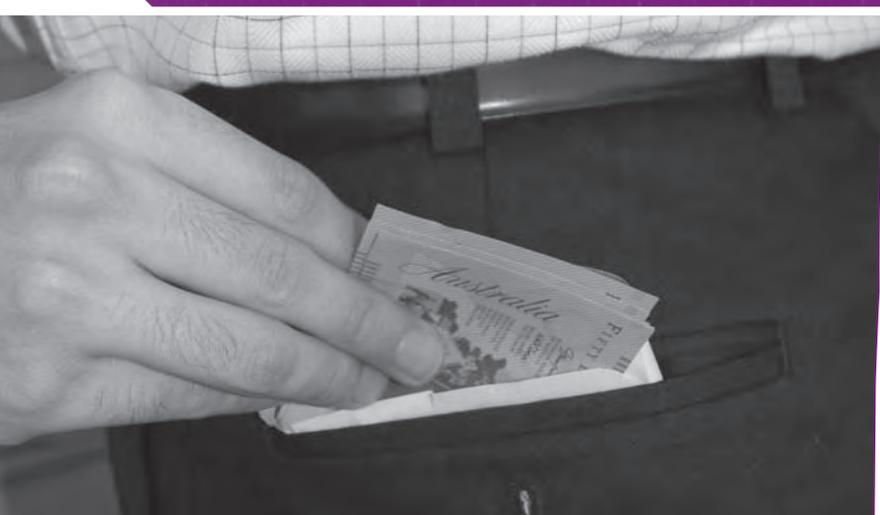


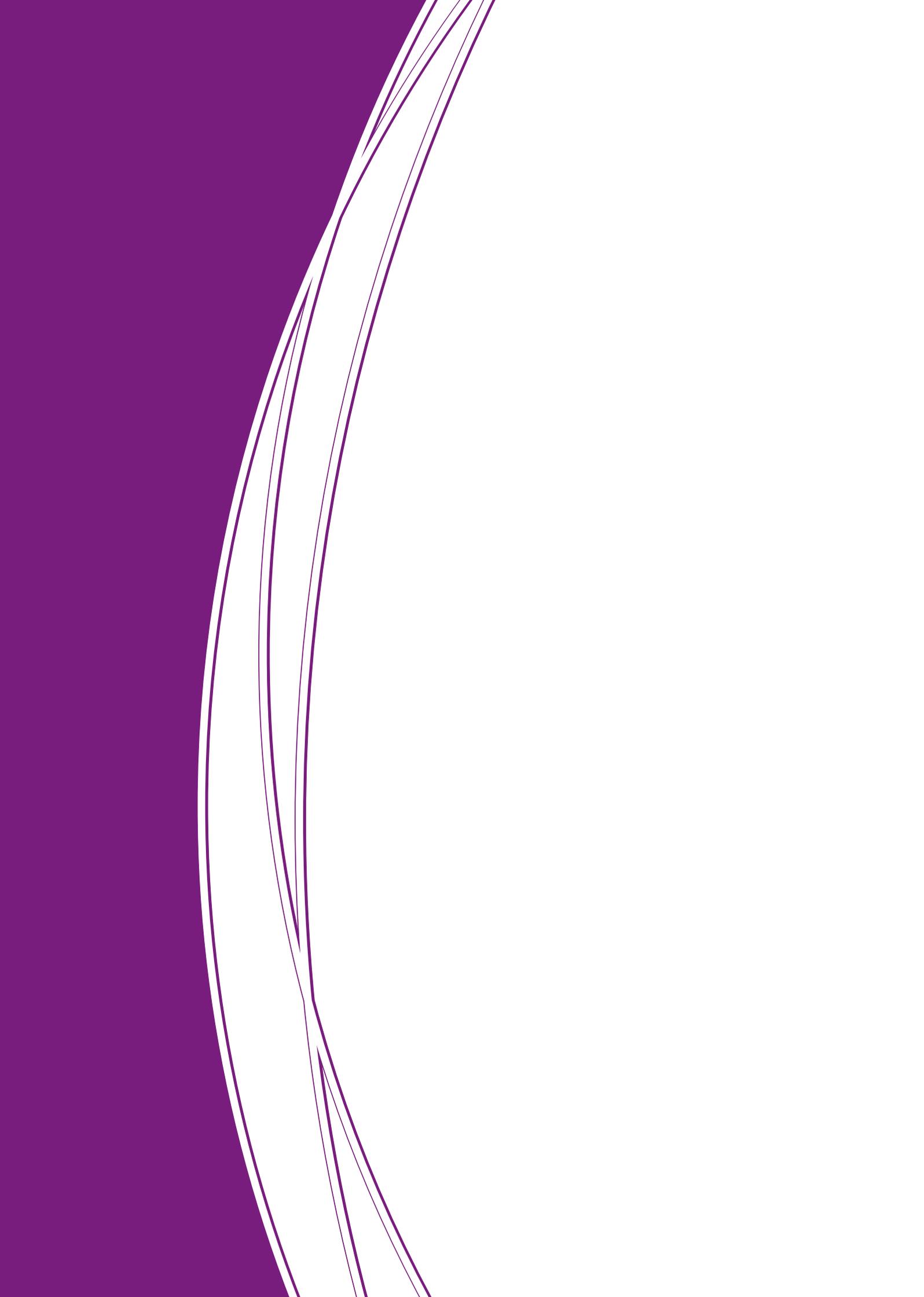
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INDEPENDENT COMMISSION  
AGAINST CORRUPTION



