

FINAL REPORT

Investigation pursuant to referral under
Section 24(2)(a) *Independent Commissioner Against Corruption Act 2012*

Public Authority	City of Mount Gambier
Public Officer	Mayor Andrew Lee
Ombudsman reference	2017/01733
ICAC reference	2016/001440
Date of referral	15 February 2017
Issue/s to be assessed	<ol style="list-style-type: none">1. Whether Mayor Andrew Lee committed misconduct in public administration by conducting personal business while representing the City of Mount Gambier when attending the Shandong Business delegation in China in April 20162. Whether Mayor Andrew Lee committed misconduct in public administration by using his mayoral position to gain a personal benefit by acquiring shares in the Rymill Coonawarra winery

Jurisdiction

This matter was referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (the ICAC Act), as raising potential issues of misconduct in public administration within the meaning of that Act (the referral).

Section 14B of the *Ombudsman Act 1972* provides:

14B—Referral of matter by OPI or ICAC

- (1) If a matter is referred to the Ombudsman under the ICAC Act, the matter—
 - (a) will be taken to relate to administrative acts for the purposes of this Act; and
 - (b) must be dealt with under this Act as if a complaint had been made under this Act and—
 - (i) if the matter was the subject of a complaint or report under the ICAC Act—as if the person who made the complaint or report under that Act was the Complainant under this Act; or
 - (ii) if the matter was assessed under that Act after being identified by the Commissioner acting on the Commissioner's own initiative or by the Commissioner or the Office in the course of performing functions under any Act—as if the Commissioner was the complainant under this Act.

(2) In this section—

Commissioner means the person holding or acting in the office of the Independent Commissioner Against Corruption under the ICAC Act;

ICAC Act means Independent Commissioner Against Corruption Act 2012;

Office means the Office for Public Integrity under the ICAC Act.

These issues concern alleged breaches by Mayor Andrew Lee of clauses 3.1, 3.2, 3.4, 3.7 and 3.13 of Part 3 of the Code of Conduct for Council Members (**the Code of Conduct**).

Failure by a council member to comply with Part 3 of the Code of Conduct constitutes misconduct for the purposes of section 5(3)(a) of the ICAC Act, a finding of which may also constitute grounds for disciplinary action under the *Local Government Act 1999*.

Investigation

Using my powers under the Ombudsman Act, I have conducted an investigation of the issues in response to the referral by:

- assessing the information provided by the Commissioner
- seeking a written response from:
 - the Mayor of the City of Mount Gambier, Mr Andrew Lee
 - the council’s Chief Executive Officer(CEO), Mr Mark McShane
- conducting interviews with:
 - the Mayor of the council, Mr Andrew Lee
 - Mr Jing Li - State Development Officer - Department of State Development
 - the Mayor of the Wattle Range Council, Mr Peter Gandolfi
 - Mr John Rymill - formerly of Rymill Coonawarra winery
- considering:
 - the ICAC Act and the Ombudsman Act
 - the Code of Conduct for Council Members
 - the Local Government Act
 - the council’s Records Management policy
 - the council’s Members Allowances Re-imburements, Benefits and Facilities policy
- preparing a provisional report
- preparing this final report.

Standard of proof

The standard of proof I have applied in my investigation and this report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court’s decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*), I have considered the nature of the complaint and the allegations made and the consequences if they were to be upheld. *Briginshaw* recognises that greater care is needed in considering the evidence in some cases;¹ and it is best summed up in the decision as follows:

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 ...²

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Response to my provisional report

Mayor Andrew Lee's legal representatives provided me with a letter dated 6 December 2017. The letter declined to make any comment on my provisional views, save for preserving Mayor Lee's right to make further submissions in the event that I received comments which caused me to reconsider the findings made in my provisional report.

The Chief Executive Officer of the City of Mount Gambier advised me, in an email dated 20 November 2017, that he had no comment to make on my provisional report.

As such, the content of this final report does not vary my findings from the provisional report issued on 15 November 2017.

