

**I·C·A·C**

INDEPENDENT COMMISSION  
AGAINST CORRUPTION



**INVESTIGATION INTO THE  
MISUSE OF SYDNEY FERRIES  
CORPORATE CREDIT CARDS**

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**ICAC REPORT  
NOVEMBER 2009**

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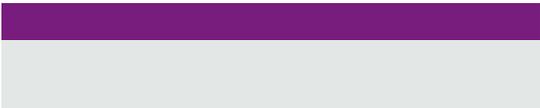
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Mr President  
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into the misuse of Sydney Ferries corporate credit cards.

I presided at the public inquiry held in aid of this investigation.

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

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

Yours faithfully

A handwritten signature in black ink, appearing to read 'Jerrold Cripps'.

The Hon Jerrold Cripps QC  
Commissioner

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# Executive summary

This report concerns an investigation by the Independent Commission Against Corruption (“the Commission”) into the conduct of the former Chief Executive Officer of Sydney Ferries, Geoffrey Smith. In particular, it concerns Mr Smith’s misuse of his Sydney Ferries corporate credit card to incur personal expenditure of over \$237,000 between September 2006 and March 2009. Other issues examined are the use of the Diners Club travel booking facility used by Sydney Ferries to incur expenditure of \$7,301.11 for business class air fares for Mr Smith’s wife on two occasions and the use of a corporate credit card in 2008 to incur expenditure of \$2,410 for a Christmas luncheon for Sydney Ferries staff.

## The investigation

The Commission’s investigation arose as a result of a report received from the Director General of the Department of Premier and Cabinet, John Lee. This report was based on a protected disclosure made on 17 March 2009 by Mabel Misra, a Sydney Ferries officer, to Alana Starke, Corporate Counsel & Company Secretary for Sydney Ferries, about Mr Smith’s continued use of his corporate credit card to incur personal expenses.

The Commission used its statutory powers to obtain relevant documentation from Sydney Ferries and other sources and two statements of information from Mr Smith concerning his use of the corporate credit card issued to him. A number of former and current employees of Sydney Ferries were interviewed and made statements.

On 2 June 2009 Mr Smith gave evidence at a compulsory examination before the Commission. The transcript of that compulsory examination was later made public, except for a small section that remains the subject of a suppression order.

## The public inquiry

The Commission conducted a public inquiry over four days from 24 June 2009 to 29 June 2009. The Hon Jerrold Cripps QC, Commissioner, presided at the inquiry and Stephen Rushton SC acted as Counsel Assisting the Commission. Mr Smith and nine other witnesses gave evidence.

## The Commission’s findings

The Commission’s findings of fact and corrupt conduct are set out in Chapter 5 of this report.

The Commission found that Mr Smith engaged in corrupt conduct:

- by using his Sydney Ferries corporate credit card between September 2006 and March 2009 to incur personal expenditure of \$237,102.23 knowing that he was not entitled to use the credit card to incur personal expenses and that its use was restricted to Sydney Ferries business expenses, and
- by knowingly falsely claiming in a letter to the Minister for Transport on 29 October 2008 that Sydney Ferries’ use of credit cards was in full compliance with government policy so that he could hide from the Minister the fact that he used his corporate credit card for personal use contrary to relevant policies.

Chapter 5 also contains a statement pursuant to section 74A(2) of the ICAC Act that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of Mr Smith for offences under the *State Owned Corporations Act 1989* and for the common law offence of misconduct in public office.



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The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Vincenzo Rossello for an offence of giving false or misleading evidence to the Commission contrary to section 87(1) of the ICAC Act.

## **Corruption prevention recommendations made in this report**

Four corruption prevention recommendations have been made and are set out in Chapter 6.

### **Recommendation 1**

That Sydney Ferries' annual reporting requirements in relation to credit card use be based on an actual certification of compliance with the Treasurer's Directions.

### **Recommendation 2**

That for the purpose of internal audit responsibilities, the position of Audit Assurance Manager have an additional reporting line to Sydney Ferries' Audit Committee and/or the Board.

### **Recommendation 3**

That the Audit Assurance Manager be appointed and trained as a nominated protected disclosures officer.

### **Recommendation 4**

That Sydney Ferries amend its code of conduct and protected disclosures procedures so that staff can and should report suspected misconduct to members of the Audit Committee.

# Chapter 1: Introduction

This report concerns an investigation by the Independent Commission Against Corruption (“the Commission”) into the conduct of the former Chief Executive Officer of Sydney Ferries, Geoffrey Smith. In particular, it concerns Mr Smith’s misuse of his Sydney Ferries corporate credit card to incur personal expenditure of over \$237,000 between September 2006 and March 2009. Other issues examined are the use of the Diners Club travel booking facility used by Sydney Ferries to incur expenditure of \$7,301.11 for business class air fares for Mr Smith’s wife on two occasions and the use of a corporate credit card in 2008 to incur expenditure of \$2,410 for a Christmas luncheon for Sydney Ferries staff.

The Commission’s investigation arose as a result of a report received from the Director General of the Department of the Premier and Cabinet, John Lee. On 17 March 2009 Mabel Misra, a Sydney Ferries officer, spoke to Alana Starke, Corporate Counsel & Company Secretary for Sydney Ferries, about Mr Smith’s continued use of his corporate credit card to incur personal expenses. Ms Starke raised the matter with the Chairman of the Board, the Hon Brian Langton, the next morning and they then saw Mr Lee, who reported the matter to the Commission.

## Why the Commission investigated

One of the Commission’s principal functions is to investigate any allegation, complaint, 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 Commission’s role is set out in more detail in Appendix 1, while Appendix 2 sets out the definition of corrupt conduct under the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”).

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

## Conduct of the investigation

The Commission used its statutory powers to obtain relevant documentation from Sydney Ferries and other sources and two statements of information from Mr Smith concerning his use of the corporate credit card issued to him. A number of former and current employees of Sydney Ferries were interviewed and made statements.

During the course of those interviews the Commission became aware of the issues regarding travel expenses and the Christmas luncheon. It was also clear that many of the staff in the Financial Services area at Sydney Ferries were aware of the manner in which Mr Smith used the corporate credit card and that he had failed to pay outstanding balances. The Commission was concerned to find out what senior officers of Sydney Ferries knew about the matter and what, if anything, they had done about it.

On 2 June 2009 Mr Smith gave evidence at a compulsory examination before the Commission. The transcript of that compulsory examination was later made public except for a small section that remains the subject of a suppression order.

## The public inquiry

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

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

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

- (a) *the benefit of exposing to the public, and making it aware, of corrupt conduct,*
- (b) *the seriousness of the allegation or complaint being investigated,*
- (c) *any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),*
- (d) *whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

The Commission reviewed the information that had been gathered during the investigation and the evidence given at the compulsory examination. After taking into account this material and each of the matters set out in section 31(2) of the ICAC Act, the Commission determined that it was in the public interest to hold a public inquiry. In making that determination the Commission had regard to the following considerations:

- The seriousness of the alleged conduct involving the misuse of public resources for personal benefit by a senior public official.
- The desirability of publicly exposing the risks and systems failures that may have allowed the conduct to occur.
- The public interest in exposing the matter outweighed the public interest in preserving the privacy of the persons concerned in the matter.

- That public exposure of the matter might assist other agencies to review their own systems and encourage other persons aware of similar conduct to come forward.

The public inquiry took place over four days from 24 June 2009 to 29 June 2009. The Hon Jerrold Cripps QC, Commissioner, presided at the inquiry and Stephen Rushton SC acted as Counsel Assisting the Commission. Mr Smith and nine other witnesses gave evidence.

At the conclusion of the public inquiry Counsel Assisting the Commission prepared submissions setting out the evidence and what findings and recommendations the Commission could make based on that evidence. These submissions were provided to Mr Smith and other persons and submissions in response were invited. All submissions in response received by the Commission have been taken into account in preparing this report.

## Investigation findings and section 74A(2) statements

Findings of fact and corrupt conduct are set out in Chapter 5 of this report.

The Commission found that Mr Smith engaged in corrupt conduct:

- by using his Sydney Ferries corporate credit card between September 2006 and March 2009 to incur personal expenditure of \$237,102.23 knowing that he was not entitled to use the credit card to incur personal expenses and that its use was restricted to Sydney Ferries business expenses, and
- by knowingly falsely claiming in a letter to the Minister for Transport on 29 October 2008 that Sydney Ferries' use of credit cards was in full compliance with government policy so that he could hide from the Minister the fact that he used his corporate credit card for personal use contrary to relevant policies.

Chapter 5 also contains a statement pursuant to section 74A(2) of the ICAC Act that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions ("DPP") with respect to the prosecution of Mr Smith for offences under the *State Owned Corporations Act 1989* and for the common law offence of misconduct in public office.

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Vincenzo Rossello for an offence of giving false or misleading evidence to the Commission contrary to section 87(1) of the ICAC Act.

All Sydney Ferries employees who gave evidence before the Commission, with the notable exception of Mr Smith, claimed that they were aware that Mr Smith's use of the Sydney Ferries corporate credit card for personal expenditure was contrary to policy. These included three individuals who had been Chief Financial Officer of Sydney Ferries at relevant times, Wendy Hughes, Alex Andreopoulos and Vincenzo Rossello. None of these senior officers took steps to cancel Mr Smith's card or to report his misuse of the corporate credit card to the Sydney Ferries Audit Committee, the contracted internal auditor, the Board, the Audit Office or this Commission. Although no findings of corrupt conduct are made against these former officers it is regrettable that none of them took such action. Had any of them done so when they first learned of Mr Smith's misuse that misuse could have been stopped. This issue is examined further in Chapter 6.

## Corruption prevention issues

Chapter 6 sets out the Commission's corruption prevention response to the conduct disclosed during the investigation.

The Commission has made four recommendations to Sydney Ferries to minimise or prevent similar conduct occurring in the future.

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

The recommendations will be communicated to Sydney Ferries with a request that implementation plans for the recommendations are provided to the Commission within three months of the publication of this report.

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

These reports will be posted on the Commission's website, [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au), for public viewing.

## Recommendation that this report be made public

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



## Chapter 2: Background

Before examining what happened it is useful to set out some background information about Sydney Ferries, the relevant policies on use of corporate credit cards and the Sydney Ferries staff involved in the investigation.

### Sydney Ferries

In 1951 the NSW government took over the then privately run Sydney Ferries Limited, which was in financial difficulties. It is not necessary to set out the detailed history of the organisation of transport services through the next 50 years except to note that a number of different models and structures were adopted.

In 2003 legislation was passed to restructure the then State Transit Authority (“the STA”). On 1 July 2004 the operation of ferries was transferred to the newly constituted Sydney Ferries, a statutory State owned corporation. Ferry services were provided within the framework of the *Transport Administration Act 1988*, the *State Owned Corporations Act 1989* and the *Passenger Transport Act 1990*.

The Sydney Ferries Board was responsible for determining the policies of Sydney Ferries and making decisions relating to its operation. The Chief Executive Officer (“CEO”) was required to manage and control the affairs of Sydney Ferries in accordance with the policies of the Board.

State owned corporations (“SOCs”) and their subsidiaries are public authorities for the purposes of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) and directors, officers and employees of SOCs are public officials for the purposes of the ICAC Act.

The objectives of Sydney Ferries are set out in section 35B of the *Transport Administration Act 1988*. The principal objective of Sydney Ferries is to deliver safe and reliable Sydney ferry services in an efficient, effective and financially responsible manner. Other objectives, expressly stated to be less important, include to be a successful business, operating at least as efficiently as any comparable business, and to exhibit a sense of social responsibility by having regard to the interests of the community.

In 2007 Bret Walker SC conducted a Special Commission of Inquiry (“the Walker Inquiry”) to inquire into the provision of services by Sydney Ferries and any action that might be taken to improve the ability of Sydney Ferries to provide “safe, efficient and customer-focused ferry services”. In his report, Mr Walker SC identified problems with using the SOC governance model in relation to the provision of public transport.

Legislation was subsequently introduced to change the status of Sydney Ferries. On 1 January 2009 Sydney Ferries ceased to be a statutory State owned corporation and became a new statutory corporation named Sydney Ferries. As a result, the Board is now subject to the direction and control of the Minister for Transport. The objectives of Sydney Ferries remain unchanged.

The period from 1 July 2004 was marked by numerous changes in the ranks of senior management at Sydney Ferries. Mr Smith was the third CEO since Sydney Ferries became a SOC. Other senior management positions, including that of the General Manager, Financial and Corporate Services (and Chief Financial Officer) were also subject to high turnover.

### Corporate credit cards

The proper use of corporate credit cards by State government entities, including SOCs, is viewed by the NSW Treasury as an efficient method for large volume, low value and low risk procurements.