**INVESTIGATION INTO  
ATTEMPTS TO IMPROPERLY  
INFLUENCE WARRINGAH  
COUNCIL OFFICERS**

**ICAC REPORT  
JUNE 2009**



**ICAC**

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INDEPENDENT COMMISSION  
AGAINST CORRUPTION

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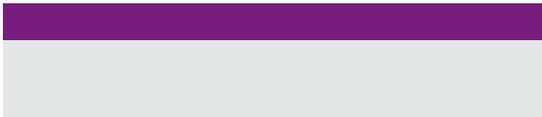
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**ICAC REPORT  
JUNE 2009**

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**I·C·A·C**

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Sydney NSW 2000

Mr President  
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into attempts to improperly influence Warringah Council officers.

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

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

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

Yours faithfully

A handwritten signature in black ink, appearing to read 'Jerrold Cripps', written over a thin horizontal line.

The Hon Jerrold Cripps QC  
Commissioner

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# Executive summary

## The investigation

This report concerns an investigation conducted by the Independent Commission Against Corruption (“the Commission”) into the conduct of Jin Hua Chen (“Mr Chen”) and his wife Yu Ling Sun (“Ms Sun”) who, between them, offered three cash payments totalling \$600 to two Warringah Council (“the Council”) officers in March 2009 in order to facilitate the Council’s building inspection approval of their business premises.

At the time Mr Chen and Ms Sun were the owners of a supermarket/butchery business located at 40/10 Oaks Avenue, Dee Why, NSW and were awaiting the Council’s building inspection approval of these premises which was required before they could open their shop for trading.

## The public inquiry

As part of its investigation the Commission held a public inquiry on 26 May 2009. Mr Chen and Ms Sun gave evidence. The Hon Jerrold Cripps QC, Commissioner, presided. Murugan Thangaraj acted as Counsel Assisting the Commission.

## The Commission’s findings

The Commission’s findings are set out in Chapter 3.

The Commission finds that on 10 March 2009 Ms Sun, with the agreement of Mr Chen, handed an envelope containing \$200 to Council officer Clint Mills with the intention of facilitating the building inspection approval for the Dee Why premises.

The Commission also finds that on each of 20 and 23 March 2009 Mr Chen handed an envelope containing \$200 to Council officer Philip Hoffman with the intention of expediting the building inspection approval process for the Dee Why premises. Ms Sun was aware of and complicit in the provision of the money on 20 March 2009.

