together with an assessment of the likely outcomes from a court. Solicitors are effectively carrying out this role more and more often without recourse to the Bar.

In a mediation it can be very useful to have the benefit of the skill of an advocate. However, where that skill is perceived as the *only* constructive role for a barrister, then it is often not seen as adding sufficient value. The barrister's role should be seen more in terms of *advising* the client in facilitating a settlement with which t*he client* can live rather than a settlement with which *the barrister* can live. Mediation is not there to enforce a party's legal rights, but to manufacture a mutually tolerable resolution. Consensual resolution will usually have a greater prospect of acceptance and endurance than adjudicated outcomes, because it fosters communication among parties and creative consideration beyond rights-based parameters for dealing with conflict.

There is a perception among solicitors and dispute resolution practitioners that barristers tend to see the dispute in terms of court outcomes only and often ignore the wider issues which can lie at the heart of a conflict. Failure by legal advisers to address these issues is a common impediment to settlement.

'If barristers are to remain advocates only, rather than dispute resolution advisers (and all that those three words import), they need to appreciate the effect that that will have on the Bar's traditional work.'

Mediation provides parties with an opportunity to identify and explore these relevant personal factors in a confidential forum where voluntary participation is founded in good faith. Whilst the notion of '*good faith*' has difficulties for lawyers in terms of certainty, it is a notion that is well understood and embraced by parties participating in a mediation process and is a fundamental cornerstone to the success of that process – it is also one of the distinguishing features between mediation and structured settlement negotiations. It is a *tool* to facilitate constructive discussions and is not intended for use as a weapon between parties. Similarly *confidentiality* of discussions is a tool which should facilitate full and frank disclosure and discussion of issues thereby offering parties the best opportunity for teasing out resolution options for consideration.

The absence of a desire of a party to participate in that spirit (despite the statutory obligation to participate in good faith imposed by s110L of the *Supreme Court Act 1970* (NSW)) may be a relevant factor for a court to consider before it makes a mandatory order to mediate.

If barristers are to remain advocates only, rather than dispute resolution advisers (and all that those three words import), they need to appreciate the effect that that will have on the Bar's traditional work and its perceived ability to participate in mediation, ADR and dispute management.

Finally, all this highlights the need for an understanding of these various ADR processes, their proper definitions and uses coupled with a universally accepted standard of conduct and accreditation.

One of the practical difficulties with a universal standard has been the administrative framework it would require and the enforceability of any sanctions or licenses to be applied. Within professional bodies, such as the Bar Association, many of these concerns can be accommodated. Similarly, appointment to various panels can go some way to identifying, adopting and enforcing a standard of skill, experience and conduct. However, the field of dispute resolution practice is far wider than that being conducted by professionals and panels.

Considerations for the future

It is apparent from the above that there is barely an aspect of civil based interaction of rights within a broad legal framework that remains untouched by consideration, at least, of alternative means of dispute resolution.

To the extent barristers play a role in the ways in which that interaction occurs, and in light of the barrister's duty under Rule 17A, barristers must equip themselves with the knowledge and skill to participate validly in the ADR evolution.

Editor's note: Any members with comments on the workability of the current Barristers' Rule 17A are invited to address them to the Association (Philip Selth) or the Editor.

Royal commissions and inquiries

By Peter Garling S.C.

Introduction

In 1982 L A Hallett, the author of the well-known text[1], excited interest when he said:

> Royal commissions and boards of inquiry (and like bodies) are well known and established organs of Government. Nevertheless, it is probably accurate to state there is, in general, little known about them. In particular, little is known of their legal status in Government and the rules (or lack of them) which regulate them.

It may be surprising to members of the Bar that a commission of inquiry[2] is an organ of Government, but reflection on the nature of a commission, the method of establishment and the purpose would suggest that Hallett's statement is undoubtedly correct.

Commissions of inquiry are not functions carried out in the exercise of the judicial power of the Commonwealth, but may nevertheless involve the commissioner acting judicially to find facts and apply the relevant law[3]. Commissions are not carried out as a function of any judicial office but may be carried out by a judge. They are part of the executive functions of government and are subject to the effective control of the Executive. That control is exercised by, *inter alia*, requiring the commissioner to deliver a report by a fixed date, providing defined terms of reference which can be altered by executive action and also by providing the funding for a commission.

In addition to royal commissions, which are usually established for a single purpose, there has been an expansion, certainly in New South Wales, in recent times of other forms of inquiry. These may range from what are effectively standing commissions of inquiry, such as the Independent Commission Against Corruption, the State Crime Commission and the Police Integrity Commission, to single purpose special commissions of inquiry such as the McInerney Inquiry into the Glenbrook Rail Accident.