For most of the time that Mr Smith was employed, Sydney Ferries was a SOC. SOCs are not subject to the same level of control with respect to their financial policies as other government agencies. Although Part 3 of the *Public Finance and Audit Act 1983* applies to SOCs in the same way as it applies to statutory bodies, other parts of that legislation do not. Treasurer’s Directions do not generally apply to SOCs.

However, it must be noted that the *Public Authorities (Financial Arrangements) Act 1987* does apply to SOCs in the same way as it applies to departments and statutory

bodies. That Act provides a comprehensive system of arrangements for the control of authorities of the State in entering into and maintaining certain kinds of financial arrangements. The use of corporate credit cards is a form of financial accommodation under that Act. The Treasurer's approval is required for such activities and may be on such terms and conditions as the Treasurer sees fit.

When Sydney Ferries became a SOC it initially adopted many of the procedures that had been in place at the STA. The Commission has been advised that the Board of Sydney Ferries adopted the STA's Credit Card Procedures<sup>1</sup> on 15 July 2004. The Procedures document specifically provided that "Credit Cards [sic] are issued for business use only". It also provided that holders of credit cards were personally accountable for ensuring that cards were used for payment of the types of expenses for which they were intended and which were incurred for official business.

On 26 March 2008 Sydney Ferries issued its own credit card procedures<sup>2</sup> to similar effect. Those credit card procedures were issued under the hand of, and approved by, Mr Smith.

Throughout Mr Smith's employment, the credit card procedures which operated within Sydney Ferries stipulated that corporate credit cards were issued and were to be used for business purposes only. Cardholders were provided with a payment mechanism for goods and services which the employee had delegated authority to purchase. There were also requirements for independent approval of payments and for the periodic review of the use of the credit cards to determine whether any should be cancelled.

The corporate credit cards used by Sydney Ferries were Westpac Visa Corporate Cards issued in the name of the Sydney Ferries Corporation. Individual statements were sent out each month to cardholders and there was provision on them for the cardholder to verify that the details were correct. There was also a space for the Manager/Supervisor to sign off that "Transactions [were]

examined and approved". The policy required this to be signed by the cardholder's supervisor. When the cardholder was the CEO the approval was to be signed by the next most senior officer, in the case of Sydney Ferries, the Chief Financial Officer.

The cardholder was required to submit the receipts for official expenses with the credit card statement. The Senior Accounts Payable Officer allocated the appropriate general ledger account code to each item of expenditure.

Sydney Ferries was liable for the debt incurred on the card and it was automatically paid each month by direct debit using an overdraft facility which Sydney Ferries had with the NSW Treasury Corporation. Although the approval was endorsed under the words "Transactions examined and approved" the approval process was a matter of form, not substance, because the amount on the card had already been paid.

## Geoffrey Smith

Geoffrey Francis Smith spent the greater part of his working life in public service. Mr Smith served 37 years as a commissioned officer in the Royal Australian Navy and he achieved the rank of Rear Admiral. Following his retirement he worked for a short period as a consultant to Nautilus Underwater Systems, prior to being engaged in marketing and business development by Australian Defence Industries Limited ("ADI Limited"). He was employed in that position for three years through his company, Fabbro Pty Limited.

Mr Smith was appointed as CEO of Sydney Ferries under an employment agreement for the period from 21 August 2006 to 20 August 2009, unless terminated earlier. In that agreement the parties acknowledged that Mr Smith's employment was affected by legislation, including the *State Owned Corporations Act 1989* and the *Transport Administration Act 1988*, and that the agreement was not intended to conflict with any rights or obligations arising from any applicable legislation. Mr Smith's appointment continued after Sydney Ferries became a statutory corporation on 1 January 2009.

<sup>1</sup> Credit Card Procedures, Procedure 58.12, State Transit Authority Procedure, issued 12 January 2004.

<sup>2</sup> Credit Card Procedures, Sydney Ferries Corporation, issued 26 March 2008.



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Mr Smith was required to “diligently perform” his duties and responsibilities including those imposed pursuant to the *State Owned Corporations Act 1989*. Schedule 10 to that Act imposed a number of positive duties upon Mr Smith including a duty to act honestly in the exercise of his powers and the discharge of his functions (Clause 3(2)), a duty to exercise care and diligence (Clause 3(3)), and a duty to refrain from making improper use of his position as CEO to gain an advantage (Clause 3(5)). A failure to comply with any of these duties could result in a fine and, in the case of making improper use of his position, a term of imprisonment. Mr Smith was also contractually bound to comply with all policies and procedures of Sydney Ferries including its code of conduct.

On 7 August 2007, Mr Smith signed a Performance Agreement which further governed his conduct from 1 September 2007 to 30 August 2008. The Performance Agreement required Mr Smith to “provide a role model of management style and behaviour,” and to demonstrate “commitment to the highest standards of ethical conduct”.

On 18 March 2009 the matters that are the subject of this report came to the attention of the Director General of the Department of Premier and Cabinet, John Lee. Mr Smith was stood aside from his position on that day. On 26 May 2009 the Minister for Transport, the Hon David Campbell, announced that Mr Smith’s employment had been terminated.

## Other Sydney Ferries officers

### Corporate Counsel

Alana Starke is the Corporate Counsel and Company Secretary. She has a dual role, reporting to the CEO and to the Board of Sydney Ferries. She was appointed in December 2006.

### Chief Financial Officers

During the period of Mr Smith’s tenure as the CEO three people performed duties as the Chief Financial Officer (“CFO”).

Wendy Hughes was in the position when Mr Smith arrived. Her full title was General Manager Corporate & Financial Services and Chief Financial Officer. In addition to her roles in the presentation of financial statements and budgeting she had responsibilities for communication and media, procurement and other corporate services functions. In early April 2007 Ms Hughes was given the role of managing Sydney Ferries’ response to the Walker Inquiry. She remained in that position until October 2007 and then returned to her substantive position until she left the organisation on 14 December 2007.

While Ms Hughes was occupied with the Walker Inquiry, Alex Andreopoulos became Acting CFO. He joined Sydney Ferries in July 2006 as the Manager, Management Accounting and later became Manager, Financial Services before taking up the position of Acting CFO. He left Sydney Ferries on 9 November 2007.

By the end of 2007 Sydney Ferries needed to find another CFO. Vincenzo Rossello had been employed as a contractor to Sydney Ferries in April 2007. He was filling in for Mr Andreopoulos as Acting Finance Manager. He became the CFO and General Manager Finance & Corporate Services in December 2007 and remained in that position until March 2009. His services were provided to Sydney Ferries through his company, Contracting Staff Pty Limited. On 8 April 2009 Mr Rossello became the Bid Team Finance Manager at Sydney Ferries. The Commission has been advised that Sydney Ferries ceased using his services on 1 July 2009.



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## Other staff

A number of other officers of Sydney Ferries gave evidence at the public inquiry. Mabel Misra has been the Manager of Financial Accounting since joining Sydney Ferries in March 2006. She managed the section that dealt with, inter alia, accounts payable and accounts receivable. That section was responsible for processing the corporate credit card statements. She had two reporting lines. Within the management structure she reported to the Manager, Financial Services. She also dealt directly with the CFO in relation to most financial accounting matters.

Ronalda Paragas commenced employment with Sydney Ferries in September 2002 as an Accounts Payable Officer and was appointed Senior Accounts Payable Officer in February 2007. She reported to Ms Misra.

Philip Dean joined Sydney Ferries around November 2007 as a Systems Accountant. In December 2007, he took up the position of Manager, Financial Services. He reported to the CFO, Mr Rossello.

Girish Patel joined Sydney Ferries in February 2007. He was employed as an Internal Control Officer and held that position until July 2008 when he was appointed Manager of Audit and Assurance Services.

Yolanda Mascarenhas was the Executive Assistant to Mr Smith and the Office Manager. Her main duties were to assist Mr Smith in administration matters. She also looked after administration matters for the 90 people on her floor.



## Chapter 3: Mr Smith's use of the credit card

Between September 2006 and March 2009 Mr Smith charged a total of \$237,107.23 of personal expenses to his Sydney Ferries corporate credit card. The expenses included petrol, school fees and groceries. In fact, official expenses were rarely incurred. Towards the end of his employment almost \$10,000 per month was being charged to the card – and paid by Sydney Ferries.

Mr Smith was also slow to reimburse Sydney Ferries for its payment of his personal expenditure.

Mr Smith received a substantial salary, about \$320,000 per annum, from Sydney Ferries. He also received a regular fortnightly payment from ComSuper, his benefit from his Navy superannuation. Notwithstanding this income Mr Smith did not regularly repay the personal expenses he incurred on his Sydney Ferries corporate credit card.

Between December 2006 and June 2008 Mr Smith reimbursed Sydney Ferries \$135,598.19 for items of personal expenditure incurred on his corporate credit card. He did not make any reimbursement in the period July 2008 to March 2009. At no time did his payments to Sydney Ferries fully reimburse it for the outstanding items of personal expenditure. Over the period October 2006 to March 2009 the outstanding balance varied from about \$1,500 to over \$100,000. At the time of the Commission's public inquiry an amount of approximately \$102,000 remained outstanding in relation to the credit card.

Mr Smith admitted that he had personal financial difficulties. He told the Commission that his wife had been ill and required hospitalisation for several months in 2005. Mr Smith said he had incurred "thousands of dollars" in expenses as a result and they had been in financial difficulties ever since.

Mr Smith had a substantial mortgage on his home. He had refinanced the property twice within the past few years to raise more money to cover his rising debts. Each time the conditions of the finance became more onerous. In March 2009 Mr Smith put his house on the market.

Mr Smith enjoyed significant personal benefits as a consequence of his use of the Sydney Ferries corporate credit card. In particular, he had no personal liability to the credit provider, he incurred no liability to pay any interest on the substantial balances which existed from time to time because Sydney Ferries paid off the entire amount outstanding at the end of each month, and there was no real credit limit on his expenditure over time save for a monthly limit of \$10,000. In effect, he had an interest-free line of credit, that was available for his use unless and until someone took action to cancel the credit card.

It is not in dispute that Mr Smith used his corporate credit card for personal expenses and that such use was contrary to Sydney Ferries policy and NSW Government policy. What was in dispute was whether Mr Smith knew that he was not entitled to incur personal expenses on the corporate credit card. In this chapter of the report the Commission will examine the evidence relevant to that issue.

### Mr Smith's explanation

Mr Smith consistently claimed during this investigation that he believed he was permitted to incur personal expenses on the corporate card, provided he reimbursed Sydney Ferries. Mr Smith did not attempt to hide the fact that he had charged personal expenses to the card. On the early statements he marked the items of personal expenditure with the letter "R" before signing an acknowledgment on each monthly statement that the expenditure had been incurred. Later he identified the official expenses simply by annotating them "SFC". It was submitted on behalf of Mr Smith that this lack of concealment on his part was evidence that he was not aware that he was doing anything wrong in incurring personal expenditure on his corporate credit card. The Commission rejects this submission. Given the nature of most of the items of personal expenditure, it would have been impossible for him to have concealed the fact that he was incurring personal expenses on his corporate credit card.

Mr Smith claimed that he had never seen the STA Credit Card Procedures that had been adopted by Sydney Ferries and had not read the replacement Sydney Ferries Credit Card Procedures approved by him in March 2008. He claimed that prior to February 2009 no one had told him he could not incur personal expenditure on his corporate credit card. He conceded, however, that no one had ever suggested to him that he was entitled to charge personal expenditure to the card.

Mr Smith admitted knowing that the card was paid off by Sydney Ferries each month. He became aware of this and the fact that Sydney Ferries cleared the full balance on his credit card statement every month after receiving “the first statement or two”. In the public inquiry he was asked whether it had ever occurred to him that the personal expenses charged to the credit card were being paid by Sydney Ferries out of public money. His response was that “it did not occur to me at the time, but I have reflected on it since”. That explanation is rejected, for the reasons outlined below.

At the commencement of the Commission’s investigation Mr Smith was asked to respond to a Notice to Provide a Statement of Information issued under section 21 of the ICAC Act. In his response Mr Smith claimed:

*Soon after I commenced employment with Sydney Ferries Corporation, I received a credit card. I did not receive any guidelines or policy statements about its use. In my previous employment with the Australian Defence Industries, I had been issued with a credit card which could be used for personal and business purposes on the understanding that personal expenditure would be reimbursed. I did not believe the practice with this credit card would be any different. (emphasis added).*

During his compulsory examination, Mr Smith claimed that he had a “similar card” when employed at ADI Limited and “... I assumed it would be the same arrangements”. After leaving the Royal Australian Navy Mr Smith held a position with ADI Limited for three years. For part of that time he had a corporate credit card and he was permitted to use that card for personal expenses.

However, this card was significantly different from the Sydney Ferries card in the way that it operated. Mr Smith was personally liable for the expenses incurred on the card. ADI had an arrangement with cardholders whereby the company would pay American Express directly each month provided that the cardholder produced business receipts to ADI by the 10th day of the month together with a personal cheque to cover the personal expenses. If this were not done then the cardholder was personally liable for the account and would need to claim any business expenses later. ADI did not care how much was charged to the American Express Card because it had no liability to make any payments to the credit provider.