Background

1. On 30 January 2017, *The Advertiser* reported a story from Regional Reporter Erin Jones that the mayor of the City of Mount Gambier had 'failed to declare income from a Coonawarra winery, and that he used a taxpayer funded business trip to China where he met his new co-owner about the purchase of the business'.³
2. In an editorial published the same day, the newspaper stated that the Jones story had raised 'troubling questions for this leader of the south east council.' It went on to opine that:

Mayor since 2014, Mr Lee failed to declare ownership of a Coonawarra winery amid allegations that he used a taxpayer funded trip to China to negotiate with his new owner, Gang Ye, 50. The mayor denies wrongdoing.

But in revelations that raise further questions about local government laws, the council's chief executive did not know about his mayor's new multi-million business interests. Mr Lee must now come clean on his conduct.⁴
3. Following further reports and editorials on the story in *The Border Watch* on 31 January and 1 February 2017, my Office contacted the Chief Executive Officer of the council to ascertain the status of Mayor Lee's Register of Member's Interests. I wanted a report on whether there was an apparent breach of section 67(1) of the Local Government Act that requires a council member to declare their sources of income, memberships and any gifts received worth more than \$750.
4. The report I received satisfied me that, although Mayor Lee had apparently neglected to update the Register to declare his ownership interest in the Farunde Wine Co Pty Ltd, he was still within the one month timeline stipulated in the legislation to complete the declaration. I accepted this explanation and closed my file on the matter.
5. On 15 February 2017 the Independent Commissioner Against Corruption wrote to me to refer two allegations of misconduct concerning Mayor Lee's personal business activities while representing the council in China and the circumstances of the mayor's acquisition of shares in the Rymill Coonawarra winery.
6. I address each of the allegations separately below.⁵

³ 'Regional mayor's failure to declare' *The Advertiser* 30 January 2017 p.3.

⁴ 'Crucial to keep game of politics clean' *The Advertiser* editorial 30 January 2017 p.16.

⁵ Throughout this report I have used the title 'Mayor Andrew Lee' or 'Mayor Lee'. This is for ease of reference; not to imply that Mr Andrew Lee was always acting in his capacity as the mayor of the City of Mount Gambier.

Alleged conduct of personal business while representing the Council

7. It was alleged, as detailed below, that Mayor Lee inappropriately undertook personal business while representing the council when attending the Shandong Business delegation in April 2016.
8. This issue was one of the three that the council resolved to refer to the OPI at its Special Meeting on 31 January 2017.
9. This matter was also the primary issue raised in the Mayor of Wattle Range Mr Peter Gandolfi's evidence to my investigation. I set out below the sequence of events regarding the China trip outlined in Mr Gandolfi's evidence.
10. Mr John Rymill called Mayor Gandolfi in April 2016, the day before the latter left for China, to ask if he could sign a Memorandum of Understanding (**MoU**) with a Chinese company on behalf of Rymill Coonawarra. He provided a draft MoU and advised that it was an agreement to sell wine from Rymill Coonawarra to a company called Landbridge and potentially develop assets together.⁶ Mayor Gandolfi got advice from the Strategic Adviser for China, which was that it was fine for him to sign the MoU on Rymill Coonawarra's behalf.
11. Mayor Gandolfi notified Mr Rymill that he could sign it and then received a text from Mr Rymill stating:

Andrew Lee is helping with some liaison with the other party, so feel free to ask him if he knows anything else.
12. Mayor Gandolfi then called Mr Rymill to ask what Mayor Lee's involvement was and Mr Rymill said he was not sure.
13. Once in China, Mayor Gandolfi attended a dinner on 5 April 2016 at the invitation of Mayor Lee with the Landbridge Group and other guests. Mayor Lee also attended. Mayor Gandolfi was introduced to Mr Ye Gang at the dinner. The next morning he signed the MoU on Rymill Coonawarra's behalf with Mr Ye Gang at a formal function. He photographed the MoU to send to Mr Rymill. He noticed that there was a change from the draft MoU he had received. The signed MoU included reference to 'Furunde Holdings', a subsidiary of Landbridge, which had not been mentioned in the draft MoU.
14. The delegation returned to Australia. In September 2016 Mr Ye Gang visited the Coonawarra. Mayor Lee invited Mayor Gandolfi to attend the winery with him and Mr Ye Gang, saying that they were 'talking price'. Mayor Gandolfi declined. He subsequently discovered in October that Rymill Coonawarra had been sold to Mr Ye Gang. That was the first he was aware of the possibility of the winery itself being sold, having believed prior to that point that it was simply a deal to sell wine. Subsequently Mayor Gandolfi discovered that Mayor Lee had become a director and a shareholder of Rymill Coonawarra (or, in fact, of Furunde Wine Co Pty Ltd, the new owner of Rymill Coonawarra).
15. The general criticism, from Mayor Gandolfi and other public commentary, is that if Mayor Lee assisted in negotiations while in China in an official capacity, with the intention of benefiting personally from the negotiations, it constituted an inappropriate use of his influence and position.

⁶ Landbridge Group Co Ltd is a company based in Shandong engaged in port logistics, petrochemical engineering and cultural tourism businesses in China and internationally. The Chairman of Landbridge Group Co Ltd is Mr Ye Cheng. His brother is Mr Ye Gang. Mayor Lee states that he first met Mr Ye Cheng at a State dinner on a delegation to Shandong in May 2015.

16. Mayor Lee has acknowledged that he met with Mr Ye Gang during his trip to China but has denied that there was any wrongdoing involved. The 1 February 2017 article in the Border Watch refers to a statement by Mayor Lee in the following terms:

Mr Lee denied engaging in personal business negotiations in his meeting with Mr Ye during the state funded Shandong Business Mission in April last year.

He told The Border Watch on Monday the purchase of Rymill Coonawarra was not discussed during the dinner he attended with Mr Ye and he clarified this further in his statement.

'I did not use taxpayer funds to advance my interest in the Rymill Coonawarra winery', he said in the statement.

'Mr Ye contacted me directly after the Shandong visit - any meetings with Mr Ye in relation to this matter were outside my official duties and I paid the expenses out of my own resources'.

'I did not perceive a conflict of interest because the region is outside of my council area and I understood that I had declared my interest promptly'.

17. From the evidence available to my investigation, it appears that the relevant bodies, Furunde Wine Co Pty Ltd and Sage Associates Pty Ltd, were registered in July 2016, some three months after the trip to Shandong, and the purchase of the winery was undertaken in October, some six months after the trip.⁷ This information does not contradict Mayor Lee's assertions that the decision to go into partnership with Mr Ye Gang to purchase the winery was made after the trip and that his involvement in the negotiations in China were unrelated to his future personal interests.
18. However, the nature of his involvement and the subsequent obtaining of a personal financial benefit raised questions that warranted further investigation. I note that there is no dispute that Mayor Lee received a financial benefit from the sale of the Rymill Coonawarra winery.
19. If Mayor Lee did use his position inappropriately, or had a conflict of interest, he may have breached the following duties in the Code of Conduct:
- 3.1 Act honestly at all times in the performance and discharge of their official functions and duties.
 - 3.13 Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999.
20. A breach of these requirements would satisfy the definition of misconduct in public administration found in s 5(3)(a) of the ICAC Act.

Alleged use of the mayoral position to gain a personal benefit

21. It was alleged that Mayor Lee had not paid commercial value for his share in the Rymill winery.
22. Information from the Australian Security Investments Commission (ASIC) indicates that Sage Associates has a 10% shareholding in Furunde Wine Co Pty Ltd, the company that has bought the winery, and Mayor Lee, in turn, has a 50% holding in Sage

⁷ Sage Associates Pty Ltd as trustee of the Andrew Lee Family Trust holds a 10 per cent shareholding in Furunde Wine Co Ltd (the owner of the Rymill Coonawarra winery) and Furunde Agriculture Development Co Pty Ltd (the owner of the relevant real estate).

