of Government Officials Act 2011*, where such conduct has been referred by the NSW Electoral Commission to the Commission for investigation.

The Commission may report on its investigations and, where appropriate, make recommendations as to any action it believes should be taken or considered.

The Commission may make findings of fact and form opinions based on those facts as to whether any particular person has engaged in serious corrupt conduct.

The role of the Commission is to act as an agent for changing the situation that has been revealed. Through its work, 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 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: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 of the ICAC Act and which is not excluded by s 9 of the ICAC Act.

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 8(2A) provides that corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

(a) collusive tendering,

(b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,

(d) defrauding the public revenue,

(e) fraudulently obtaining or retaining employment or appointment as a public official.

Subsection 9(1) provides that, despite s 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.

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 s 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.

Subsection 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within

the description of corrupt conduct in s 8 is not excluded by s 9 from being corrupt if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Subsection 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

Section 74BA of the ICAC Act provides that the Commission is not authorised to include in a report under s 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

The Commission adopts the following approach in determining findings of corrupt conduct.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of subsections 8(1), 8(2) or 8(2A) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirement of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of subsection 9(5). In the case of subsection 9(1)(a) and subsection 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of subsections 9(1)(b), 9(1)(c) and 9(1)(d) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

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 are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. 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 when making factual findings. 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 *Rejfek 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).

Findings of fact and corrupt conduct set out in this report have been made applying the principles detailed in this Appendix.

Appendix 3: Summary of responses to adverse findings

Section 79A(1) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") provides:

> *The Commission is not authorised to include an adverse finding against a person in a report under section 74 unless—*
>
> *(a) the Commission has first given the person a reasonable opportunity to respond to the proposed adverse finding, and*
>
> *(b) the Commission includes in the report a summary of the substance of the person's response that disputes the adverse finding if the person requests the Commission to do so within the time specified by the Commission.*

Counsel Assisting the Commission made written submissions setting out, inter alia, what adverse findings it was contended were open to the Commission to make against various parties. These were provided to relevant parties on 7 August 2019. Written submissions in response were received by 10 October 2019. Leave to make cross-party submissions was applied for and granted to two parties. Cross-party submissions were received by 25 October 2019.

The Commission considers that, in the circumstances, all affected parties had a reasonable opportunity to respond to the proposed adverse findings.

Mr Montague, Mr Vasil and the Department of Planning, Industry and Environment (DPIE) requested the Commission include in this report a summary of the substance of their responses. The Commission did not accept all of the adverse findings contended for by Counsel Assisting, or by other parties. It is not necessary to summarise the substance of responses in relation to those adverse findings not made by the Commission.

Mr Montague

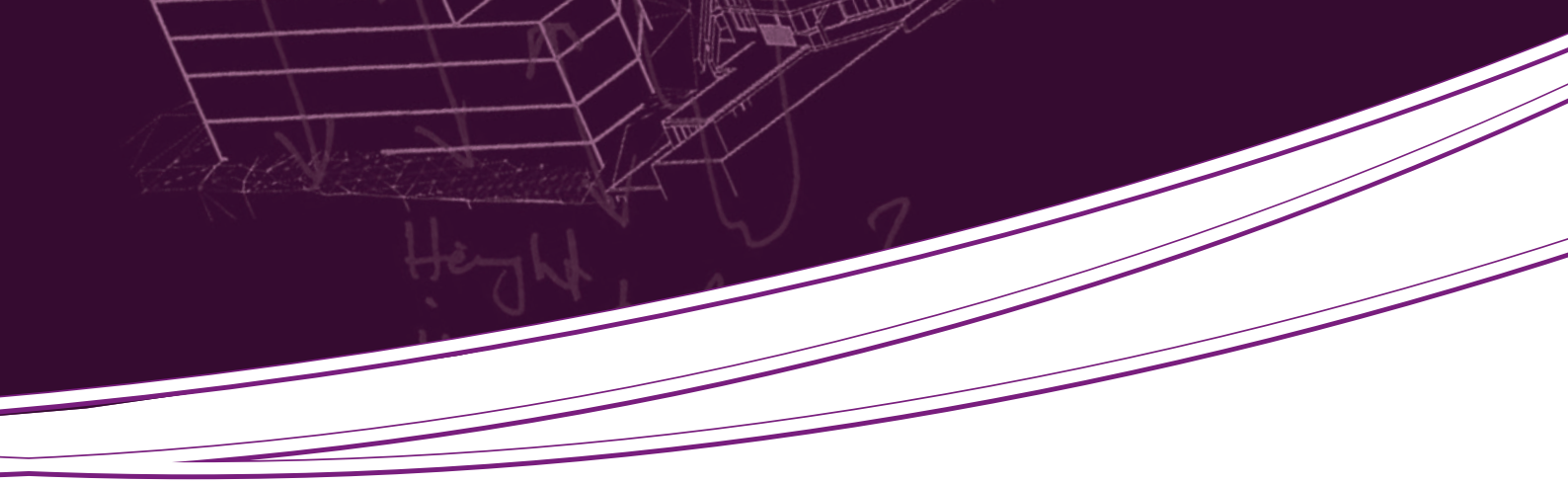
Mr Montague denied being involved in any wrongdoing or corrupt conduct.