At no stage did the two Council officers engage in corrupt conduct and they co-operated fully with the Commission’s investigation.

A statement is made pursuant to section 74A(2) of the *Independent Commission Against Corruption Act 1988* (NSW) (“the ICAC Act”) that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Chen for three offences of corruptly offering an inducement contrary to section 249B(2) of the *Crimes Act 1900* (NSW) (“the Crimes Act”).

A statement is also made pursuant to section 74A(2) of the ICAC Act that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Ms Sun for two offences of corruptly offering an inducement contrary to section 249B(2) of the Crimes Act.

# Chapter 1: Introduction

This report concerns an investigation by the Commission into the conduct of Jin Hua Chen and Yu Ling Sun, owners of a supermarket/butchery business at 40/10 Oaks Avenue, Dee Why, NSW. In particular, the investigation examined the circumstances surrounding Mr Chen and Ms Sun's offer of three cash payments totalling \$600 to Clint Mills and Philip Hoffman, officers of Warringah Council. At the time Mr Chen and Ms Sun were waiting for the Council to issue a building inspection approval of the Dee Why premises so that they could commence trading.

The Commission's investigation arose as a result of a report received from the Council's Internal Ombudsman pursuant to section 11 of the ICAC Act. The report stated that the owners of a butchery business at 40/10 Oaks Avenue, Dee Why, Mr Chen and a person called "Amy", who was later identified as Ms Sun, had offered a cash bribe to Mr Mills on 10 March 2009 as he was leaving the Dee Why premises after conducting a building inspection.

## Why the Commission investigated

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

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

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

The matter reported to the Commission was 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 in fact occurred, whether there were any corruption prevention issues which needed to be addressed, and, in the event corrupt conduct was established, to send a clear message to the public that providing gifts and money to influence public officials in relation to their official duties is unlawful and will not be tolerated.

## Conduct of the investigation

The Commission's investigation involved examining numerous documents obtained from the Council and other sources, as well as interviewing and obtaining statements from several witnesses.

A controlled operation was authorised pursuant to the requirements of the *Law Enforcement (Controlled Operations) Act 1997* (NSW). A controlled operation permits those authorised under the operation to engage in specified activity which would otherwise be unlawful.

The controlled operation was conducted with the assistance of Mr Hoffman. It involved a telephone conversation between Mr Hoffman and Ms Sun on 19 March 2009 and two meetings at the Dee Why premises between Mr Hoffman, Mr Chen and Ms Sun on 20 and 23 March 2009 respectively. The conversations which took place on these three dates were lawfully recorded using listening devices.

In addition, the Commission conducted separate interviews of Mr Chen and Ms Sun on 1 April 2009 in the presence of their legal representative and interpreter to obtain further relevant evidence. During these interviews, both Mr Chen and Ms Sun admitted that they intended to bribe the officers.

## Assistance from Warringah Council officers

This investigation was assisted by the honesty and co-operation of the Council officers involved in this matter. Mr Mills and Mr Hoffman acted with utmost propriety at all times. Mr Mills immediately and positively rejected the money that was offered to him by Ms Sun and promptly reported the incident to Mr Hoffman. Mr Mills and Mr Hoffman then reported the matter to the appropriate officers at the Council without delay.

The Commission is indebted to Mr Hoffman who agreed to take part in the controlled operation and assisted the investigation by obtaining relevant evidence substantiating the allegations which gave rise to the investigation.

Warringah Council is one of only a handful of councils that employ internal ombudsmen. This investigation was also assisted by the prompt actions taken by Jane Coulter, the Council's Internal Ombudsman.