Associates Pty Ltd. The interest therefore amounts to a 5% shareholding in the winery for Mayor Lee.

23. Mayor Gandolfi has stated that a reporter from The Border Watch spoke to him after the publicity in The Advertiser on 31 January 2017. The reporter apparently asked him why Mayor Lee was involved in the dinner in China with Mr Ye Gang. Mayor Gandolfi advised that he did not know why and that the reporter would have to ask Mayor Lee. He also suggested that the reporter ask Mayor Lee whether he purchased his shareholding in Rymill Coonawarra.
24. It was stated that the reporter spoke to him later that day and said that Mayor Lee had told her that the shares were gifted to him.
25. If this is correct, that the shares were gifted to Mayor Lee by Mr Ye Gang, it may suggest that they were given as a bonus or thank you for Mayor Lee's assistance in the negotiations with the sale of the winery.
26. More specifically, the report raised the possibility that a gift may have been made to Mayor Lee in the understanding that he had some influence in the sale as a result of his position as Mayor. If this is the case, it raises the possibility that Mayor Lee inappropriately used his position to gain a personal benefit.
27. If Mayor Lee did use his position to gain a personal benefit, he may have breached the following duties in the Code of Conduct:
 - 3.1 Act honestly at all times in the performance and discharge of their official functions and duties.
 - 3.4 Not exercise or perform, or purport to exercise or perform, a power, duty or function that he or she is not authorised to exercise or perform;
 - 3.7 Council members must not:
 - 3.7.1 Seek gifts or benefits of any kind;
 - 3.7.2 Accept any gift of benefit that may create a sense of obligation on their part or may be perceived to be intended or likely to influence them in carrying out their public duty.
 - 3.15 Use council resources, including services of Council staff, for private purposes, unless legally or properly authorised to do so, and payments are made when appropriate
28. Any breach of these requirements would satisfy the definition of misconduct in public administration found in s 5(3)(a) of the ICAC Act.

Relevant law/policies

29. Section 5(3) of the ICAC Act provides:

(3) *Misconduct in public administration* means—

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

30. Section 109(2) of the Local Government Act provides that:

An employee of a council must at all times act with reasonable care and diligence in the performance of official duties.

31. Section 63 of the Local Government Act provides:

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils.
- (2) Council members must observe the code of conduct

32. The Local Government (General) Regulations prescribes at regulation 7:

For the purposes of section 63 of the Act, the *Code of Conduct for Council Members* published by the Minister in the Gazette on 29 August 2013 (and as in force on that day) is adopted as a code of conduct to be observed by the members of all councils.

33. The Code of Conduct for Council Members, *inter alia*, provides that:

Council members must:

- 3.1 Act honestly at all times in the performance and discharge of their official functions and duties;
- 3.2 Perform and discharge their official functions and duties with reasonable care and diligence at all times;
- 3.6 Ensure that relationships with external parties cannot amount to interference by improper influence, affecting judgment, decisions and/or actions.

Council members must not:

- 3.7.1 Seek gifts or benefits of any kind;
- 3.7.2 Accept any gift or benefit that may create a sense of obligation on their part or may be perceived to be intended or likely to influence them in carrying out their public duty;
- 3.13 Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999;
- 3.14 Council members using council resources must do so effectively and prudently;
- 3.15 Council members must not use council resources, including services of Council staff, for private purposes, unless legally or properly authorised to do so, and payments are made when appropriate;
- 3.16 Council members must not use public funds or resources in a manner that is irregular or unauthorised.

Whether Mayor Andrew Lee committed misconduct in public administration by conducting personal business while representing the City of Mount Gambier when attending the Shandong Business delegation in China in April 2016

34. It is clear from the evidence that the signing of the MoU between Rymill Coonawarra and Mr Ye Gang in Shandong in April 2016 has aroused suspicions that Mayor Lee was using his mayoral position to conduct personal business.