Submissions relating to the formation of the interview panel and the inclusion of Mr Stavis on the shortlist of candidates are set out and dealt with in chapter 2 of this report.

It was submitted on behalf of Mr Montague that he believed Mr Stavis to be the best candidate available, in the unique circumstances of the Council at the time, and that he was entitled to do so. It was submitted that the extent of the difficulties faced by Mr Montague should not be underestimated, and that he was desperate to have the position filled. Further, it was submitted that Mr Montague could not appoint anyone without consulting Council, and he understood that the consequences of appointing someone whom a majority of councillors, or even those most interested in planning, would not work with, would not in fact be a merit appointment.

It was submitted that Mr Montague was unaware of the contacts between Mr Stavis and Mr Khouri, Mr Vasil, Mr Hawatt and Mr Azzi prior to the interviews. It was submitted that the effect of the contact with Mr Hawatt and Mr Azzi was to skew the interview process in Mr Stavis' favour.

It was also submitted for Mr Montague that, if the references initially obtained for Mr Stavis were problematic, the recruitment consultant should have told him so. It was also submitted that there was no contemporaneous evidence supporting the conclusion that Mr Montague was pressured prior to his decision to appoint Mr Stavis, that there was no history of Mr Hawatt or Mr Azzi pressuring Mr Montague and that a finding that he was pressured would be inconsistent with objective evidence as Mr Montague was on leave for a period following the interviews.



It was submitted for Mr Montague that Mr Hawatt and Mr Azzi did not push for Mr Stavis but expressed interest in him, that Mr Montague formed his own view and the fact that Mr Hawatt's and Mr Azzi's views had some impact does not establish pressure. It was submitted that none of Mr Montague's statements regarding pressure rise to the level of an admission that the pressure was a threat to Mr Montague or he perceived it to be directed against himself.

It was further submitted that Mr Montague's conduct after 8 December 2014 was consistent with someone who would not succumb to pressure, and that in the face of a threat made by councillors, Mr Montague adhered to his position. In support of this submission, it was suggested that Mr Montague did not flinch in the face of that threat until he formed the view on the basis of legal advice that he had little choice but to proceed with Mr Stavis' appointment as a necessary circuit breaker. It was also submitted that "the war" was brought to a close by Mr Robson outmanoeuvring the councillors procedurally.

Mr Vasil

The Commission has not made any of the adverse findings in respect of which Mr Vasil sought that the substance of his responses be recorded.

The DPIE

The DPIE submitted that any findings, observations or recommendations intended to be made by the Commission regarding the NSW planning system should acknowledge the following matters:

- the *Local Government Act 1993* and the *Environmental Planning and Assessment Act 1979* have undergone substantial amendment over the last five years and there will be further reforms, including the implementation of all of the recommendations from a 2018 review conducted by Nick Kaldas APM
- the DPIE has published a number of planning circulars over the last five years, which demonstrate numerous changes and improvements to the planning system, including in relation to the delegation of plan-making functions and rezoning reviews (PS18-013) and changes to the arrangements for which councils may assume the secretary of the DPIE's concurrence to vary development standards (PS18-003).

The DPIE submitted that the Commission is not in a position to express considered views about the current operation of the planning system on the basis of this investigation.

The DPIE submitted that the evidence did not support a finding that it did not properly oversee the making and amendments of local environmental plans (LEPs) or that it failed to effectively oversee the use of clause 4.6 in the Canterbury LEP as well as other LEPs in NSW and that provided opportunities for misuse of that clause. It submitted that, as an independent level of elected government, councils are, and should be, primarily responsible for their own governance, including day-to-day plan-making for local government matters.

The DPIE also submitted that a finding that a potential safeguard had been removed by reason of assumed concurrence for the purpose of clause 4.6(5) of the Standard Instrument Local Environmental Plan would be unwarranted, having regard to:

- the limitations on the use of clause 4.6 by council delegates and the setting up of planning panels to exercise the functions formerly exercised by councillors, which have since been implemented, and
- the wording of clause 4.6, which envisages that the council must be satisfied that the relevant criteria in clause 4.6(4) are satisfied.

Submissions from the DPIE concerning other aspects of the Commission's corruption prevention findings and recommendations are set out in chapter 10.

I·C·A·C

INDEPENDENT COMMISSION
AGAINST CORRUPTION

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