In fact, there were no relevant similarities between the credit card arrangement which Mr Smith had with ADI and that which he used during his employment as CEO of Sydney Ferries. Mr Smith was aware that Sydney Ferries paid the balance owed each month despite it including personal expenses he had incurred. Mr Smith could not have reasonably “assumed it would be the same arrangements” as those which applied in his previous employment.

The Commission is satisfied that Mr Smith knew that his Sydney Ferries corporate credit card operated differently from the card he used at ADI.

## Prior working history

Mr Smith had worked in the public sector for most of his working life. Whilst serving in the Royal Australian Navy, Mr Smith had “significant” delegations to approve expenditure from time to time. He recognised that he was working in a “public money environment”. He had no authority to authorise the expenditure of money of the Commonwealth on the private expenditure of any officer of the Navy. In the course of his evidence at the public inquiry Mr Smith acknowledged that whilst Commonwealth or public money could be used to meet expenses incurred by officers whilst discharging their responsibilities as officers of the Commonwealth, it would have been an inappropriate use of Commonwealth funds to be authorising expenditure to pay for such things as the weekly grocery bill. He agreed that he would have refused to authorise such expenditure by an officer in the Royal Australian Navy.

Mr Smith also acknowledged that as CEO of Sydney Ferries, he was operating in a public money environment, and that he was involved in the expenditure of public money. He acknowledged that the funds used to pay his monthly credit card bills were public money. In those circumstances common sense was all that was required for him to know that he should not use public money for his personal expenses.

The financial delegations which existed within Sydney Ferries were similar to those which applied in the Royal Australian Navy, at least in relation to the expenditure of public money. Mr Smith was aware that each credit card account statement which he signed had to be countersigned by another officer of Sydney Ferries, namely the CFO. Mr Smith told the Commission that he understood that the CFO did so because the CFO had a delegation that allowed him or her to sign-off on business expenditure incurred by Sydney Ferries.

Mr Smith was also aware that Sydney Ferries corporate credit cards were issued to officers to allow them to acquit matters within their delegation. Mr Smith agreed that neither he nor any other officer of Sydney Ferries had a delegation which allowed them to authorise Sydney Ferries to meet the private expenditure of any officer of Sydney Ferries. His evidence that it would have been of no concern to him if he had become aware that others in Sydney Ferries were funding their personal lives with Sydney Ferries corporate credit cards is rejected by the Commission. The Commission is satisfied that, having regard to his prior experience of financial delegation within the public sector and his knowledge that financial delegations within Sydney Ferries were limited to business expenditure, Mr Smith knew at all relevant times that he

was not entitled to use his Sydney Ferries corporate credit card for personal expenditure.

Although it would not have been necessary for Mr Smith to read a policy or other document to know that what he did was wrong, there was evidence that he signed a number of documents which stipulated that the corporate credit card should only be used for business purposes.

## The cardholder request and responsibility forms

On 31 August 2006, Mr Smith signed a two-page Cardholder Request form to obtain a Westpac Visa commercial credit card with a \$10,000 credit limit. Page 2 of the document contained a section titled “Cardholder’s Consent” which included the following statement: “I further acknowledge that the Card will only be used for business purposes, and not for private or personal purposes under any circumstances”.

In his evidence to the Commission, Mr Smith claimed that he did not carefully familiarise himself with the terms of that document before he signed it because he had confidence in Ms Mascarenhas and the CFO, Ms Hughes, and thought that if there was anything in the document which was of significance to him, they would bring it to his attention. He said that the terms of the acknowledgement were not drawn to his attention, and said “I signed this application, but I did not read that bit”.

Mr Smith said that he was aware that the card had a limit of \$10,000, having read it on a “document that came with the card”. According to Mr Smith, the credit card and associated Westpac documentation were in an envelope left in his in-tray. Mr Smith claimed that the limit was not the extent of his authority to incur debt on the card but, rather, a monthly credit limit of \$10,000 on his “spend”.

On 27 October 2006 Mr Smith signed a Cardholders’ Responsibilities form. It was a one-page Sydney Ferries document. The provisions in it included that cards were to be used only for official business purposes (Clause 3) and credit cards were to be used within the guidelines set out by the Department [*sic*] and the credit card provider (Clause 14).

Mr Smith signed the “Acceptance of conditions” section of this document, which states “I acknowledge and accept the above conditions in the operation of my Credit Card”. In his evidence he agreed that it would be “accurate” to assume that he had been very careful to read it before he signed it. However, he went on to say that he did not recall signing it. He assumed that it was just one of the many documents that he was signing at the time.

The Commission does not accept that Mr Smith did not read these documents before signing them.

## Personal expenditure incurred for the first time

The corporate credit card issued to Mr Smith was first used on 21 September 2006. Statements were issued regularly for the period ending on about the 27<sup>th</sup> of each month. It is convenient here to refer to the statement ending on 27 September 2006 as the “September 2006 statement” and so on.

The first statement received by Mr Smith, for September 2006, included a charge of \$1,527.16 on 26 September 2006 for accommodation on the Gold Coast. This was not a business expense.

In November 2006 Mr Smith approached Mabel Misra, the Manager Financial Accounting, about the Gold Coast accommodation expenditure. She said he told her that he had incurred some personal expenditure on the card and was going to repay the amount immediately. The Commission accepts Ms Misra’s evidence on this issue. Mr Smith told the Commission that he had incurred the charge on behalf of his son. Ms Misra’s recollection was that Mr Smith had said that the credit card had been taken away by his son by accident; however, she acknowledged that she may have been mistaken on that point. The charge was an online transaction so it could have been incurred by Mr Smith, or his son, at his home.

The conversation took place shortly after Mr Smith signed the Cardholders’ Responsibilities form on 27 October 2006. If he had really believed that he was entitled to incur personal expenditure on his corporate credit card there would have been no need for him to speak with Ms Misra about the matter.

Mr Smith drew a cheque dated 20 December 2006 on his personal account to cover the personal expenses of \$1,527.96 and gave it to Ms Misra. The cheque was dishonoured. On 2 January 2007 he left another cheque, dated 28 December 2006, together with a note to Ms Misra that it should not be banked until 15 January 2007. That cheque was drawn in the sum of \$6,868.33 to cover the original amount and personal expenses appearing on the November 2006 credit card statement.

Ms Paragas became aware in November 2006 that Mr Smith was using his corporate credit card for personal expenditure when she received his statement for September 2006. From time to time thereafter she received further credit card statements which indicated that Mr Smith was continuing to incur further personal expenditure.

She became concerned that Mr Smith might not know that Sydney Ferries corporate credit cards could be used for business purposes only. Ms Paragas gave a copy of the Cardholders’ Responsibilities form to Ms Mascarenhas upon which she had highlighted that part of the document which specified that the cards were to be used for business purposes only. Ms Mascarenhas told Ms Paragas that she would provide the document to Mr Smith. Ms Mascarenhas specifically recalled Ms Paragas expressing concern to her that Mr Smith was using his corporate credit card for personal expenditure. Although she could not recall whether a copy of the document had been handed to her by Ms Paragas, she was adamant that she would have passed it on to Mr Smith if asked to do so.

## The March 2008 credit card procedures

At the time Mr Smith commenced employment at Sydney Ferries the relevant procedures on the use of corporate credit cards<sup>3</sup> specified that they were to be used for business purposes only. Mr Smith claimed that he was not aware of this document.

On 26 March 2008 new Sydney Ferries Credit Card Procedures were approved by Mr Smith and issued.<sup>4</sup>

Like its predecessor, the new Credit Card Procedures document made it clear that “credit cards are issued for official business purposes only”. It also provided that where non-business expenditure was incurred it must be “immediately paid by the cardholder”.

Mr Smith initially claimed that the first person who drew the new Procedures to his attention was Mr Lee, the Director General of the Department of Premier and Cabinet, during the period between when Mr Smith was stood aside on 18 March 2009 and when his employment was terminated on 26 May 2009. He claimed, at least initially, that this was the first occasion on which he had seen the document.

He also claimed that it was a document produced and released by Mr Rossello pursuant to “his delegation and authority”. Mr Smith was then shown the page on which the document history was recorded. That showed that Mr Rossello and Ms Starke had reviewed the document and made minor changes. The final line was a statement “Approved by CEO” against the date of 26 March 2008. Mr Smith had then signed the document. Under questioning, Mr Smith somewhat reluctantly admitted that he had “reviewed” the document.

3 Credit Card Procedures, Procedure 58.12, State Transit Authority, issued 12 January 2004.

4 Credit Card Procedures, Sydney Ferries Corporation, issued 26 March 2008.

Mr Smith gave evidence later in the public inquiry to the effect that he had not really “reviewed” the document at all. Rather, he said, any “review” was limited to noting that it had been “staffed through” other officers and that made it “acceptable”. The Commission rejects his evidence on this matter. It is inconceivable that Mr Smith did not read a document that he was being asked to sign and approve as a new Sydney Ferries procedure, particularly given that the document was highly relevant to him in view of his extensive use of his corporate credit card. The Commission is satisfied that Mr Smith read the document and was aware of its contents.

## Was Mr Smith told?

When questioned in a compulsory examination, Mr Smith said that he would have expected one of his CFOs to have brought to his attention the fact that it was Sydney Ferries policy that corporate credit cards should not be used to incur personal expenditure. He was adamant that no one had told him that until February 2009 and agreed that if this was the case he had been let down by the CFOs failing to advise him that he was breaching policy.

According to Mr Smith, the various CFOs who reported to him during his employment, namely Ms Hughes, Mr Andreopoulos and Mr Rossello, drew to his attention in early 2007, May 2007 and May 2008 respectively that there were amounts outstanding for personal expenditure on the Sydney Ferries corporate credit card and that they had to be repaid. Mr Smith acknowledged that, on each of these occasions, he gave an undertaking that payment would be made.

Mr Smith claimed that it was not until approximately February 2009 that Mr Rossello advised him that he could no longer incur private expenditure on the Sydney Ferries corporate credit card and reimburse the expenditure later, because of a change in the status of Sydney Ferries when it became a statutory corporation in January 2009. He denied that Ms Hughes, Mr Andreopoulos or Mr Rossello had ever previously suggested to him that he could not use the Sydney Ferries corporate credit card for personal expenditure.

Mr Smith also acknowledged that at “some time in 2008” he had been approached by Mr Patel who indicated that he had become aware that there were outstanding personal balances on the Sydney Ferries corporate credit card that “needed to be addressed”. According to Mr Smith, he made Mr Patel aware that the matter had been discussed with the CFO, Mr Rossello, and that arrangements were in place to bring the account into order. Mr Smith denied that Mr Patel had ever suggested

to him that only business expenses could be charged to the card.

All Sydney Ferries employees who gave evidence before the Commission, with the notable exception of Mr Smith, claimed that they were aware that Mr Smith's use of the Sydney Ferries corporate credit card to incur personal expenditure was contrary to policy.

A number of Sydney Ferries officers said that when endeavouring to get Mr Smith to reimburse Sydney Ferries for what he owed they told him he was not entitled to use his card for private purposes. In the Commission's view, it is not necessary to resolve this conflict because, whether told so in terms by his staff or not, Mr Smith well knew that he was misusing his corporate credit card by using it for private purposes and he did not need to be told that such use was contrary to policy, improper or unlawful.

It is possible that Sydney Ferries officers may have been less direct or forceful than they now claim when confronting Mr Smith on this issue. He was, after all, their CEO. However the Commission is satisfied that at all material times the requests for reimbursements they made to him were made in the context that all involved in those conversations, including Mr Smith, knew that his use of the corporate credit card for private purposes was improper and unlawful.

## Repayments

The most substantial repayments made by Mr Smith occurred in June 2007 and June 2008. Of the total reimbursement of approximately \$135,000 made by Mr Smith in respect of his expenditure of approximately \$237,000, some \$118,336.40 or 87% consisted of reimbursements that were made in June 2007 and June 2008.

The timing of these payments appears to reflect a concern on the part of Mr Smith that, if repayment were not made by the end of the financial year, disclosure would need to be made of his personal use of his Sydney Ferries corporate credit card.

Initially, Mr Smith claimed in his evidence to the Commission that in May 2007 Mr Andreopoulos informed him that the amount outstanding had to be settled “before the end of year accounts could be finalised”. He claimed that Mr Andreopoulos had not informed him of any reason why the amounts had to be settled, saying it was in his mind that outstanding debts should be settled before the end of the financial year.

Later in his evidence, however, Mr Smith disclosed that Mr Andreopoulos had in fact indicated to him that settlement

of the outstanding amounts by the end of the financial year was necessary so that they did not appear as a debt in the financial statements of Sydney Ferries and bring discredit on the organisation.