35. However, Mayor Lee has denied any involvement in the MoU except that he was present when it was signed. He has told my investigation:

I didn't read the MoU. I know it's not an actual MoU. At the time of the signing I knew about the purchase [of Rymill Coonawarra winery]. I knew it was on the way. But it was confidential....The MoU was more of an issue in terms of economic development.

36. Two facts are relevant here. First, an examination of the terms of the MoU does not lead to a conclusion that the document specifically advances the interests of Mayor Lee. Instead, it cites the interests of the Landbridge Group in:

long-term cooperative relations in wine production and marketing [noting that] further discussions and communications would take place in the future to determine specific procurement matters, and to explore in-depth cooperation mode'.⁸

37. Whilst the document does state Landbridge's 'plan' to 'purchase a certain quantity of wine from the [Rymill Coonawarra] company' in the future - it does not make a specific commitment to do so. Instead, the document may be accurately characterised as a high level aspirational agreement that seeks to build stronger economic ties between Shandong and the wine region of the Coonawarra through Rymill Coonawarra winery.

38. As stated by Mayor Lee, the MoU was signed after Mayor Lee began his dealings with the Landbridge Group to broker the sale of the Rymill Coonawarra winery. Given these facts, it is difficult to conclude that the signing of the MoU was in any way used to further Mayor Lee's private interests.

39. Mayor Lee's legal representatives have put to me that:

Our client was made aware of the Memorandum of Understanding but was not involved in the preparation of the document. Mr Yu (the secretary to the Chairman) and Mr Ye informed our client that they wanted to sign a Memorandum of Understanding with Rymill during the Shandong visit. Our client communicated this to Mr Rymill, who was unable to attend. Our client understands that Mr Rymill asked his good friend, Mayor Peter Gandolfi to sign on his behalf. Our client informed Mr Ye and Mr Yu of this and they prepared the Memorandum of Understanding...

Our client was an intermediary between Mr Yu and Me Ye and Mr Rymill, The two Furunde companies were not incorporated until July 2016. There was no legal purchaser entity until this later time...

By the date in April 2016 of the second delegation, the Terms Sheet had already been executed by Rymill and Mr Ye (the Chairman) and the due diligence was underway as managed by our office. As referred to above, our client was not involved in the preparation or execution of the Memorandum of Understanding, save for the limited involvement referred to above.

40. Mayor Lee admits he gave Mr Ye Gang his business card in Shandong, but realised later that 'it was not right to do that' in the context of their other business dealings.

41. I consider, on the information available to me, that there is no evidence to conclude that the signing of the MoU between Rymill Coonawarra and Mr Ye Gang in Shandong in April 2016 constitutes misconduct on the part of Mayor Lee.

42. I understand that Mayor Lee made two earlier trips to China, in November and December 2015, at his own expense to meet with Mr Ye Cheng to talk specifically about acquiring the Rymill winery.

43. Mayor Lee's legal representatives have explained his business conduct in China at that time as follows:

[After an initial meeting] a second meeting with John Rymill took place in Penola on about the 4 October 2015 and at that meeting more particular details regarding the [Coonawarra winery] business were discussed.

Our client travelled to China on a personal trip in early November 2015 to meet with the Chairman. Our client paid all costs associated with this trip from his own resources. Our client met with the Chairman and was advised that he wanted to invest in a winery with the plan to build high class accommodation and also a port.

⁸ Memorandum of Understanding of South Australia Wine Production and Processing Base - April 2016. p.3.

When our client returned from China he resumed contact with John Rymill to ascertain whether he still wished to sell the Rymill Coonawarra winery business and real estate.

John Rymill also offered our client a commission of 1.5 per cent if the purchase price was \$15 million. However, our client refused this commission, particularly on the basis that he was assisting the Chairman and instead proposed to John Rymill that the purchase price be reduced by that amount (being \$225,000), which was subsequently agreed.