Commissions of inquiry have been an established feature of Government in Australia. The first federal royal commission appears to have been conducted in 1908 by Justice Hood of the Supreme Court of Victoria, who was charged to conduct the Royal Commission into Insurance. One of the earliest royal commissions was one conducted by the chief justice of the High Court of Australia, Griffith CJ in 1918. It was an inquiry into the war. It finished within one week.

It is substantially outside the scope of this article to discuss any particular standing commission of inquiry. Rather, the purpose of this article is to provide the readers with some assistance when they receive a brief to appear at a commission of inquiry.

Establishment

Essentially, there are two bases by which a commission of inquiry can be established. The first of these is by the exercise of the Crown's prerogative to issue Letters Patent for a commission of inquiry. Sir Owen Dixon discusses the historical basis for this source of power to issue Letters Patent in his judgment in *McGuinness v The Attorney General of Victoria*[4]. This basis is also recognised in New South Wales in the *Royal Commissions Act 1923*, which in part regulates procedures before a royal commission, but which does not provide a statutory basis for the issues of Letters Patent.

'There is often a tendency by commissioners to be very protective of the integrity of their inquiries.'

The second basis for the establishment of a commission of inquiry is by the issue of Letters Patent, which are authorised by statute. One example can be found in s1A of the *Royal Commissions Act 1902* (Cth), which provides a statutory source of power for the issue of Letters Patent by the governor-general, providing that they 'relate to or [are] connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth'.

Standing commissions of inquiry will have particular Acts of Parliament, which establish them and control the conduct of them.

Typically, although not universally, these Acts provide for mechanisms for the summonsing of witnesses, the compulsory production of documents, the method of taking evidence from witnesses, the obligation of witnesses to answer questions, privileges against self-incrimination and powers of contempt.

Nature and purpose

The principal purpose of a commission of inquiry is to gather information for the Government. That process of information gathering may be for the purpose of a review of, or the formulation of, government policy, but is more usually directed towards a the investigation of a particular incident and establishing all of the factual circumstances surrounding that incident. Occasionally, and perhaps more frequently in recent times, the terms of reference may call for recommendations on policy questions as a result of the factual findings of a particular incident[5].

The very nature of a commission of inquiry means that it performs an investigatory role and involves an inquisitorial style of proceeding, rather than an adversarial style. This has a number of consequences, including:

- the fact that not all investigations are made through the process of public hearings;
- the commissioner may chose to investigate certain matters and not to investigate others; and
- the commissioner has control over the manner and style of hearings or other information gathering processes.

A number of commissions of inquiry have used methods of information gathering in public other than traditional hearings. Seminars and meetings of a range of affected bodies and individuals, which allow a flexible debate, particularly on policy formulation questions, are now regularly being used to assist a commissioner with the inquiry.

It will therefore be necessary for a barrister when briefed to appear at a commission to read the terms of reference and determine the particular purpose of the commission, so as to provide a base for consideration of the role or interest of the client.

Appearance before a commission of inquiry

An individual has no absolute right of appearance before a commission of inquiry, nor any absolute right to participate throughout the whole of the inquiry. All appearances at a commission of inquiry are by leave of the commissioner, which can be granted or withdrawn at any stage of the inquiry.

In NSW, s7 of the Royal Commissions Act provides a further limitation on an appearance: it provides that a person must be 'substantially and directly interested in any subject-matter of the inquiry, or that the person's conduct in relation to any such matter has been challenged to the person's detriment' before being granted the right to appear. This statutory test appears to reflect the practice of those commissions which do not have any statutory provisions dealing with appearances. It has long been the practice for a commissioner to require a person seeking leave to appear to establish that the person has a particular interest in the inquiry which requires leave to appear. It is not sufficient for the person to be interested in the outcome in the same way as the broader public may be.

Once granted leave to appear, a person's entitlement to participate may be terminated at any time. As well, the ability to cross-examine a witness will depend upon approval by the commissioner. Traditionally, all witnesses are called by counsel assisting the inquiry. Counsel assisting ought to elicit all of the relevant evidence. But other participants may wish to elicit additional evidence, or else to challenge the evidence of the witness. The commissioner is entitled to control this process, and commonly does.

Counsel appearing at a commission of inquiry need to be sensitive to the fact that leave to appear does not give them an open-ended role in the conduct of the inquiry.