Mr Smith also attributed a comment to like effect to Mr Patel, claiming that the comment was made some time in 2008. He told the Commission that, having informed Mr Patel that he had discussed the outstanding amounts with Mr Rossello and that arrangements were in place to bring the account into order, Mr Patel said “That’s good because it wouldn’t look good for the CEO to have outstanding balances”.

When Mr Smith was asked to specifically identify why his conduct would discredit him or Sydney Ferries he sought to limit the problem to one of untimely repayments rather than a lack of entitlement to use the card as he had. The Commission rejects his evidence on this point and is satisfied that Mr Smith made the repayments in June 2007 and June 2008 because he well recognised that the incurring of personal expenditure upon his Sydney Ferries corporate credit card was not permitted, and that if discovered his behaviour would bring discredit upon him and Sydney Ferries.

## Representations to ministers

### Annual reports to shareholding ministers

Pursuant to section 24A of the SOC Act Sydney Ferries was required to produce an Annual Report in accordance with the *Annual Reports (Statutory Bodies) Act 1984*. In each of the reports for the years ending 30 June 2007 and 30 June 2008 there is a statement in the following form:

#### CREDIT CERTIFICATION

*The Chief Executive Officer of Sydney Ferries has certified that all corporate credit cards issued to Sydney Ferries staff are for business purposes only, and are used in accordance with the relevant Premier’s Memoranda and Treasurer’s Directions.*

The transmission letter for each report was addressed to the shareholding ministers, the then Treasurer and Minister for Transport, and signed in each case by the Chairman of the Board of Sydney Ferries and Mr Smith as CEO.

Mr Smith claimed that he had not provided any certification, and had only become aware of the representations in the Annual Reports “of late”. He

sought to distance himself from these statements on the basis that he was involved only in the first section of the Annual Report and did not go over the financial statements in detail. The certifications appeared in the appendices to the reports. Sydney Ferries has not been able to provide copies of the two certifications to the Commission. In those circumstances Mr Smith must be given the benefit of the doubt on this issue, although as a responsible CEO he should have been aware of statements in the reports attributable to him.

### Letter to the Minister for Transport

On 22 October 2008, Mr Smith was asked by the Minister for Transport, the Hon David Campbell, to confirm that Sydney Ferries was using credit cards in accordance with a 2008 Corporate Credit Cards Policy and Procedure issued by the Department of Premier and Cabinet.<sup>5</sup> A copy of that document was attached to the letter. One of the conditions of use set out in the document is that the corporate credit card “is to be used only for Official Business [sic]”. The policy also sets out the cardholder’s responsibilities and provides, inter alia:

*Officers issued with a corporate credit card are in a position of trust in regards to the use of public funds and improper use may render the cardholder liable to disciplinary/legal action and/or criminal prosecution.*

Mr Smith had approved the new Sydney Ferries Credit Card Procedures on 26 March 2008. Despite continuing to incur personal expenses on his credit card he had not made any payments to Sydney Ferries since June 2008. By late October 2008 the outstanding balance of personal expenditure was almost \$52,000.

On 29 October 2008, Mr Smith wrote to the Minister advising that Sydney Ferries’ use of credit cards was “in full compliance with the promulgated policy”. This representation was false. In his evidence to the Commission, Mr Smith sought to transfer responsibility for the contents of the response to Mr Rossello.

Mr Smith acknowledged that the Minister’s letter of 22 October 2008 was received by him, and that, as it was a communication from a Minister of the Crown, he took it seriously and endeavoured to ensure that any response was accurate and truthful. He claimed, however, that

<sup>5</sup> Corporate Credit Cards: Policy and Procedure, Department of Premier and Cabinet (NSW), last revision date January 2008.

he did not take steps to carefully read the attached document to which the Minister referred.

Mr Smith gave evidence about this matter on two occasions. On the first occasion, on 24 June 2009, he claimed that he had arranged for the document to be sent to the finance area and then signed the typed version of the draft that appeared in his in-tray two days later. He said that he had no reason to doubt that the draft response was accurate. Mr Smith said he had sent the letter to Mr Rossello and would have expected Mr Rossello to tell him if his activities were not in accordance with the policy. Mr Rossello did not believe he had received the letter and claimed that he certainly did not draft or cause the drafting of any reply.

Mr Smith's evidence was clearly contradicted by the evidence of his Executive Assistant, Ms Mascarenhas, and the internal procedure for dealing with correspondence which existed within the CEO's office at the time. When correspondence was received in that office a "CEO Distribution List" was attached to it. It was a form which required the CEO to note when a response was due, the level of urgency, the persons to whom it was to be distributed, what steps needed to be taken by the recipient by reference to an alphabetic code, any comments or notes, and details of any re-submission. The procedure for the use of this form had been devised by Mr Smith.

In this case, the registration number and topic of the correspondence had been written on the form by Ms Mascarenhas' administrative assistant but it was otherwise blank. Ms Mascarenhas was quite certain that the letter from the Minister had not left Mr Smith's office. She recalled receiving the letter and then typing the response to the Minister from a handwritten draft prepared by Mr Smith. She had then discarded the draft.

Ms Mascarenhas gave evidence on a Friday and Mr Smith was not asked again about this matter until the following Monday. Mr Smith then said that he had believed that he had given the letter to Ms Mascarenhas to give to Mr Rossello. He explained the evidence of Ms Mascarenhas, which he did not dispute, by saying that he must have taken this document to Mr Rossello's desk himself and, as Mr Rossello was not there, left it on his desk. Mr Smith then went on to say that he had found the draft response on his desk on 29 October 2008. He stated that it was typed and was long and verbose. Mr Smith said that he had begun to mark it up but, as "it was a mess," he decided in the end to prepare a written draft himself. He

could not explain why he had not given this account on 24 June 2009 other than to state that he "was not asked to provide a full account of what occurred the other day".

The Commission does not accept Mr Smith's second version of events. On that account the distribution form was not completed by Mr Smith to indicate what was required or the level of urgency, no one had countersigned to show that the task was completed and the response had been left on Mr Smith's desk. That could be done only if the person responsible had bypassed Mr Smith's executive assistant. In addition, Mr Smith was claiming that he took the document to Mr Rossello by hand and left it on a desk without providing any information, written or oral, as to what was required. This sequence of events is highly unlikely.

The veracity of Ms Mascarenhas' evidence is not in issue. She clearly endeavoured to give her best recollection of events in a careful and responsive way. Even Mr Smith acknowledged that he had "no reason to doubt her evidence". On Ms Mascarenhas' evidence, Mr Smith appears to have made a calculated decision to keep the Minister's letter within his office and to respond to it by way of a deliberately false representation.

In answer to questions from Counsel for Sydney Ferries, Mr Smith admitted that he was aware at the time of drafting his letter to the Minister that it was incorrect to say that Sydney Ferries had used credit cards in full compliance with the Corporate Credit Cards Policy and Procedure because of his own failure to refund Sydney Ferries its money. He also admitted that he was aware that he owed Sydney Ferries \$50,000 by reason of not having complied with the proper use of the credit card and that his conduct would bring discredit on Sydney Ferries and himself if it became known.

The Commission is satisfied that Mr Smith made a deliberate decision to respond personally to the Minister's letter because he knew that if any person from the accounting staff were to draft a response the Minister would likely be advised that there had not been compliance with the Corporate Credit Cards Policy and Procedure. Even if Mr Smith's stated belief that he could use the corporate credit card for personal expenses provided he paid the money back was accepted, the letter to the Minister was clearly false because he had failed to make timely repayments.

The Commission is satisfied that Mr Smith deliberately misrepresented Sydney Ferries' use of corporate credit cards to the Minister because he was aware that his

personal use of his corporate credit card was contrary to relevant policies and he wanted to hide that fact from the Minister.

The Commission's findings on these matters are set out in Chapter 5.

## Chapter 4: Other issues

### Travelling with Mrs Smith

In addition to the use of his corporate credit card for personal expenses, Mr Smith also incurred other expenses of a personal nature totalling \$9,711.11.

In common with other NSW government organisations Sydney Ferries uses the services of Carson Wagonlit to book official travel. This travel was paid for through a Diners Club credit card issued to Sydney Ferries.

In early 2007, Mr Smith organised through Ms Mascarenhas to book return business class airfares for both himself and his wife to Melbourne. The amount for Mrs Smith's fares was \$977.37. The booking was charged to the Diners Club facility on 18 April 2007 and Mr Smith travelled with his wife to Melbourne and attended a counter-terrorism conference between 28 April and 2 May 2007.

Mr Smith said that he approached Ms Mascarenhas before the booking was made and asked her to identify the Government's policy for travel and the level of travel. He also disclosed that he wished to take his wife with him on that occasion. He said Ms Mascarenhas provided him with a copy of the Department of Premier and Cabinet policy concerning official travel within Australia and overseas. Mr Smith claimed that Ms Mascarenhas had discussed with the CFO the "simplicity of a single booking". He was subsequently advised by Ms Mascarenhas that a single booking would be made and that Mr Smith would be "billed after the event".

Mr Smith's evidence is corroborated by email correspondence dated 27 February 2007. After making the booking Ms Mascarenhas sent an email to Ms Hughes asking that a copy of the account be sent to her so that the expenses for Mrs Smith's airline booking could be refunded in full. Ms Mascarenhas also indicated that Mr Smith would pay other expenses on his corporate credit card and refund any that were not related to the business trip. Ms Hughes forwarded the email to Ms Misra and Ms Paragas so that they could deal with it.

On 5 August 2008, the Diners Club facility was again used to purchase return business class airfares to Hong Kong in October 2008. The booking was made on 5 August 2008, and Mrs Smith's fare amounted to \$6,289.64. Between 5 and 7 October 2008, Mr Smith attended the annual Inter Ferry Conference held in Hong Kong and his wife travelled with him. Both Mr and Mrs Smith stayed in Hong Kong after the conference, Mr Smith having taken a few days annual leave. Mr Smith said that he believed he was entitled to make the Hong Kong booking for his wife using the Diners Club facility because that "is how we had done it in 2007".

Mr Smith initially wrote seeking the consent of the Minister for Transport to attend the Hong Kong conference. He subsequently sought and obtained the consent of the Chairman of Sydney Ferries, Mr Langton. There was no reference to the possibility of Mrs Smith accompanying her husband in either letter. Mr Langton advised the Commission that there had never been any communication with Mr Smith concerning Sydney Ferries paying for Mrs Smith's airfare or her accommodation. However, he was not asked whether Mr Smith ever disclosed that his wife would be accompanying him on the journey. Mr Smith said that he was "... very confident that the Chairman was aware ..." that Mrs Smith would be accompanying him to Hong Kong.

The "policy" concerning official travel within Australia and overseas given to Mr Smith in 2007 by Ms Mascarenhas was the Department of Premier and Cabinet's Circular C2005-03 and it is silent in relation to the booking of air travel for an accompanying spouse and the payments of the costs incurred. As the CFO had approved the making of a single booking in 2007 on the basis that Mr Smith would reimburse Sydney Ferries for Mrs Smith's airfares, it is possible that Mr Smith did believe that to do the same again in October 2008 would be acceptable.

Neither the April 2007 nor the October 2008 airfare expenses have been repaid. Mrs Smith's airfares were paid out of the public purse and remain outstanding. The

October 2008 airfare was incurred at public expense at a time when the debts due to Sydney Ferries for Mr Smith's personal expenditure were escalating. He had not made any payment by way of reimbursement since June 2008. In these circumstances, Mr Smith should not have regarded it as appropriate to charge another, significant item of personal expenditure to his corporate credit card.

Mr Smith charged other miscellaneous items to his Sydney Ferries corporate credit card whilst he and Mrs Smith were in Hong Kong. The entries indicate that the charges were incurred for clothing, jewellery and restaurants. These amounts are included in the total of more than \$237,000 worth of personal expenses incurred on his corporate credit card. For reasons already advanced, Mr Smith knew only too well that this should not have occurred.

## Christmas celebrations

In late 2008 Mr Smith directed Ms Mascarenhas to book and pay for a Christmas function for the executive staff of Sydney Ferries on her Sydney Ferries corporate credit card. The function took place on 19 December 2008 at the Manta Restaurant in Woolloomooloo. The amount incurred by Ms Mascarenhas was \$2,410. That amount has not been repaid.

Although there existed a Department of Premier and Cabinet memorandum concerning out of pocket expenses and Christmas season parties which prohibited the expenditure of State funds on any event which would provide predominately personal benefits to public sector employees, including staff Christmas functions, there is no evidence that this particular policy was brought to the attention of Mr Smith. He denied that he was aware of it. He further claimed that he had not considered any policy or procedure in relation to this particular issue. He said:

*... I was looking at an opportunity to reward a group of incredibly dedicated people who had worked very hard in the interests of reforming Sydney Ferries, once a year rewarding with an activity such as this.*

The Commission is not satisfied that Mr Smith was aware that his conduct was in contravention of any policy, although a responsible CEO would have made himself aware of relevant policies before authorising the expenditure of public funds.