## The public inquiry

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

Section 31(2) of the ICAC Act provides that:

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

- (a) *the benefit of exposing to the public, and making it aware, of corrupt conduct,*
- (b) *the seriousness of the allegation or complaint being investigated,*

(c) *any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),*

(d) *whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

The Commission assessed the material gathered during the investigation and the evidence given at the interviews. Taking into account these factors 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 having regard to the following considerations:

- The serious nature of the matters being investigated, which involved allegations of bribery of public officials.
- There was clear evidence of corrupt conduct.
- Public exposure of the matter was considered desirable for the purpose of educating and deterring others who might be minded to engage in similar conduct.
- The risk of prejudice to the reputation of persons who would be called to give evidence at the inquiry was not undue.
- There was a substantial public interest in exposing the relevant matters that was not outweighed by any public interest in preserving the privacy of the persons concerned.

The public inquiry took place on 26 May 2009. The Hon Jerrold Cripps QC, Commissioner, presided at the inquiry and Murugan Thangaraj acted as Counsel Assisting the Commission. Both Mr Chen and Ms Sun gave evidence.

Following the conclusion of the evidence at the public inquiry, Counsel Assisting made oral submissions regarding possible findings and recommendations. The legal representative of Mr Chen and Ms Sun then made oral submissions in response which were considered in preparing this report.



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

Findings of fact and corrupt conduct are set out in Chapter 3 of this report.

The Commission finds that on 10 March 2009 Ms Sun, with the agreement of Mr Chen, handed an envelope containing \$200 to Council officer Clint Mills with the intention of facilitating the building inspection approval for the Dee Why premises.

The Commission also finds that on each of 20 and 23 March 2009 Mr Chen handed an envelope containing \$200 to Council officer Philip Hoffman with the intention of expediting the building inspection approval process for the Dee Why premises. Ms Sun was aware of and complicit in the provision of the money on 20 March 2009.

Chapter 3 contains statements pursuant to section 74A(2) of the ICAC Act that the Commission is of the opinion that the advice of the Director of Public Prosecutions (DPP) should be obtained with respect to the prosecution of Mr Chen for three offences of corruptly offering an inducement under section 249B(2) of the Crimes Act and of Ms Sun for two offences of corruptly offering an inducement under section 249B(2) of the Crimes Act.

## **Recommendation that this report be made public**

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

## Chapter 2: The cash payments

This chapter sets out the circumstances surrounding the cash payments made by Mr Chen and Ms Sun to Council officers Clint Mills and Philip Hoffman.

### Background

Mr Chen and Ms Sun purchased business premises at 40/10 Oaks Avenue, Dee Why, in 2008. The purchase price was approximately \$1.5 million, and the purchase was partly financed by significant borrowing. They intended to use the premises to operate a supermarket/butchery business.

On 1 April 2008, a development application (“DA”) for an Asian supermarket and butchery under section 78A of the *Environmental Planning and Assessment Act 1979* was lodged with the Council. The DA was approved by the Council on 18 July 2008.

On 17 November 2008, Mr Chen and Ms Sun applied to the Council to fit out the Dee Why premises. Their application was allocated to Mr Hoffman, a Senior Building Surveyor. He found the plans unsatisfactory and determined that amended plans were required. The amended plans were received by the Council in mid-December 2008. Mr Hoffman assessed them as being of a sufficient standard to progress to approval and issue of a construction certificate, which is the document that permits the commencement of the construction works. The construction certificate was subsequently issued on 19 December 2008.

On 30 January 2009, the Council received a request from Mr Chen to conduct a building inspection of the premises. Council approval of the building inspection was required before Mr Chen and Ms Sun could open their shop for trading.

The inspection date was initially set for 16 February 2009, however due to a number of cancellations requested by Ms Sun, citing the reason that the works on the premises were not completed, the inspection did not take place until 10 March 2009.

### Offer of cash on 10 March 2009

By 10 March 2009, Mr Chen and Ms Sun were anxious for approval of the building inspection to be granted as soon as possible. They were not receiving any income from the Dee Why premises but were making substantial interest payments on the loan.