Our client made a further personal trip to China in early December 2015 (on or about the 9 December 2015) to update the Chairman on the progress of assisting him in the negotiations. The costs associated with this trip were again paid from our client's personal resources. This was the first time that our client met Mr Ye Gang (the brother of the Chairman) and the person who represented the purchaser in all further dealings. Our client also corresponded with Mr Yu (a lawyer and secretary to the Chairman).

A Terms Sheet with Rymill Coonawarra was signed by the Chairman on the 18 January 2016 and in March 2016 the formal due diligence commenced which was undertaken by our office on behalf of the Chairman, Mr Ye Gang and our client.

44. The City of Mount Gambier paid all expenses for the delegation representatives in China. Mayor Lee contends that he did not inappropriately undertake personal business during the time allocated to the second Shandong delegation in April 2016. During that time, Mayor Lee stated that he attended the Premier's welcome speech, investment presentations and business groups. He also attended a dinner on 5 April 2016 with Wattle Range Mayor Peter Gandolfi and Mr Ye Gang because the two were to sign the MoU the next day. Mayor Lee also attended the MoU signing which the Premier witnessed.
45. I understand that following the official delegation business, Mayor Lee travelled to the city of Tengzhou at the invitation of the local Mayor, together with the Principal of St Martin College and one of her Chinese teachers. Mayor Lee there made a presentation to approximately 70 government officials to promote the city of Mount Gambier and regional areas. The costs involved in this leg of the trip were apparently paid by the municipality of Tengzhou.
46. Mayor Lee then left Tengzhou to travel to Qingdao on 10 April 2016 to meet the CEO of the City of Mount Gambier and then stayed one night before heading to Shenzhen to join a business group.
47. In his evidence to my investigation, Mr Jing Li (then the State Development Officer - SA Investment Attraction Agency), stated that he had been part of the 'very successful' delegation to Shandong in April 2016. He states that he had also been present at an earlier meeting between Mayor Lee and Landbridge Chairman Ye Cheng in Adelaide in early September 2015. As such, he knew some of the principal actors in this business and the interest of the Landbridge Group in scoping investments in South Australia.
48. As a Mandarin speaker himself, Mr Li fully understood the nature and detail of the Adelaide conversation between Mayor Lee (whom he refers to as Mr Lee) and Landbridge Chairman Mr Ye Cheng. He observed that after the Adelaide meeting - and later in Shandong:

Mr Ye wanted me to do some deals for him. I declined because I am a public servant. The Mayor is in a different position. The two roles [public and business] could be conducted alongside each other.

In Shandong we didn't pay much attention to what the delegation did. There were many mayors and councilors on the trip. They didn't tell the state government what they were doing.

I'm not aware of Mayor Lee using his position to pursue private business [on the Shandong delegation and generally].

49. It is not in dispute that Mayor Lee had already met with Mr Rymill in September and October 2015 to confirm particulars about the Coonawarra winery business and its continuing availability for sale. Mayor Lee had also arranged with a local architect to draft plans for a hotel on the property for Mr Ye Cheng.
50. From the various statements given to my investigation by Mayor Andrew Lee, Mr Jing Li and Mr John Rymill, the evidence is clear that negotiations for the sale of the winery were well advanced by the time of the Shandong conference in April 2016. It is apparent that by this time Mayor Lee had invested significant amounts of time and his own money in helping to facilitate the deal with the Landbridge Group.
51. There is a suggestion that the winery sale deal was all arranged quickly around the time of the 2016 Shandong conference. That appears not to be the case. This is also contradicted by the amount of time that Rymill Coonawarra had been up for sale. An article advertising the sale appeared in the 4 November 2014 edition of the Australian Financial Review.

Opinion

In light of the above, my final view is that there is no evidence to establish that Mayor Lee conducted personal business while representing the City of Mount Gambier when attending the Shandong Business delegation in China in April 2016. Therefore, it cannot be concluded that he committed misconduct within the meaning of section 5(3) of the ICAC Act.

