

JCA COLLOQUIUM 2013
ROYAL COMMISSIONS – THE PRACTICALITIES
SPEAKING NOTES
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OUTLINE

1. Deal with the practicalities of a Royal Commission sequentially
 - The appointment of a Royal Commissioner.
 - The establishment phase – setting up a functioning Commission.
 - The exploratory phase – initial investigations and the conduct of the hearing.
 - The post-hearing phase –the report and a miscellany.

APPOINTMENT OF A COMMISSIONER

1. How does a government go about appointing a Commissioner
 - Steeped in mystery
 - A Commission comes under Dept of Prime Minister and Cabinet (not Dept of AG) but AG and other relevant Ministers will usually be involved.
 - If it is to be a judge, the approach will be through the head of jurisdiction
 - Modern trend is for govts to seek the appointment of a named person rather than (as in the past) to ask head of jurisdiction to make a member of the court available.
2. Debate in Australia since early 20th century as to whether serving judges should ever be appointed
 - See, for example, (1978) 52 ALJ 540
 - Seems to have been more of an issue in Victoria than elsewhere
 - Common at federal level and in NSW and WA for serving judges to be appointed.
3. Arguments against the practice are well known
 - Threats to public confidence in impartiality of judges
 - Seen as inimical to independence of judges from executive arm of government
 - Danger of being drawn into or perhaps used in political controversy
 - More open to public criticism

- Feeling that judges should not be involved in matters that may later come before their court
 - Difficulties for the court when one of their number is detached from the work of the court
4. Comment on two of those issues
- Independence: a govt could theoretically direct how a Commissioner is to act but a judge confronted with this would probably resign causing political difficulties for the govt.
 - Detachment: experience of SCWA in my absence with HHH Commission (having serving and retired judges from other jurisdictions 'subbing') was favourable.
5. I accept the arguments against the practice are serious and deserve mature consideration. But my own view is that the practical difficulties can be managed.
- Judge are ideally suited to the role
 - They are used to dealing with disparate subject matters
 - Fact finding and adjudication is a specialty that comes with judicial experience
 - They are used to approaching notorious and complex matters objectively and dispassionately.
 - Would members of the public draw a distinction between retired and serving judges to make the appointment of the former less problematic?
 - My experience – a refreshing change after 11 years in office
 - The attraction of being directly involved in the development of policy in a relevant area.

THE ESTABLISHMENT PHASE

1. Akin to setting up a small govt agency or a mid-tier law firm
 - Finding premises, admin staff etc
 - Arranging IT and other contracts
 - Getting working protocols in order
2. Three critical appointments in which The Commissioner must be involved
 - The Commission secretary (will bear the brunt of dealings with govt)
 - Counsel assisting – you have to work with them and have confidence in them

- Instructing solicitors – they will do the heavy lifting in assembling materials and identifying possible issues
3. There is a fourth: IT. While there is no such thing as ‘the paperless courtroom, it would be nigh on impossible to run a Commission (or a complex trial) without sophisticated IT systems.
 4. Early dealings with govt
 - Must be involved in setting and (or) amending terms of reference
 - Must make a realistic assessment of time the inquiry will take (and thus the reporting date)
 - Should stay out of budget negotiations – leave it to the secretary.

EXPLORATORY PHASE

1. Bear in mind two things that may sound trite but which are critical
 - There is no text book – each commission will be different and its requirements will be dictated by peculiar circumstances
 - It is an administrative, not judicial, proceeding
2. Two related topics; procedural fairness and dealings with the media
 - Rules of evidence don’t apply but rules of procedural fairness do
 - Likely that if something is important or notorious enough to demand a Commission it will attract intense media scrutiny
 - This carries with it the danger of people being convicted or having reputations irreparably damaged in the court of public opinion rather than in accordance with evidence.
3. Procedural fairness arises against this background
 - In a trial setting we don’t pay overt regard to procedural fairness because the court rules are designed with those requirements in mind
 - But not in a commission –rules of court don’t help
 - A commissioner must develop and implement an approach that honours the rules of procedural fairness in their spirit and not just according to their letter.
 - Commissioner bears a grave responsibility to instil that message at all levels of commission lawyers, investigators and staff.
4. Dealings with the media
 - Experience of the HIH commission: ‘end of the day’ sessions during which counsel assisting (accompanied by representatives of affected parties if they chose to do so) would answer journalists questions about the proceedings
 - Strict protocol: counsel were to answer questions and correct misapprehensions but not to suggest argument or ‘stories’.

- Seems to have worked reasonably well: with one notable exception there was very little misreporting.
 - This is one difference between life as a trial judge and life as a commissioner: as a judge I seldom took interest in media coverage of cases but as a commissioner you had to: to see how things were 'playing out' in public arena and to discern new areas of inquiry.
 - There was one substantial problem : getting journalists to understand the difference between submission and findings and to appreciate that it was the commissioner – not counsel assisting – who made findings
5. Use of coercive power
- Apart from run of the mill summonses (eg to obtain documents or to require a witness to attend) coercive powers should be used sparingly
 - Note Royal Commissions Act 1902 (Cth) s6 O(2) - if a commissioner is a judge she or he has the same powers as a High Court judge to deal with contempt
 - Note s5 O(1) – it is a criminal offence to defame a commission (which included counsel assisting) or a commissioner.
 - Need to bear in mind that a commission can itself be in contempt of court (see, for example, BLF case (1982) 152 CLR 25 at 55) which may dictate how and when coercive powers are exercised.
6. Continued dealings with govt
- Requirement for commission to appear before Senate Estimates Committees: attendance should be by secretary rather than commissioner.
 - If budget or time extensions are required, apply sooner rather than later – closer you get to the reporting date, the greater will be the level of public concern at delay or additional cost.
 - Don't hesitate to seek amendments to legislation or terms of reference if you think it necessary.

POST-HEARING PHASE

1. Writing the report
- Remember the deadline!
 - At an early stage begin to draft a 'report structure' (headings and main points) just as you would do (or at least as I always did) in long and complex trials.

- Allow counsel assisting and solicitors to prepare drafts –you have to take responsibility and ‘own’ the end product but there is a great advantage in working from a draft in which facts have been marshalled.
2. Keeping the lid on public expectations
- This can be a real problem (and I suspect will be for the present sexual abuse commission)
 - A commissioner must be alive to this difficulty from an early stage and keep repeating the desired message.
 - For example, there was some criticism of the HIH report due to what was perceived as a small number of recommendations for prosecutions.
 - But I looked at evidence that would be admissible in later criminal proceedings and took a deliberate decision to avoid swamping the prosecuting authorities.
3. Should you measure the success of a commission and, if so, how?
- The expenditure of public moneys probably makes it inevitable that the success (or otherwise) of a commission will be assessed.
 - But measures are elusive. Some possibilities
 - Number of successful prosecutions? But it is the prosecuting authorities, not the commission, that have the final say as to who is prosecuted and on what charges.
 - Reform recommendations implemented? But budget implications and the attitude of vested interests who have the ‘ear’ of governments can have a marked impact on how policy recommendations are dealt with.