Mr Chen and Ms Sun told the Commission that they agreed to offer money in the hope that by doing so they could speed up the approval process.

The first attempted payment occurred on 10 March 2009, when Mr Hoffman attended the Dee Why premises for the purpose of conducting a building inspection accompanied by Mr Mills, a Student Planning and Development Assessments Officer. The two officers found the state of the premises to be unsatisfactory. Mr Hoffman explained to Mr Chen and Ms Sun that numerous problems required rectification before the premises could pass the building inspection. Mr Chen and Ms Sun therefore understood that the Council approval would not be forthcoming at this stage.

As the two officers were leaving, Ms Sun placed an envelope into Mr Mills’s trouser pocket. Mr Mills took the envelope out of his pocket, looked inside and saw several \$50 notes. He immediately told Ms Sun that he could not accept the money and Ms Sun took the envelope back. Mr Chen was nearby at the time and saw Mr Mills reject the money. Mr Mills also saw Ms Sun holding another envelope which he correctly assumed was meant for Mr Hoffman, however it was not offered to Mr Hoffman on this occasion.

Mr Hoffman was walking ahead of Mr Mills when Ms Sun gave Mr Mills the envelope with money, and accordingly Mr Hoffman did not witness the incident himself. Mr Mills subsequently told Mr Hoffman what had occurred. The two officers returned to the Council and reported the matter appropriately to their superiors on the same day. A formal report of the incident was then made to the Commission by Jane Coulter, Council’s

Internal Ombudsman, following which the Commission immediately commenced an investigation.

### Offer of cash on 20 March 2009

On 19 March 2009, a controlled operation was authorised pursuant to the *Law Enforcement (Controlled Operations) Act 1997* (NSW). A controlled operation permits those authorised under the operation to engage in specified activity which would otherwise be unlawful. Mr Hoffman agreed to participate in the controlled operation and assist the Commission's investigation.

On the afternoon of 19 March 2009 Mr Hoffman telephoned Ms Sun and made arrangements for a further inspection of the Dee Why premises to take place on 20 March 2009.

On 20 March 2009, Mr Hoffman attended the Dee Why premises. On this occasion he was wearing recording equipment to allow his conversations with Mr Chen and Ms Sun to be recorded pursuant to a lawfully obtained surveillance device warrant.

Mr Hoffman noted that there were still numerous problems with the premises and he discussed these problems with Mr Chen and Ms Sun for some time. Mr Chen then placed an envelope into Mr Hoffman's pocket. Mr Hoffman pulled out the envelope and saw some \$100 notes inside. Ms Sun was present at this time. The three of them then had the following conversation, which was lawfully recorded:

*Mr Hoffman: Hey, what's that ?*

....

*Okay. So you both okay with that.  
What is it ?*

*Mr Chen: [Unintelligible] good luck. For the lucky.*

*Mr Hoffman: But what –*

*Mr Chen: Yeah that for the lucky.*

*Ms Sun: Yeah Chinese people say you lucky.*

Later in the conversation the following exchange between Ms Sun and Mr Hoffman took place:

*Ms Sun: Tomorrow we can open ?*

....

*Mr Hoffman: That's what you want, the supermarket for tomorrow.*

*Ms Sun: Yeah, tomorrow.*

*Mr Hoffman: I'll get back to you and we'll talk about it.*

Mr Hoffman accepted the envelope in accordance with the controlled operation plan and left the premises. Upon returning to the Council offices, Mr Hoffman met with Commission investigators to whom he handed over the envelope, which was found to contain \$200.

### Offer of cash on 23 March 2009

After arranging a further appointment with Ms Sun, Mr Hoffman attended the Dee Why premises once again on 23 March 2009 to conduct a final building inspection. The conversations between Mr Hoffman, Mr Chen and Ms Sun on this occasion were again lawfully recorded.