Whether Mayor Andrew Lee committed misconduct in public administration by using his mayoral position to gain a personal benefit by acquiring shares in the Rymill Coonawarra winery

52. Mayor Lee has stated that he gained a personal benefit through acquiring a share in the Rymill Coonawarra winery. The question is whether there is evidence that proves he used his position as mayor in order to receive that benefit.
53. Mayor Lee maintains that his five per cent share in the winery is not a gift, but payment for the valuable consideration he provided in brokering the deal.
54. Mayor Lee has stated that he entered into a 'gentleman's agreement' about his remuneration for brokering the (yet to be concluded) winery sale deal with Mr Ye Cheng at a meeting in Melbourne on 24 November 2015. He says Mr Ye offered him either a fixed commission or a (shareholder) interest in the wine business and, after haggling about the size of the shareholding offered, he chose the latter. He told my investigation that 'a shareholding is not a gift'.⁹
55. Mayor Lee's legal representatives have submitted that:

⁹ As noted above, the only statement to the contrary was made by Mayor Gandolfi who told my investigation that a reporter from the Border Watch had told him that Mayor Lee told her the shares he acquired in the winery were 'gifted' to him. This is hearsay evidence and appears not to be consistent with Mayor Lee's statements admitting the benefit was remuneration for service. Mayor Lee told my investigation that he 'can't recall' saying that to the journalist and that he 'wouldn't normally say that'. The council CEO, Mr Mark McShane stated in an email to my Office dated 28 June 2017 that he had 'scoured the early Border Watch articles relating to the Mayor and can find no mention of a statement from him that he received part ownership of the winery as a 'gift'.

Our client has given a detailed factual background...as to the circumstances of the sale of Rymill Coonawarra winery to Farunde Wine Co and the circumstances in which he became a director and a related entity, a shareholder in the winery;

Our client has given an explanation of the valuable consideration provided for his interest in the winery. There is no declaration as to a gift because the shareholding is not a gift;

56. Whilst there is no written shareholders' agreement or other written agreement between Mayor Lee and Mr Ye Gang (who conducted this aspect of the business) with respect to the terms on which Mayor Lee acquired his interest, there is evidence that Mayor Lee (in his own capacity) did considerable work to secure the success of the winery sale to the Landbridge Group.
57. I note, for example, that Mr John Rymill stated that he knew Mayor Lee primarily 'through his efforts to broker the sale of the winery'.
58. I note there is no restriction on council representatives conducting private business while also maintaining their role as an elected member of council. This, of course, is subject to the conflict of interest provisions of the Local Government Act and the relevant requirements of the Code of Conduct. As Mayor Lee's legal representatives assert:

Our client, in his capacity as Mayor of the City of Mount Gambier, is in all respects an independent contractor to Council. For example, his monthly allowance is paid without deduction for tax (he has a personal ABN registration). Whilst it is also plain that our client is obliged to comply with the Code, it is equally obvious that his role as Mayor is not a full time employed position which requires our client to devote the whole of his time to that position. It is obvious that his outside business interests (that do not contravene the provisions of the Code) are not an issue and require no further explanation as to their appropriateness.
59. As noted above, Mayor Lee first met Mr Ye Cheng at the first Shandong Delegation in May 2015. He was introduced to the businessman, who speaks limited English, through the Naracoorte Council Mayor. At this time they apparently spoke for just 10-15 minutes.
60. They met again, in September 2015, in Adelaide at the meeting arranged by Mr Jing Li working with the State Development Office, to discuss potential business ventures in South Australia. The following week Mayor Lee and Mr Jing Li accompanied Mr Ye Cheng on a trip around the Mount Gambier region. They toured several businesses during this time, of which Rymill Coonawarra was one.
61. Mayor Lee claims that it was after this trip that Mr Ye Cheng expressed a particular interest in acquiring the Rymill winery.
62. It appears from the evidence provided by Mr Jing Li that it was more likely Mayor Lee's ability to speak Mandarin that led to him becoming an intermediary for Mr Ye, rather than his position as a public officer.
63. While he admitted that his use of his mayoral email account to discuss the business deal with Mr Rymill on two occasions was inappropriate, he rectified his mistake at the time and in all other correspondence he separates his work as an intermediary in the deal from his position as Mayor. Mr Rymill substantiated this in his evidence to my investigation:

We dealt mainly with Ouwens Lawyers [counsel for Mr Ye]. Lee was a conduit...