## A matter of credit

Mr Rossello said that he had discussed Mr Smith's use of the credit card for personal expenses with Ms Starke. That was denied by Ms Starke. She said that the first time she knew about it was on 17 March 2009 when the matter was reported to her by another Sydney Ferries employee.

According to Mr Rossello he had been told by Ms Starke to make "file notes" of his conversations. The discussion with Ms Starke was unusual, if for no other reason than her instruction to him to take "file notes" did not appear to carry with it any means by which this continuing problem would be resolved. Mr Rossello said that he told Ms Starke that he had spoken to Mr Smith about his spending on the card and asked him to repay it. According to Mr Rossello, Ms Starke had told him to make file notes in case he needed to "justify or explain what happened".

Mr Rossello agreed that Ms Starke was known within the organisation as someone who urged executives to follow proper processes and procedures. In these circumstances, had she known of Mr Smith's conduct it is unlikely that she would simply have told Mr Rossello to take file notes.

Mr Rossello said he had made notes in his diaries. However, the only diary that he still had was for the year 2009. When interviewed, Mr Rossello said that his executive assistant or someone instructed by her had cleaned his office and thrown out the diaries for previous years. He later stated that he had been mistaken and that he had discarded the diaries himself after copying phone numbers and the like to the new diary. He did this in circumstances where he acknowledged the importance of the file notes.

Mr Rossello had made three entries in his 2009 diary recording conversations with Mr Smith about his credit card. Each entry also contained a reference to a



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conversation with Ms Starke. The entries were recorded on the pages for 14 January 2009, 12 February 2009 and 13 March 2009. Photocopies of these pages were provided to the Commission by Sydney Ferries on 15 April 2009 in response to a statutory notice.

Mr Rossello said that the entries had been made on the dates on which the conversations occurred and he was careful to record the conversations accurately and contemporaneously. He said the file notes all recorded face-to-face meetings with Mr Smith at the offices of Sydney Ferries.

During the public inquiry the Commission obtained Mr Rossello's diary. It was barely used. There was only one telephone number in the diary – that of his doctor. The transfer of information from Mr Rossello's 2008 diary into his 2009 diary did not happen.

There is a real possibility that the diary entries which exist for early 2009 were fabricated by Mr Rossello and do not record actual meetings with either Ms Starke or Mr Smith. Mr Rossello was fully aware that he should not have been approving credit card statements that contained personal expenditure, especially when no payment had been made by Mr Smith. Mr Rossello needed to find an explanation for what happened and protect himself. He attributed the idea of making file notes to Ms Starke.

It transpired that Mr Smith and his wife were in Bangkok, Thailand, on 12 February 2009. When asked how he could have recorded a face-to-face meeting with Mr Smith on 12 February, Mr Rossello suggested, "I could have written it on the wrong page".

The "wrong page" explanation is highly unlikely. Mr Rossello said that the notes made by him were made on the "... same day, worst case, the following day". That means that the conversation had to have occurred on either 11 or 12 February 2009, and on both days Mr Smith was in Bangkok. He did not return to work until 16 February 2009.

There is a further problem with Mr Rossello's diary notes. Whilst there is regular reference to requests by Mr Rossello

to Mr Smith that the balances needed to be "cleared", none of the file notes records any suggestion by Mr Rossello to Mr Smith that his use of the Sydney Ferries corporate credit card was "illegal" or "wrong" or contrary to any policy.

Ms Starke was called to give evidence and emphatically denied that she had been aware of Mr Smith's misuse of the Sydney Ferries corporate credit card prior to 17 March 2009. Once she became aware, she acted immediately the next morning to arrange a meeting with the Chairman, Mr Langton.

The fact that Ms Starke took immediate steps to deal with the matter in an appropriate fashion when alerted to it very much suggests that she would have acted in precisely the same manner had Mr Rossello reported the matter to her in the previous year.

The Commission rejects Mr Rossello's evidence that he discussed Mr Smith's personal use of his corporate credit card with Ms Starke.

## Chapter 5: Findings of fact, corrupt conduct and section 74A(2) statements

The Commission conducts its investigations with a view to determining whether any person has engaged in corrupt conduct.

Three steps are involved in determining whether or not corrupt conduct has occurred. The first step is to make findings of fact. The second step is to determine whether the conduct which has been found as a matter of fact comes within the terms of section 8 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”). The third step is to determine whether the conduct also satisfies section 9 of the ICAC Act.

### Findings of fact

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

1. Between 21 August 2006 and 26 May 2009 Geoffrey Francis Smith was the Chief Executive Officer of Sydney Ferries.
2. Mr Smith was issued with a Sydney Ferries corporate credit card in September 2006.
3. At all relevant times Sydney Ferries procedures required corporate credit cards to be used for business purposes only.
4. On 31 August 2006 Mr Smith signed an application for his Sydney Ferries corporate credit card. The application included an acknowledgement that “the card will only be used for business purposes and not for private or personal purposes under any circumstances”.
5. On 27 October 2006 Mr Smith signed a document titled “Card holder’s responsibilities” by which he acknowledged receipt of his Sydney Ferries corporate credit card and the conditions of its use, including a statement that it was to be used for official purposes only.
6. On 26 March 2008 Mr Smith issued and signed a new Sydney Ferries procedure on the use of credit cards which provided that credit cards were issued for official business purposes only but that if non-business expenditure was incurred it must be immediately paid by the cardholder. Mr Smith read this document and was aware of its contents at the time he signed it.
7. Between September 2006 and March 2009 Mr Smith used his Sydney Ferries corporate credit card to incur personal expenditure of \$237,102.23. He did so knowing that he was not entitled to use his Sydney Ferries corporate credit card to incur personal expenses and that its use was restricted to Sydney Ferries business expenses.
8. In using his Sydney Ferries corporate credit card to incur personal expenses on credit and not reimbursing Sydney Ferries in a timely manner Mr Smith was able to benefit by not having to pay interest on his personal credit purchases.
9. On 29 October 2008 Mr Smith signed a letter to the Minister for Transport, the Hon David Campbell, in which he knowingly falsely claimed that Sydney Ferries’ use of credit cards was in full compliance with government policy which required that corporate credit cards be used only for official business. He made this false claim because he was aware that his use of his corporate credit card for personal as opposed to business use was contrary to relevant policies and he wanted to hide that fact from the Minister.
10. Each of Ms Hughes, Mr Andreopoulos and Mr Rossello was aware that Mr Smith had used his Sydney Ferries corporate credit card to incur personal expenditure. None took action to cancel Mr Smith’s card or to report his misuse.

## Corrupt conduct

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

Before proceeding further it is useful to first consider the meaning of “breach of public trust”, which appears in section 8(1)(c) of the ICAC Act and “official misconduct” which appears in section 8(2) of the ICAC Act as both are relevant in determining whether Mr Smith engaged in corrupt conduct.

Section 8(1)(c) of the ICAC Act includes in the definition of “corrupt conduct” any conduct of a public official that constitutes or involves a “breach of public trust”. There is no definition of the term “breach of public trust” in the ICAC Act.

As Mahoney JA observed in *Greiner v. The Independent Commission Against Corruption* ((1992) 28 NSWLR 125 at 165), it is not necessary to attempt a precise definition of the term “breach of public trust” where used in section 8(1). Nor does it appear desirable to do so. There is no closed category of circumstances which may constitute a “breach of public trust”.

In *R v. Bembridge* ((1783) 99 ER 679 at 681), Lord Mansfield said:

*The law does not consist of particular cases but of general principles, which are illustrated and explained by these cases. Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatever way the officer is appointed ... Secondly, where there is a breach of trust, fraud or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.*

The Commission examined breach of public trust in its *Report on Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles* (“the Smiles Report”). The Commission observed that breach of public trust is part of the law relating to misbehaviour in public office. There is a common law criminal offence – variously known as misconduct in public office, misbehaviour in public office or breach of public trust – to which further reference is made later.

Although it is helpful, in this context, to consider authorities concerning the common law criminal offence of misconduct in public office, it is necessary to keep in mind that the term “breach of public trust” in section 8(1)(c) is not confined to conduct which may constitute such an offence. The term “breach of public trust” ought to be given a broader meaning, especially in its statutory context within the ICAC Act. There is no reason to construe section 8(1) generally, or section 8(1)(c) in particular, as being confined to conduct which constitutes a criminal offence. If section 8(1) was to be so confined, there would be no reason to have section 9(1)(a) in the Act. On the other hand, section 8(2) lists a series of criminal offences, including official misconduct (section 8(2)(a)). It is appropriate to equate “official misconduct” in section 8(2)(a) with the common law offence of misconduct in public office. The existence of that precise reference to the offence in section 8(2)(a) supports the construction that “breach of public trust” in section 8(1)(c) is not to be confined to conduct which could constitute the common law offence of misconduct in public office.

At page 18 of the Smiles Report, the Commission stated that:

*Mere error does not amount to a breach of public trust (R v. Borron (1820) 106 ER 721) and hence is not corrupt conduct within the meaning of sections 8(1)(c) and 9 of the ICAC Act. ...*

*Examination of the cases leads to the conclusion that the over-arching principle required for breach of a public trust is bad faith. If a power is exercised, a function carried out or an office fulfilled honestly and in good faith, or the attempt to do so is honest and in good faith, there can be no breach of public trust. Fraud, bribery, deliberate partiality, knowingly permitting extraneous factors to affect the outcome, can all fall within the concept of bad faith, depending on the circumstances. The honest exercise or attempted exercise in good faith of an office or power cannot be said to be a misuse of that office or power within the meaning of the authorities, even if the outcome of that exercise is wrong or invalid. Honesty and good faith negate breach of public trust as that term is used in the ICAC Act. Indeed, they are inconsistent with corrupt conduct within the meaning of the Act (Greiner at 134-135 per Gleeson CJ). Honesty and good faith are consistent with the provisions of the Act which look to “the honest or impartial exercise*

*of official functions by a public official” (section 8(1)(a)) and by contrast include within corrupt conduct “dishonest or partial exercise” of official functions (section 8(1)(b)).*

In *Herscu v. The Queen* ((1991) 173 CLR 276 at 281) it was said that the following statement by Dixon CJ in *Canadian Pacific Tobacco Company Limited v. Stapleton* ((1952) 86 CLR 1 at 6) was apposite:

*I think that the words “except in the performance of any duty as an officer” ought to receive a very wide interpretation. The word “duty” there is not, I think, used in a sense that is confined to a legal obligation, but really would be better represented by the word “function”. The exception governs all that is incidental to the carrying out of what is commonly called “the duties of an officer’s employment”; that is to say, the functions and proper actions which his employment authorises.*

The power to use the Sydney Ferries corporate credit card was a power vested in Mr Smith by virtue of his office. The power was properly exercisable for the benefit and in the interests of the public through Sydney Ferries. It was not conferred or properly exercisable for personal benefit. The Commission is satisfied that Mr Smith knowingly failed to exercise the power entrusted to him in relation to the use of the Sydney Ferries corporate credit card in the public interest.

As indicated above, it is appropriate to equate “official misconduct” in section 8(2)(a) with the common law offence of misconduct in public office.

PD Finn (as his Honour then was) said, concerning the common law offence of misconduct in public office, in an article entitled “Public Officers: Some Personal Liabilities” (1977) 51 ALJ 313 at 315:

*The kernel of the offence is that an officer having been entrusted with powers and duties for the public benefit has in some way abused them, or has abused his official position.*

The offence of misconduct in public office is an indictable common law offence in NSW.

The Hong Kong Court of Final Appeal considered the offence in *Shum Kwok Sher v. HKSAR* ((2002) 5 HKCFAR 381). The leading judgment in this case was given by Sir Anthony Mason NPJ. After considering previous English cases in which the offence had been considered his Honour considered the following to be the elements of the offence:

1. A public official;
2. who in the course of or in relation to his public office;
3. wilfully and intentionally;
4. culpably misconducts himself.

His Honour held that “a public official culpably misconducts himself if he wilfully and intentionally neglects or fails to perform a duty to which he is subject by virtue of his office or employment without reasonable excuse or justification. A public official also culpably misconducts himself if, with an improper motive, he wilfully or intentionally exercises a power or discretion which he has by virtue of his office or employment without reasonable excuse or justification.”

Mason NPJ set two qualifications to this statement. The first was that the misconduct must be wilful as well as intentional. The second was that the misconduct complained of must be serious misconduct. Whether the misconduct is serious is to be determined having regard to the responsibilities of the office and the office holder, the importance of the public objects which they serve and the nature and the extent of the departure from those responsibilities.