Mr Hoffman found the premises to be generally satisfactory this time, however there were still a few matters which were unsatisfactory and required rectification. Mr Hoffman discussed these with Mr Chen. Mr Chen was therefore aware that further consideration was to be given by the Council before the building inspection approval could be issued and trading could commence.

In the course of the building inspection, Mr Chen placed an envelope into Mr Hoffman's trouser pocket. Ms Sun was not present when this occurred. The following exchange between Mr Hoffman and Mr Chen then took place:

*Mr Hoffman: Yeah ? What is it ? What you got in there ?*

....

*Mr Chen: Yeah, just some lucky notes.*

....

*Yeah my country is [unintelligible] like that.*

*Mr Hoffman: There's some fifty dollar notes in there. You know we can't take money.*

....

*we can't do that and we don't do business that way in, not only Warringah but Australia, but ...*

Mr Hoffman accepted the envelope in accordance with the controlled operation plan and left the premises. Upon returning to the Council offices, Mr Hoffman met with Commission investigators to whom he handed over the envelope, which was found to contain four \$50 notes totalling \$200.

On the next day, 24 March 2009, Ms Sun telephoned Mr Hoffman at the Council and asked him if she and her husband could now start trading.

## Jin Hua Chen's evidence

On 1 April 2009, Mr Chen was interviewed under criminal caution by Commission investigators with the assistance of an interpreter and in the company of his legal representative.

Mr Chen admitted that he offered \$200 in cash on each of three separate occasions, once to Mr Mills (the money was physically handed over to Mr Mills by Ms Sun, however Mr Chen said that he asked his wife to do this) and twice to Mr Hoffman, in order to "speed up the process and pass the application" so that he "can start operating [the] shop sooner".

When asked by Commission investigators at the interview whether he knew that what he was doing was wrong, Mr Chen replied, "Now I know".

The Commission is satisfied that at all relevant times, Mr Chen knew that what he was doing was wrong.

At the public inquiry on 26 May 2009 Mr Chen gave evidence consistent with the evidence he gave at his interview. He confirmed that he and his wife were concerned that they were making interest payments on the loan while the business was not generating any income, that this was a matter of discussion between them, that they wanted the Council officers to be encouraged to speed up the process and that he asked his wife to give the officers some money for that reason.

Mr Chen also confirmed that his wife gave one of the Council officers (Mr Mills) an envelope containing cash at his (Mr Chen's) bidding, that he saw the officer reject the money, that he tried to provide money to the other officer (Mr Hoffman) on 20 March 2009 in the hope that it would expedite the approval and believing he would accept it, and that on 23 March 2009 he again offered \$200 to Mr Hoffman to attempt to speed up the process because there was still further work that had to be done before approval could be granted.

Mr Chen stated, however, that his wife was not a participant in the payment attempt on 23 March 2009 and was not aware of his actions on that day until he told her what he had done after Mr Hoffman left.

When asked by his lawyer how he felt about what he had done, Mr Chen told the public inquiry:

*I understand it is against the law but at that time I was – I was in a hurry and I would like this to be finished quickly so that I could start my business. .... I know this is against the law and would be – would be unfair to the community.*

## Yu Ling Sun's evidence

On 1 April 2009, Ms Sun was also interviewed under criminal caution by Commission investigators with the assistance of an interpreter, and in the company of her legal representative.

Ms Sun was more circumspect than Mr Chen at her interview and prevaricated somewhat in her disclosures to the Commission. She initially admitted at the interview that she gave \$200 to the younger of the two Council officers (Mr Mills) at the time of the first building inspection (10 March 2009). She stated that she did this because:

*We bought the property and we have been waiting for six months and to give him some money I thought that you know the – he can speed up the process.*

Ms Sun also corroborated Mr Chen's evidence that she and Mr Chen had jointly decided to hand over the money to the Council officers. Later at the interview she then, for the first time, appeared to depart from this position by saying that the money was given as *lai see* or "lucky money", referring to monetary gifts given during holidays or special occasions in Chinese and other East Asian societies to bring good luck.