I recall asking [him] earlier in the piece whether this [commercial discussion] should be outside his mayoral role. He agreed with that.

64. In text messages exchanged between Mayor Lee and Mr Rymill, both refer to him by his first name 'Andrew'. This division of roles was further evidenced in Mr Rymill's statement, in which he said he believed he was dealing with 'private citizen' Andrew Lee rather than Mayor Lee throughout the process.

65. Mayor Lee also discouraged Mr Rymill from arranging a business meeting at his mayoral office. In a text message on 29 September 2015, he stated:

Yes, I have a bigger office in council. However I feel uncomfortable to talk private business in council.

66. Mr Rymill was also aware that Mayor Lee was an agent for Mr Ye and would be receiving a payment because of his work in brokering the deal. This was understood well before the sale was completed, as this text message from Mayor Lee dated on 26 November 2015 indicates:

About the price, can you put down 14775000? (15million - 1.5% commission = 14775000) (sic) I will get consultant fee from his side. He pay (sic) less stamp duty too.

67. The final purchase price was \$13,275,000. Mayor Lee and his legal representatives claim that helping to engineer a substantial discount is proof of the valuable consideration he offered Mr Ye and was the major reason why he acquired his shareholding interest. As stated by his legal representatives:

Our client acquired his interest for valuable consideration, in the nature of the services he rendered to the purchaser in assisting in negotiating a substantially discounted purchase price of the Rymill Coonawarra business and real estate...

There has neither been a detriment suffered by Council, nor an improper benefit obtained by our client. The region invested in by the purchaser is outside of our client's Council area. Although our client made initial attempts to promote investment within the Mount Gambier district, the purchaser was specifically interested in acquiring a winery and (after visiting Rymill Coonawarra in about September 2015) expressed specific interest in acquiring that winery in particular.

68. I have carefully considered whether Mayor Lee's public position was a factor in his ability to pursue the business opportunity presented by the Landbridge Group's interest in the Rymill Coonawarra business. One reading of the facts may lead to this conclusion. However, I do not consider that pursuing the business opportunity in the manner he chose amounted to improper conduct or placed in him breach of the Code of Conduct.

69. It is not in doubt that Mayor Lee did receive a financial benefit through the winery sale deal. His claim that this was because of the valuable brokerage service he provided to Mr Ye is not contradicted by the evidence.

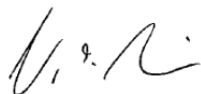
Opinion

In light of the above, my final view is that there is no evidence that Mayor Lee committed misconduct within the meaning of section 5(3) of the ICAC Act, by using his mayoral position to gain a personal benefit.

Comment

Although Mayor Lee did send two emails from his mayoral account and inappropriately used his business card in his dealings with Mr Rymill and Mr Ye, these mistakes are not serious enough for a finding of misconduct. He has admitted his error of judgement and stated his regret for his actions. I note he took action at the time to remedy the mistake with the use of his mayoral email account.

As principal officer of his council, Mayor Andrew Lee walked a very fine ethical line dealing with the Landbridge Group as intermediary in a large commercial transaction. Given the language and cultural differences involved, and perhaps an incomplete understanding of the history of the deal on the part of some observers, it is not difficult to see why some in Australia have concluded that Mayor Lee's business dealings in the winery sale were suspicious. I advise the Mayor that in the future he should examine and clarify any actions that may give rise to a perception that he is using his elected office for personal gain.



Wayne Lines
SA OMBUDSMAN

7 December 2017