The statement of the elements of the offence of misconduct in *Shum Kwok Sher v. HKSAR* was considered and approved by the England and Wales Court of Appeal in *Attorney General’s Reference No. 3 of 2003* ((2004) EWCA Crim 868). That court however did not accept the need for the conduct to be both wilful and intentional and accepted that recklessness in relation to advertence to the consequences would also suffice.

In his 2005 judgment in *Sin Kam Wah v. HKSAR* ((2005) HKCFA 27) Mason NPJ reformulated the elements of the offence after taking into account what he described as the detailed consideration in *Attorney General’s Reference No. 3 of 2003*. He set out the elements as:

1. a public official;
2. in the course of or in relation to his 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, not trivial, 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 responsibilities.

The Commission is satisfied that between September 2006 and March 2009 Mr Smith wilfully and intentionally used his Sydney Ferries corporate credit card to incur personal expenditure of \$237,102.23, knowing that he was not entitled to do so. Such conduct:

- constitutes or involves a breach of public trust on the part of Mr Smith, and therefore comes within section 8(1)(c) of the ICAC Act.
- could adversely affect the exercise of official functions by himself, and by officers of Sydney Ferries reporting to him and responsible for processing and approving payment of his credit card debt, and could involve official misconduct on the part of Mr Smith, and therefore comes within section 8(2) of the ICAC Act.

For the purposes of section 9 of the ICAC Act, the conduct could also constitute or involve a common law offence of misconduct in public office. It could also constitute or involve an offence contrary to Schedule 10, Part 1, Clause 3(5) of the *State Owned Corporations Act 1989*. That provision makes it an offence for an officer of a State owned corporation to make improper use of his position to gain directly or indirectly an advantage for himself or to cause detriment to the State owned corporation. The test of impropriety for this offence is an objective one. Impropriety does not depend on a consciousness of impropriety, but consists of a breach of the standards of conduct expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case (*R v. Byrnes* (1995) 183 CLR 501).

Such conduct could also, for the purposes of section 9 of the ICAC Act, constitute or involve reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of Mr Smith.

In these circumstances the Commission finds that Mr Smith engaged in corrupt conduct by using his Sydney Ferries corporate credit card between September 2006 and March 2009 to incur personal expenditure of \$237,102.23 knowing that he was not entitled to use the credit card to incur personal expenses and that its use was restricted to Sydney Ferries business expenses.

Mr Smith's conduct in knowingly falsely claiming in a letter to the Minister for Transport on 29 October 2008 that Sydney Ferries' use of credit cards was in full compliance with government policy, so that he could hide from the Minister the fact that he used his corporate credit card

for personal use contrary to relevant policies, is conduct which:

- constitutes or involves the dishonest exercise of his official functions and therefore comes within section 8(1)(b) of the ICAC Act,
- constitutes or involves a breach of public trust on his part and therefore comes within section 8(1)(c) of the ICAC Act,
- could adversely affect the exercise of official functions by the Minister for Transport and could involve official misconduct on the part of Mr Smith, and therefore comes within section 8(2) of the ICAC Act.

It could also constitute or involve the common law offence of misconduct in public office or an offence contrary to Clause 3(2) of Schedule 10, Part 1 of the *State Owned Corporations Act 1989*. Clause 3(2) requires an officer of a State owned corporation to act honestly in the exercise of his functions.

Such conduct could also constitute or involve reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating Mr Smith's services as a public official.

In these circumstances the Commission finds that Mr Smith engaged in corrupt conduct in knowingly falsely claiming in a letter to the Minister for Transport on 29 October 2008 that Sydney Ferries' use of credit cards was in full compliance with government policy so that he could hide from the Minister the fact that he used his corporate credit card for personal use contrary to relevant policies.

## Section 74A(2) statements

In making a public report, the Commission is required by the provisions of section 74A(2) of the ICAC Act to include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

- obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*
- the taking of action against the person for a specified disciplinary offence,*
- the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.*

An “affected person” is a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with, an investigation.

The Commission is satisfied that Mr Smith and Mr Rossello come within the definition of ‘affected persons’ and accordingly statements under section 74A(2) must be included in this report in respect of each of them.

Ms Starke is also an affected person because of the allegations by Mr Rossello that he had told Ms Starke about Mr Smith’s conduct and that she was a “liar” in denying that had occurred. For the reasons set out earlier in this report the Commission has rejected Mr Rossello’s evidence concerning Ms Starke.

The Commission also regards Ms Hughes and Mr Andreopoulos as affected persons because they failed to take action to stop Mr Smith using his corporate credit card for personal expenses and failed to report the matter to the Board of Sydney Ferries or other appropriate entity.

## Geoffrey Smith

Mr Smith gave his evidence following a declaration made by the Commissioner pursuant to section 38 of the ICAC Act. The effect of that declaration is that his evidence cannot be used against him in any subsequent criminal prosecution, except a prosecution for an offence under the ICAC Act. Similarly Mr Smith’s responses to the section 21 notices were made under objection and are therefore not able to be used.

However, in the course of its investigation the Commission has obtained other evidence that would be admissible in any prosecution of Mr Smith. The Commission has documentary evidence concerning Mr Smith’s personal expenditure on the credit card and those repayments that he made, thereby acknowledging his responsibility for the amounts. In addition a number of officers of Sydney Ferries have made statements concerning Mr Smith’s conduct.

The Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of Mr Smith for the following criminal offences:

- misconduct in public office in relation to:
  - his misuse of the corporate credit card for personal expenses, and
  - the false claim he made in the letter to the Minister dated 29 October 2008
- using his position as an officer of a statutory SOC to gain an advantage for himself contrary

to Schedule 10, Part 1, Clause 3(5) of the *State Owned Corporations Act 1989*, in relation to his misuse of his corporate credit card

- acting dishonestly in the exercise of his functions contrary to clause 3(2) of Schedule 10, Part 1 of the *State Owned Corporations Act 1989*, in relation to the false claim he made in the letter to the Minister dated 29 October 2008.

As Mr Smith has already been dismissed from his position as CEO of Sydney Ferries there is no need to express any opinion as to whether or not consideration should be given to the taking of action against him for a specified disciplinary offence or taking action with a view to the dismissal or termination of Mr Smith.

## Vincenzo Rossello

Mr Rossello also sought and was granted a declaration pursuant to section 38 of the ICAC Act. Nevertheless his evidence can be used against him in a prosecution for an offence under the ICAC Act.

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 Rossello for an offence against section 87(1) of the ICAC Act for giving evidence during the public inquiry that he knew to be false or misleading. More particularly his evidence that “I sought advice from a senior person internally, on what I should be doing about the – the problem, and I was told that I should take file notes”.

Mr Rossello was engaged by Sydney Ferries pursuant to the Agreement for Provision of Professional Services entered into between Sydney Ferries and Contracting Staff Pty Limited on 26 November 2008. The word “Contractor” in that agreement is defined to include its “Personnel”, namely Mr Rossello. As the CFO of Sydney Ferries, Mr Rossello was clearly exercising public official functions. He was a “person otherwise engaged” by a public authority and accordingly was a public official within the meaning of the ICAC Act.

In those circumstances the Commission would ordinarily be required to express an opinion as to whether or not consideration should be given to the taking of disciplinary action or other action against Mr Rossello with a view to dispensing with or terminating his services. However, that is no longer necessary.

The Commission has been advised that Sydney Ferries gave notice of termination of its contract with Contracting Staff Pty Limited on 1 July 2009. Although the termination



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formally takes effect from 2 December 2009 Mr Rossello and his company ceased to provide services to Sydney Ferries on 1 July 2009.

### **Alana Starke**

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with regard to the prosecution of Ms Starke for any offence. The Commission is not of the opinion that consideration should be given to the taking of disciplinary action against Ms Starke.

### **Wendy Hughes and Alexander Andreopoulos**

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with regard to the prosecution of either Ms Hughes or Mr Andreopoulos for any offence.

Ms Hughes and Mr Andreopoulos are no longer employed by Sydney Ferries. Accordingly it is not necessary to express any opinion as to whether or not consideration should be given to the taking of disciplinary action or other action against either Ms Hughes or Mr Andreopoulos with a view to dispensing with or terminating their services.

## Chapter 6: Corruption prevention issues

The purpose of this chapter is to examine the factors that allowed, encouraged or caused Mr Smith's conduct and describe how such conduct might have been prevented in this case and might be prevented in similar cases in the future.

### The Commission's corruption prevention role

The Commission's corruption prevention role is established under section 13(1) of the ICAC Act, as follows:

...

*(d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,*

*(e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated,*

*(f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct,*

...

Section 13 also establishes the corruption prevention functions that apply to investigations carried out by the Commission:

*(2) The Commission is to conduct its investigations with a view to determining:*

...

*(b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and*

*(c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct,*

...

Four corruption prevention recommendations have been made.

### Credit card use – some preliminary comments

Despite its findings against Mr Smith, the Commission regards the appropriate use of government-issued credit cards as a potentially efficient and useful method for purchasing low-value items.

Because their use leaves an auditable trail of activity which is itself difficult to corrupt, and the transactions can usually be linked directly to the cardholder, credit cards are in many ways preferable to (or at least no worse than) other purchasing methods such as cash or purchase orders. As such, an over-reaction to Mr Smith's conduct might have the unintended consequence of making government purchasing more inefficient without actually lowering the overall risk of corruption. For this reason, the Commission does not, at least as a result of this investigation, recommend that credit card use in the NSW public sector be curtailed.

That said, the Commission did consider whether a person in Mr Smith's role as a CEO needs a corporate credit card. Certainly the value of Mr Smith's business-related purchases on the card was dwarfed by his private purchases<sup>6</sup> and many of the business expenses could have

<sup>6</sup> By value, approximately 88% of the purchases on the card were of a private nature.

been incurred by other means. However, the Commission is not persuaded that cases like Mr Smith's are common enough to warrant all government CEOs being relieved of their corporate credit cards.

The documented procedures that Sydney Ferries had adopted for managing credit card expenditure encompassed most of the controls that would be expected in a NSW government agency. Appropriate segregations of duty existed, proper documentation and accounts were kept and cardholders were obliged to sign a statement to confirm that they acknowledged and accepted the specified conditions of use.

In respect of credit cards issued to CEOs, the NSW Treasury's *Credit Card Use Best Practice Guide* of August 2005<sup>7</sup> says (on page 2) that:

*card accounts for CEOs and Executive members (SES officers reporting directly to the CEO) should be examined and authorised by the officer in charge of the corporate finance area or a similarly independent officer.*

Therefore, the practice of having the CFO sign-off on Mr Smith's monthly credit card statement was in line with Treasury's stated best practice.

However, for a variety of reasons that are canvassed in more detail below, the Sydney Ferries CFOs and other staff who knew about Mr Smith's conduct decided neither to cancel his card nor to report his conduct to an external authority.

There is no doubt that Mr Smith's seniority played a major role in allowing his corrupt conduct to continue. With the procedures and systems in place, had a Sydney Ferries officer in a less senior position than Mr Smith's engaged in the same corrupt conduct, the conduct would most likely have been prevented much earlier. Counsel Assisting the Commission expressed the issue in the following terms:

*From a corruption prevention point of view, the crux of the problem was that Mr Smith was not required to have his expenditure approved by any level of authority above him.*

After learning of the allegations against Mr Smith and terminating his employment, Sydney Ferries has amended its procedures so that the monthly statement of the sole remaining corporate credit card is now presented to the Board each month. That is to say, the previous situation, in which the CEO's use of the card was authorised by

a subordinate, no longer exists. In this circumstance, it is unnecessary for the Commission to make a recommendation in respect of this particular issue.

## Good practice and conduct by Sydney Ferries staff

Before providing an analysis of what contributed to Mr Smith's corrupt conduct, it is worth describing some of the good practices by Sydney Ferries staff that either assisted the Commission or otherwise had a desirable effect.

### Management of the complaint

Mr Smith's conduct was ultimately reported by Ms Misra – via Ms Starke, the Chairman of the Board and the Department of Premier and Cabinet – to the Commission.

Ms Misra's decision to approach Ms Starke was taken against a background of what she perceived as relative inaction by some of her superiors. Her complaint was against the most senior officer in her organisation, there was a chance that she would be identified as the complainant and at the time of making her complaint, she had no clear idea of how seriously it would be taken. Ms Misra found this a stressful experience and she is to be commended for the action she took.

### Conduct of the finance and accounting staff

The finance and accounting staff at Sydney Ferries were in an unenviable position when Mr Smith's misconduct became apparent to them. Some of their good practices included:

- Mr Patel confronted Mr Smith about outstanding amounts on his credit card.
- Ms Paragas sent a copy of the Cardholders' Responsibilities statement to Mr Smith with the following passage highlighted "cards are used only for official business purposes".
- The accounting staff ensured that Mr Smith was always recorded as a sundry debtor to Sydney Ferries, thereby creating a strong audit trail.
- Ms Misra and Ms Paragas followed up on an unexplained transaction on the September 2006 statement of \$1,527.96 to Stella Resorts Group (which was a personal expense incurred by Mr Smith).
- At Ms Misra's request, Ms Paragas maintained a spreadsheet detailing Mr Smith's credit card

<sup>7</sup> Similar wording also appears in Direction no. 205.04 of the Treasurer's Directions.

debts. Ms Misra told the Commission she did this because “there was no action being taken also to stop the use – the private use, so we needed evidence”.