Ms Sun's lawyer then informed the Commission that "We admitted we did bribe the Council officer. We do not argue the money is *lai see*. I want to make this point clear". Commission investigators then put to Ms Sun, "Okay, so just confirming the money was intended as a bribe not as *lai see*. Is that correct?", to which she replied "Yes".

However, Ms Sun denied that she took any part in or had any knowledge of the money payments made to Mr Hoffman on 20 March 2009 and 23 March 2009.

At the public inquiry on 26 March 2009, Ms Sun agreed that throughout March 2009 she and her husband were concerned about the interest payments they were making

without having an income, and that on three separate occasions she or her husband provided money in an envelope to Council employees for the purpose of hopefully speeding up the process.

She also confirmed that on the first occasion, on 10 March 2009, she physically handed over the money with her husband's consent, and that on the second occasion, on 20 March 2009, her husband handed over the money with her consent.

Her evidence at the public inquiry was therefore inconsistent to the extent that she had previously stated at her interview that she was not a party to the payments on either 20 March 2009 or 23 March 2009. At the public inquiry she admitted her complicity in the payment on 20 March 2009.

Ms Sun still maintained that she was not aware of her husband giving money to Mr Hoffman on the third occasion on 23 March 2009, and said that she only found out about it when Mr Chen told her after the event. Her evidence is consistent with that given by Mr Chen at the public inquiry on this point, and there is no evidence available to the Commission to indicate otherwise. Ms Sun admitted that she rang Mr Hoffman on 24 March 2009, the day after the final inspection, and asked him if she could now start trading:

*Counsel Assisting: On 23 March 2009 you were aware that Mr Chen, your husband, gave the council employee, Mr Hoffman, some money?*

*Ms Sun: Yeah.*

....

*Counsel Assisting: The next day you rang Mr Hoffman and asked if you could start to trade?*

*Ms Sun: Yes.*

*Counsel Assisting: You rang the next day because you were hoping that the money your husband had given the previous day would allow you to trade quicker?*

*Ms Sun: Yes.*

Ms Sun also admitted that what she had done was wrong and that she knew it was a crime.

## Submissions

It was submitted on behalf of Mr Chen and Ms Sun that the money they invested in their business is a huge amount to a working couple, some of Council's requirements for rectification in respect of the Dee Why premises were perceived by them to be quite unreasonable which may have had the effect of encouraging them to decide to offer money, they have only graduated from high school and did not have a good command of the English language which limited their ability to communicate with the Council officers, they showed frankness and remorse in this matter, and the amount of money involved is relatively small. It was argued that for these reasons, the Commission should not refer Mr Chen and Ms Sun's conduct to the Director of Public Prosecutions (DPP) for consideration to be given to their prosecution.

The Commission takes the view that whilst these matters may be of relevance for sentencing purposes in the future, they have limited relevance for the Commission's purposes in making findings of corrupt conduct or making recommendations to seek the advice of the DPP in relation to prosecution.

## Chapter 3: The Commission's findings and recommendations

This chapter sets out the Commission's findings of fact and contains findings of corrupt conduct against Mr Chen and Ms Sun. The chapter also sets out the statements required by section 74A(2) of the ICAC Act.

### Findings of fact

Based on the evidence set out in Chapter 2, the Commission is satisfied that the following facts have been established to the requisite standard of proof.