Procedural fairness

A commission of inquiry has obligations of procedural fairness, the content of which may vary from inquiry to inquiry, and which will depend upon the nature and subject matter of the inquiry, as well as the way in which an inquiry has proceeded[6].

In *Mahon v Air New Zealand* [1984] 1 AC 808, the Privy Council, when dealing with a royal commission, held that the obligations of natural justice were:

> The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon

> evidence that has some probative value. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.[7]

It is now commonplace for commissions of inquiry to circulate, either in advance of the conclusion of evidence or else in advance of final submissions, a list of potential findings critical of a person or body which might be made, and to give to the persons represented before it an opportunity to consider those potential findings and deal with them.

If no indication is given that such a course is going to be followed, it is appropriate for counsel appearing for a party to raise with the commission the question of what practice it proposes to follow in the circumstances.

Powers of compulsion

Most commissions of inquiry will have the requisite powers to compel the attendance of witnesses, the giving of evidence and the production of documents. These powers derive from a variety of statutes which affect the conduct of commissions of inquiry.

It is essential for counsel briefed to satisfy themselves as to the nature and extent of those powers. Some statutes remove the privilege against self-incrimination[8], but this is usually accompanied by a statutory prohibition against the use of the evidence and material in proceedings against the person concerned. Again there may be limitations to this prohibition and counsel ought be careful to be satisfied what the prohibition is and how, if at all, it is limited.

Questions of contempt also vary from commission to commission. There is often a tendency by commissioners to be very protective of the integrity of their inquiries. This can lead to an over-reaction on the part of a commissioner to adverse publicity about the inquiry or evidence which a witness has given. When confronted by such an occasion, it is incumbent upon counsel to know what are the particular powers of contempt which the commission has, and to what extent the commissioner (as opposed to a court) can deal with any such circumstance.

That said, in general terms, it will be a contempt, or a specified statutory offence, for a witness to decline to attend and give evidence, produce documents or otherwise fail to comply with properly made orders of any commissioner.

Judicial review

Opportunities for judicial review of the findings of a commission of inquiry are few. *Mahon's case* is a well known but rare example, and even that case was limited to a review of a small part of the royal commissioner's findings.

However, there may be a greater opportunity to seek judicial review involving other matters going to the heart of a commission of inquiry. Although not dealing with a commission of inquiry, the type of challenge mounted to the appointment of Mathews J to conduct a ministerial inquiry in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[9] is one course which may ground judicial review. *R v Winneke; ex parte Gallagher*[10] is an example of the use of the prerogative writ in attempt to subject a royal commission to judicial review with respect to the ordinary functioning and conduct of a commission.

What is clear is that there is a reluctance on the part of courts to interfere with the functioning and conduct of commissions of inquiry, and it would be unwise for counsel appearing at any commission to rely upon the availability of judicial review as if it were akin to an appeal as of right.

Some statutes contain privative clauses with respect to proceedings against commissions and commissioners. The provisions of s36 of the *Special Commissions of Inquiry Act 1983* (NSW) is a good example of this.

Protection and immunities

In New South Wales, commissioners are provided by statute with the same protection and immunities as are given to a judge of the Supreme Court[11]. In the Commonwealth sphere, a royal commissioner has the same protection and immunity as a judge of the High Court of Australia[12].

However, the position may be different for witnesses and practitioners who may not enjoy the same protection as in a court. The Commonwealth legislation provides for this, but not all State legislation does. Counsel will need to carefully check the position for each different inquiry.

Conclusion

Since a commission of inquiry is not a judicial proceeding akin to party and party litigation, it is critical that counsel briefed to appear at such an inquiry give careful consideration to at least the matters mentioned briefly in this article in order to ensure that they best serve their client's interests.

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1 L A Hallett, *Royal Commissions and Boards of Inquiry* (Law Book Company, 1982), p. ix.

2 It is convenient to use the term commission of inquiry as a generic one to encompass all forms of inquiries. I will refer to several of the different types of inquiries separately as appropriate.

3 See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

4 (1940) 63 CLR 73 at 93-102.

5 The terms of reference for the current HIH Royal Commission are a good example of this trend. The can conveniently be found at www.hihroyalcom.gov.au.

6 See *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118; *Maksimovich v Walsh & anor* (1985) 4 NSWLR 318 at 327, 337.

7 at 820F - H.

8 See s6A of the *Royal Commissions Act 1902*.

9 (1996) 189 CLR 1.

10 (1982) 152 CLR 211.

11 See s6 of the *Royal Commission Act 1923* (NSW) and s11 of the *Special Commissions of Inquiry Act 1983* (NSW).

12 See s7 of the Royal Commissions Act.