- On 1 September 2008, Ms Misra emailed Messrs Rossello, Dean and Patel pointing out Sydney Ferries’ legal obligations and urging them to enforce compliance or withdraw Mr Smith’s card.
- On 13 March 2009, Ms Misra emailed Messrs Dean and Rossello to advise that “All transactions on the credit card and balances outstanding will be reported [to the Ministry of Transport] as we are now a statutory authority”.
- On 17 March 2009, Ms Misra emailed a number of colleagues, including Mr Smith himself, to indicate that pursuant to the *Public Finance and Audit Act 1983* (which had applied to Sydney Ferries in full since 1 January 2009), staff were bound by new obligations in relation to accounting for credit card use. This email and its attachments made it abundantly clear that Mr Smith’s conduct breached that Act and that Ms Misra and her staff would be taking steps to remedy this.
- Ms Paragas and her colleagues also followed up business-related transactions that were not accompanied by the required receipts and chased outstanding credit card statements.
- Mr Patel caused a new credit card procedure to be drafted, which was brought into effect in March 2008. In part, this was a conscious attempt to address Mr Smith’s misuse of his corporate credit card. Mr Patel also sought to initiate a review of credit card use under that procedure (discussed in more detail below).
- Mr Dean, in an email to Mr Rossello of 19 May 2008, indicated that unless Mr Smith’s debt was paid by 31 May, any outstanding balance “must be reported by Finance and will be (unfortunately) included in the SFC audit management letter as a serious issue”. This threat of exposure is likely to have played a role in encouraging Mr Smith to make a large repayment in June.
- Sydney Ferries finance and accounting staff also diligently applied the fringe benefits tax provisions that applied to some of Mr Smith’s transactions.

In addition, the three CFOs made some attempts to modify Mr Smith’s behaviour. This is discussed elsewhere in this chapter.

## Aspects of Sydney Ferries’ credit card procedures

As set out in Chapter 3, the Commission does not accept Mr Smith’s evidence that he was unaware of his responsibility to use his Sydney Ferries credit card for business purposes only. Consequently, it cannot be claimed that his conduct would have been prevented if the relevant procedures were better written or explained.

That notwithstanding, this section outlines some aspects of Sydney Ferries’ procedures that contributed to Mr Smith’s conduct.

### The direct debit facility

As per Treasury policy<sup>8</sup>, the outstanding balance on Mr Smith’s credit card was paid automatically each month via a direct debit facility. The entirely sensible rationale for this requirement is the desire to avoid interest payments and late payment fees. The balance was therefore routinely paid before Mr Smith and the relevant CFO had checked and signed the statement and certainly before Mr Smith had reimbursed his personal expenses.

The consequences of the direct debit policy were threefold. First, Mr Smith’s \$10,000 credit limit was restored each month, irrespective of the size of his aggregate debt to Sydney Ferries. Had Mr Smith not been able to take advantage of this automatic repayment facility, his debt at any one time would have been capped at \$10,000.

Secondly, the automatic payment meant that instead of incurring a debt to the card issuer (Westpac Bank), Mr Smith’s debt was to Sydney Ferries. That is, instead of owing money to an external financial institution, Mr Smith’s interest-free debt was to the agency that he headed. It can be safely inferred that had Mr Smith’s debt been owed to an external party, his delay in paying what he owed would not have been tolerated.

Thirdly, because the outstanding balance was paid automatically when the statement, after being annotated by Mr Smith, was presented to the CFO for signature, the CFO was not authorising payment in any meaningful sense. The CFOs knew that whether they signed Mr Smith’s statement or not, the account had already been paid. Payment of the monthly account did not hinge on an actual approval by the CFO. This may have encouraged the CFOs to avoid the confrontation with Mr Smith that withholding authorisation would have caused.

Although it is important to gain an understanding of all the factors that contributed to Mr Smith’s conduct, in the Commission’s opinion, the aim of avoiding

<sup>8</sup> See Treasurer’s Directions 205.07.

interest payments and late payment fees is a legitimate consideration. So, despite the consequences described above, the Commission does not recommend that the Treasury policy of credit card payment by automatic direct debit be discontinued.

## Annual Reports

Sydney Ferries' Annual Reports for 2006-07 and 2007-08 each contained the following statement:<sup>9</sup>

*The Chief Executive Officer of Sydney Ferries has certified that all corporate credit cards issued to Sydney Ferries staff are for business purposes only and are used in accordance with the relevant Premier's Memoranda and Treasurer's Directions.*

These statements were false. The Commission's investigation found that no actual certification process took place, less still a certification by Mr Smith.

While the Commission does not expect the CEO of a public agency to personally conduct an annual review of credit card usage, his or her ultimate certification must be based on some type of informed advice. Simply inserting the required words into the Annual Report is misleading and, in the case of Sydney Ferries, was a falsehood.

The Commission recommends that in future, the statements in Sydney Ferries' Annual Reports regarding credit card use should be based on an actual assessment and certification of compliance. This certification could be synchronised with Sydney Ferries' revised credit card procedure which contains a requirement for periodic compliance reviews.

## Recommendation 1

**That Sydney Ferries' annual reporting requirements in relation to credit card use be based on an actual certification of compliance with the Treasurer's Directions.**

## Who knew about it?

As set out in Chapter 3, at various times numerous Sydney Ferries officers knew that Mr Smith was misusing his credit card. Of these, three were his direct reports, namely the CFOs Ms Hughes, Mr Andreopoulos and Mr Rossello.

Although these direct reports did not convey Mr Smith's conduct to the Commission or other bodies such as the

Board, Audit Committee, Audit Office or internal auditor, they did take some steps to arrest the situation. This section describes the ethical dilemma that may be triggered when subordinates are confronted by the misconduct of their superior officers, canvasses some of the reasons that were advanced by the CFOs for not taking stronger action and finally, sets out the Commission's views on what ought to have happened.

## Superiors and subordinates

In forwarding his monthly credit card statements to the three CFOs for approval, Mr Smith created a dilemma for them by effectively requiring them to either accommodate his misuse of the card or take action to stop it. The same might be said about the other Sydney Ferries staff who knew about Mr Smith's conduct but were, by implication, expected to accommodate it. Those Sydney Ferries officers were even more seriously compromised when Mr Smith failed to deliver on the assurances that he had made to repay his debts.

The Commission has previously considered situations in which conduct by a senior officer has created ethical dilemmas for subordinates. In its 2003 *Report on investigation into the conduct of certain officers of the NSW Grains Board*, the Commission concluded that:

*It is a reprehensible abuse of power to directly or indirectly require subordinate staff to choose between honest conduct and keeping their job.<sup>10</sup>*

Similarly, the Commission's 1996 *Report on the Public Employment Office evaluation of the position of Director-General, Department of Community Services* stated that where there is a conflict between loyalty to a superior officer and integrity, "Integrity is and must always be predominant".<sup>11</sup>

The sentiments expressed in these previous reports also apply in respect of Sydney Ferries. While loyalty is by and large an admirable quality, NSW public officials should understand that there can be no duty of loyalty where there is an expectation, even an unspoken one, to remain silent about serious misconduct or corrupt conduct.

Equally, CEOs and senior public sector managers must be proactive in seeking to ensure that their own behaviour is fully compliant with relevant policy and procedures, recognising that subordinate staff may be reluctant to raise these issues with them.

<sup>9</sup> The requirement for such a statement arises from section 205.01 of the Treasurer's Directions. Although Treasurer's Directions do not directly apply to State owned corporations, Sydney Ferries had adopted them in respect of annual reporting of credit card use.

<sup>10</sup> *Report on investigation into the conduct of certain officers of the NSW Grains Board*, Independent Commission Against Corruption, Sydney, 2003, page 49.

<sup>11</sup> *Report on the Public Employment Office evaluation of the position of Director-General, Department of Community Services*, Independent Commission Against Corruption, Sydney, 1996, page 14.

## So why didn't they report Mr Smith's conduct?

The CFOs, Ms Hughes, Mr Andreopoulos and Mr Rossello, advanced a number of explanations for why they decided to deal with Mr Smith's misconduct internally, rather than report it to an external authority or otherwise take firmer action. Most significantly, all three CFOs said that they were persuaded by Mr Smith's (ultimately unfulfilled) assurances that he would pay his debts.

All three of the CFOs confronted Mr Smith in person about his credit card use. They each extracted from Mr Smith assurances that he would repay his outstanding debts. They each told the Commission that at various times they told Mr Smith that he was not permitted to incur personal expenses on the card. Although they might not have strictly enforced Sydney Ferries' credit card procedure and elected not to report Mr Smith's conduct, they did not ignore the matter completely.

Ms Hughes stated that because she was Mr Smith's subordinate, she relied on his assurances and did not provide him with a written direction or advice. She also felt that Mr Smith's initial explanation of how he used his corporate credit card in previous employment was "plausible", which suggests that at the time she mistakenly viewed his conduct as misguided but not corrupt. Also, because Mr Smith was not attempting to conceal the fact that he was using the card for personal purchases, Ms Hughes was not as alarmed as she otherwise would have been. She also said that she developed a sense of "respect and loyalty" towards Mr Smith and admired his dedication to Sydney Ferries despite having to also deal with an illness in the family.

Ms Hughes said that 2007 was a difficult time for Sydney Ferries staff. In January and March, ferry accidents resulting in fatalities had occurred. In April the Government established a Special Commission of Inquiry into general aspects of Sydney Ferries' operations. Ms Hughes was seconded to work on matters arising from that Inquiry, which triggered Mr Andreopoulos' acting appointment.

Ms Hughes mentioned that her work on the Inquiry was stressful and that upon resigning from Sydney Ferries in December 2007, she was "just happy to get out of there". Whilst in this frame of mind, and not wanting to burden her successor, she signed two of Mr Smith's credit card statements just days before she left the organisation. She did this knowing that Mr Smith had been in breach of the credit card procedure since September 2006.

It is also worth pointing out that because the Special Commission was dwelling on matters that went to

the future of Sydney Ferries as a going concern, the ramifications of exposing Mr Smith's conduct were placed in a different context.

Mr Andreopoulos conceded that, against the background of the Special Commission and "the need for stability throughout that process" his primary aim was to obtain repayment and then "start from a clean slate" rather than cancel the card or report Mr Smith's conduct to a higher authority. He also said that Mr Smith "was seen as an agent of change and reform and was driving change" and that "To have another CEO depart so quickly" would not be in the interests of Sydney Ferries.

When asked why he did not cancel Mr Smith's credit card, Mr Rossello told the Commission that:

- He "felt sorry for – for Mr Smith" because he was "going through a personal hard time".
- Mr Smith "was very well respected", "was good for the organisation" and was "trying to make a difference to Sydney Ferries".
- "I didn't feel I was in a position, being a contractor, to be able to do that".

He also said that it was difficult for him to repeatedly confront Mr Smith about his credit card use because "when they're your superior it makes it a – a bit awkward" and he approved Mr Smith's credit card statements "under a distressed state . . . this is one of those roles I don't enjoy doing".

## CFO turnover

There is no evidence that Mr Smith contrived the high turnover in CFOs, especially not for the purpose of enabling his corrupt conduct. However, the Commission is of the opinion that the turnover in CFOs had the unintentional effect of allowing Mr Smith's conduct to continue.

For instance, had Ms Hughes remained in the CFO role, it is possible that Mr Smith's repeated assurances about repaying his debt would not have been tolerated for as long. Specifically, it is likely that his inability to pay his debts would have become apparent earlier and his undertakings would have carried less weight.

In her evidence to the Commission, Ms Hughes indicated that "if he did continue to do it I'd have to do something like cancel his card" and that she "would have" cancelled the card had she known about the continued misuse. However, as Ms Hughes was seconded to another part of the organisation, she was not in a position to take, or threaten to take, this action and Mr Smith had the opportunity to

repeat his undertakings afresh to Mr Andreopoulos and then Mr Rossello.

In addition, a number of witnesses suggested that because Mr Andreopoulos was acting in the CFO role for the first time and because Mr Rossello was employed as a temporary contractor, their employment was precarious and they lacked the necessary authority to bring Mr Smith into line. Mr Andreopoulos, for instance, told the Commission that he “never considered cancelling the card independently. That would have been a matter for Wendy [Hughes]” who was the substantive holder of the position.

In hindsight, it would have been preferable to have a permanent employee substantively occupying the CFO role on a continuous basis. The CFO occupies an important gatekeeper role in any organisation and discontinuity and a lack of authority in that role can create opportunities for corrupt conduct. That said, because employee turnover is not a matter that an organisation can directly control it is not practical for the Commission to make recommendations in this regard.