1. Jin Hua Chen and Yu Ling Sun are proprietors of a supermarket/butchery business at 40/10 Oaks Avenue, Dee Why, NSW. As at March 2009, Mr Chen and Ms Sun were waiting for a building inspection approval of the Dee Why premises to be issued by Warringah Council so that they could open their shop for trading. Philip Hoffman, a Council officer, was involved in the building inspection approval process.
2. On 10 March 2009 Mr Hoffman attended the Dee Why premises accompanied by Clint Mills, another Council employee, for the purpose of conducting a building inspection of the premises. Mr Hoffman identified a number of deficiencies with the state of the premises which had to be rectified before Council approval could be granted for commencement of business on the premises, which he pointed out to Mr Chen and Ms Sun. As Mr Hoffman and Mr Mills were leaving the premises at the conclusion of the building inspection, Ms Sun, with the agreement of Mr Chen, handed Mr Mills an envelope containing \$200 in cash with the intention of facilitating the building inspection approval.
3. On 20 and 23 March 2009 further building inspections of the Dee Why premises were conducted by Mr Hoffman. On each occasion, Mr Chen passed Mr Hoffman an envelope containing \$200 in cash with the intention of expediting the building inspection approval process. Mr Chen

offered these payments to Mr Hoffman notwithstanding that he witnessed Mr Mills's rejection of the money after Ms Sun placed the envelope containing \$200 into Mr Mills's pocket on 10 March 2009.

4. Ms Sun was a party to the payment of money to Mr Hoffman on 20 March 2009. There was insufficient evidence to conclude that she was a party to the payment made by Mr Chen on 23 March 2009.
5. Both Mr Chen and Ms Sun knew that making payments to Council officers to facilitate or expedite council building inspection approval was wrong.

### Corrupt conduct

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

In the light of the above findings, the Commission finds that by providing the envelopes of cash to Mr Mills and Mr Hoffman, Mr Chen and Ms Sun both engaged in corrupt conduct, as defined in sections 7, 8 and 9 of the ICAC Act, on the basis that:

- their conduct could have adversely affected the honest or impartial exercise of official functions by Mr Mills and Mr Hoffman who are public officials, within the meaning of section 8(1)(a) of the ICAC Act, and could have adversely affected the exercise of official functions by Mr Mills and Mr Hoffman or the Council (a public authority) and also involve bribery, within the meaning of section 8(2)(b) of the ICAC Act; and
- their conduct could constitute, within the meaning of section 9(1) of the ICAC Act, the criminal offence of corruptly offering an inducement contrary to section 249B(2) of the *Crimes Act 1900* (NSW).

## Section 74A(2) statement

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

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

An “affected” person is defined in section 74A(3) of the ICAC Act as a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.

For the purposes of this report Mr Chen and Ms Sun are “affected” persons.

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 Chen for three offences of corruptly offering an inducement contrary to section 249B(2) of the *Crimes Act 1900* (NSW), namely the cash payments made on 10, 20 and 23 March 2009.

Mr Chen gave his evidence before the Commission under objection and therefore, pursuant to section 37(3) of the ICAC Act, his evidence is not admissible against him in any

criminal proceedings except for the prosecution of offences under the ICAC Act.

The DPP, in determining whether to prosecute Mr Chen for the above offences, will have available the evidence of the Council officers Clint Mills and Philip Hoffman. Mr Chen’s record of interview and the surveillance device recordings of the conversation between Mr Chen, Ms Sun and Mr Hoffman from their meetings on 20 and 23 March 2009 at the Dee Why premises would also be available as evidence.

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 Ms Sun for two offences of corruptly offering an inducement contrary to section 249B(2) of the *Crimes Act*, namely the cash payments made on 10 and 20 March 2009.

Ms Sun gave her evidence before the Commission under objection and therefore, pursuant to section 37(3) of the ICAC Act, her evidence is not admissible against her in any criminal proceedings except for the prosecution of offences under the ICAC Act.

The DPP, in determining whether to prosecute Ms Sun for the above offences, will have available the evidence of the Council officers Clint Mills and Philip Hoffman. Ms Sun’s record of interview and the surveillance device recordings of the conversation between Mr Chen, Ms Sun and Mr Hoffman from their meeting on 20 March 2009 at the Dee Why premises would also be available as evidence.

# Appendix 1: The role of the Commission

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

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

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

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

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

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

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

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

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

The first (section 8) defines the general nature of corrupt conduct. 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 section.

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

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

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

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

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

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

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

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

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

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

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











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