### What should have happened - the Commission's opinion

The failure to report or otherwise respond more firmly to Mr Smith's escalating misconduct does warrant criticism. The Commission's view is that, ideally, Mr Smith's conduct should have been reported to the Board as soon as it became obvious that he was knowingly breaching the credit card procedure. At the very least, action should have been taken once it had become apparent that Mr Smith's promises about repaying his debts and ceasing his conduct proved worthless.

The staff at Sydney Ferries who knew about Mr Smith's conduct could have reported the matter to any or all of the Board or Audit Committee, in-house Corporate Counsel, the internal auditor Walter Turnbull, the NSW Audit Office, the shareholding or portfolio ministers, the Department of Premier and Cabinet, Treasury or the Commission. Any such disclosure could also have been made anonymously.

In fact, the relevant Sydney Ferries code of conduct sets out a positive duty to report suspected corrupt conduct. It states, “All employees have **an obligation** to report any possible corrupt conduct at work of which you become aware” and “Employees **must** report any possible corrupt conduct to their General Manager<sup>12</sup> and/or the Independent Commission Against Corruption” (emphasis added).

Even if Sydney Ferries staff did not appreciate that Mr Smith's conduct amounted to “possible corrupt conduct”,

the code of conduct also states that “It is important for employees to report any wrongdoing at work which leads to a person or an organisation gaining an unfair advantage”.

The code therefore sets out an expectation that the CFOs would act on the information that was being brought to their attention. In addition, the CFOs were:

- very senior and well-paid officials;
- the designated custodians of Sydney Ferries' finances and related policies and procedures;
- the key point of contact with the Audit Committee; and
- responsible for the performance and welfare of their own staff, some of whom were clearly uncomfortable with the situation that Mr Smith had placed them in.

The failure by the CFOs to report or arrest Mr Smith's conduct fell below the standard of behaviour expected of Sydney Ferries staff, as set out in its code of conduct, but also below the standard expected of any senior public official.

### A review of the credit card procedure? – the role of Mr Patel

Girish Patel was appointed Sydney Ferries' Internal Control Officer in February 2007. In July 2008 he commenced in the newly established position of Audit Assurance Manager which had additional accountabilities in relation to financial reporting. In both positions, Mr Patel reported to the CFO.

Sydney Ferries' internal audit function was performed primarily by the firm Walter Turnbull. That notwithstanding, Mr Patel's respective position descriptions state “the position assists in carrying out an ongoing, independent and objective program of comprehensive audits and reviews”. One of his accountabilities was to “undertake internal audits and reviews in areas identified as ‘at risk’ . . .”. Although Mr Patel's position involved a variety of activities other than auditing, at least in relation to credit card use, his responsibilities meant that he would be reviewing his own manager's performance.

Mr Patel's position as Internal Control Officer had responsibility under clause 6.1 of Sydney Ferries' credit card procedures (which Mr Patel had himself drafted) to “independently review credit card expenditure and compliance with these procedures”. However, Mr Patel's evidence, which is accepted by the Commission, is that in or about April 2008, he was directed not to perform this review by Mr Rossello. Mr Rossello told Mr Patel that he

<sup>12</sup> The CFOs were designated as General Managers.

would perform the review himself, but did not. It is likely that had he been given the opportunity to do so, Mr Patel would have furnished a report that detailed Mr Smith's non-compliance with the procedure. Consequently, an obvious opportunity for Mr Smith's behaviour to be exposed was lost.

The evidence does not establish that Mr Rossello's decision to prevent this review was motivated by any improper considerations. The fact, however, is that Mr Patel lacked the necessary independence to perform his duties. In his words, "in terms of reporting there was no independence in my role. There was zero independence which was totally, totally wrong."

In any organisation there will be occasions when it is appropriate for scheduled reviews or audits such as the one described above to be postponed or even cancelled. Priorities often change and staff in governance and audit roles sometimes need to modify their review program. However, Mr Patel's proposed review of the credit card procedure was cancelled by Mr Rossello – the person who was primarily responsible for its administration.

In the Commission's opinion, it should not be possible (or at least straightforward) for a person having Mr Patel's functions to be directed to refrain from conducting a review or audit, especially where such a review is mandated by a written procedure adopted by the CEO.

In its March 2008 review of *Internal Audit Capacity in the NSW Public Sector*, the Department of Premier and Cabinet has noted that "Best practice indicates internal audit should have independence from operational management. This provides a transparent process to ensure governance is effective, risks are appropriately identified and managed, and the control environment is adequate"<sup>13</sup> and also that "Reporting to, or holding the position of, an operational head may compromise audit independence. This does not appear to be consistent with public or private sector best practice"<sup>14</sup>.

In relation to Mr Patel's role, the Commission makes the following recommendation:

## Recommendation 2

**That for the purpose of internal audit responsibilities, the position of Audit Assurance Manager have an additional reporting line to Sydney Ferries' Audit Committee and/or the Board.**

<sup>13</sup> See [www.dpc.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0015/20166/1A\\_Report-Final\\_16\\_April\\_2008.pdf](http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0015/20166/1A_Report-Final_16_April_2008.pdf), p.18.

<sup>14</sup> *ibid*, p.35.

Sydney Ferries has two nominated protected disclosures officers: the CEO and the Corporate Counsel. The complaint which triggered the Commission's investigation into Mr Smith was a protected disclosure made to the Corporate Counsel, Ms Starke. Any officer, including Mr Patel, could have made a protected disclosure to Ms Starke, or to an investigative agency at any time. However, Mr Patel took what was probably the most logical step<sup>15</sup>; raising the matter with his direct managers, firstly Ms Misra and then Mr Rossello.

Given his duties and his expressed concern about Mr Smith's conduct, the Commission is of the view that had Mr Patel himself been a nominated protected disclosures officer, the corrupt conduct may have been reported and dealt with at an earlier point in time.

In its 2008 *Report on an investigation into corruption allegations affecting Wollongong City Council*, the Commission noted that staff should have a number of avenues through which to lodge complaints and that "... appointed PD officers should be drawn from both managerial and non-managerial staff so that, if necessary, complainants are able to make complaints about the conduct of managers"<sup>16</sup>. The rationale behind this observation applies equally to Sydney Ferries.

The Commission therefore makes the following recommendation:

## Recommendation 3

**That the Audit Assurance Manager be appointed and trained as a nominated protected disclosures officer.**

It should also be pointed out that subsequent to the events detailed in this report, the Acting CEO of Sydney Ferries has directed that any allegation about his own conduct should be reported to a member of the Board or the Commission. That notwithstanding, the Commission has recommended below that this direction be formalised by making amendments to the code of conduct and protected disclosures procedures.

Finally, it is noted that the Commission has examined the relevant procedures relating to the operation of Sydney Ferries' Audit Committee and its audit plan. Other than the non-completion of the required review of the credit card

<sup>15</sup> Research reported by Donkin et al finds that approximately two thirds of all whistleblower reports are made in the first instance to the relevant supervisor. See Donkin M, Smith R and Brown AJ, *How do officials report? Internal and external whistleblowing*, in Brown AJ (ed), *Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU Press, Canberra, 2008, pp.83–108.

<sup>16</sup> *Report on an investigation into corruption allegations affecting Wollongong City Council*, Independent Commission Against Corruption, Sydney, 2008, p.135.

procedure (the subject of Recommendation 2 above), the Commission found no deficiencies. Given the nature of Sydney Ferries' operations, the Commission accepts that credit card use was not a matter that merited inclusion in the audit plan or which, in the absence of a complaint, ought to have been directly scrutinised by the Committee. The Commission is also satisfied that there were no barriers preventing staff from raising matters with the members of the Audit Committee or Board. Relevantly, the Chair of the Audit Committee regularly liaised directly with the CFOs, without Mr Smith's involvement.

Although there was nothing to stop any member of staff from reporting Mr Smith's conduct to the Audit Committee, the Commission has made the following recommendation which is intended to create a positive duty to make such a report.

#### Recommendation 4

**That Sydney Ferries amend its code of conduct and protected disclosures procedures so that staff can and should report suspected misconduct to members of the Audit Committee.**

### Legal status of Sydney Ferries

The Commission has considered whether Sydney Ferries' legal status as a State owned corporation (SOC) contributed to Mr Smith's ability to persist with his conduct. Sydney Ferries was established as a statutory SOC on 1 July 2004. By design, SOCs are not subject to many of the conventional mechanisms that regulate risk in other parts of the public sector. For instance, some aspects of the *Public Finance and Audit Act 1983*, the *Public Sector Employment and Management Act 2002*, Premier's Department Memoranda and Circulars and the normal Budget process do not apply to SOCs. Following the report of the Walker Special Inquiry of Investigation, Sydney Ferries was transformed from a SOC into a statutory SOC on 1 January 2009.

This change in legal status had perceived consequences for Sydney Ferries' financial reporting obligations. On 17 March 2009, (the day of her official complaint) Ms Misra emailed Messrs Smith and Rossello and Ms Starke advising as follows:

*From 1 January 2009 the full Public Finance and Audit Act 1983 and Regulations [sic] 2005 is applicable to Sydney Ferries. This Act and Regulations imposes certain obligations on the officers of Sydney Ferries in relation to maintenance of books, use of funds, recovery*

*of funds and reporting. (Attached for your information). I would like to advise that this is also applicable in relation to any expenditure incurred on the corporate credit card.*

*The Financial Accounting Section will fully comply with all the requirements of the Act and Regulation.*

Four days prior, Ms Misra had sent an email to Messrs Rossello and Dean stating, inter alia:

*All transactions on the credit card and balances outstanding will be reported as we are now a statutory authority.*

On a related theme, the considerable majority (approximately 87%) of the money that Mr Smith reimbursed, was paid in the months of June 2007 and June 2008. This was because Mr Smith perceived that his outstanding debts could or would be disclosed in Sydney Ferries' end-of-financial-year reports. Mr Smith did, therefore, react to the threat that his outstanding debt would be reported to an external authority.

Because certain aspects of the *Public Finance and Audit Act 1983* do apply to SOCs<sup>17</sup> and Sydney Ferries had an existing suite of relevant policies and procedures, the Commission is not convinced that Mr Smith's corrupt conduct would have been prevented had Sydney Ferries not been a SOC. Given that a number of key personnel had elected to treat Mr Smith's debt as an internal matter, and that Mr Smith was himself prepared to deceive the Minister for Transport in his letter of 29 October 2008 about his credit card misuse, the legal status of Sydney Ferries is a peripheral corruption prevention issue.

From a broader corruption prevention perspective, however, it is worth highlighting that Mr Smith appears to have been sensitive to the prospect that his debts would be reported in Sydney Ferries' end-of-financial-year accounts. SOC or not, this sensitivity was a useful point of leverage that helped to prevent Mr Smith's debts from growing even larger.

<sup>17</sup> See section 24A(1) of the *State Owned Corporations Act 1989*. The legislation stipulates that Part 3 of the *Public Finance and Audit Act 1983* applies to SOCs. This in turn creates a number of reporting requirements that arguably should have revealed Mr Smith's debts.

## What Sydney Ferries has done in response to the allegations

Since the allegations against Mr Smith were made, Sydney Ferries, under the direction of its Board and Acting Chief Executive Officer, has implemented a number of corruption prevention measures which should be mentioned. Sydney Ferries has advised the Commission that:

- all credit cards but one have been cancelled. This remaining card is held by the Executive Assistant to the CEO and can be used only with the CEO's approval;
- credit card procedures have been revised to include a process for monthly reporting to the Board on expenditure. The monthly credit card statement is also viewed by the Board;
- the Protected Disclosures policy has been circulated to all staff and relevant senior staff have been reminded of their responsibilities under the *Protected Disclosures Act 1994*. This includes guidance on how to make a complaint about the CEO;
- all expenses relating to the CEO must now be approved by the Chairman of the Board;
- a review of credit card use over the previous one to two years by staff other than Mr Smith has been undertaken;
- an internal audit review has been commenced of other highly liquid areas including fuel cards, petty cash and floats, entertainment expenses and mobile phones.



## Appendix 1: The role of the Commission

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

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

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

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

promotes inefficiency, produces waste and could lead to loss of revenue.

The role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

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

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

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

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

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

- (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.*

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

Section 9(1) provides that, despite section 8, conduct does

not amount to corrupt conduct unless it could constitute or involve:

- (a) *a criminal offence, or*
- (b) *a disciplinary offence, or*
- (c) *reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*
- (d) *in the case of conduct of a Minister of the Crown or a Member of a House of Parliament – a substantial breach of an applicable code of conduct.*

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

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

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there 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.



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This situation highlights the need to exercise care in making findings of corrupt conduct.

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

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

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

*... as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a*

*judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

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

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



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