SOME NOTES UPON COMMISSIONS OF INQUIRY

*Cedric Hampson AO, QC**

These notes formed the basis of an AIAL seminar, Brisbane, 16 April 1996.

Any person may appoint another to discover facts for him and even to make recommendations on the basis of those facts. The Domesday Book can be regarded as the report of Commissioners sent about to establish the assets of the kingdom. Only if information will not be given voluntarily to the enquirer does it become necessary to arm him with some special powers of compulsion.

Two famous commissions were those set up by Thomas Cromwell in 1535. The first enquired into monastic habits and morals and Cromwell's ruffians were guilty of dishonest lying in the scandalous state of affairs they reported. The second commission was into the monastic revenues. The two commissions were an early recognition of the political use of commissions; use them to establish first there is a problem; secondly, how to solve the problem at profit to the Crown.

Dixon J in *McGuinness v* AG (Vic) (1940) 63 CLR 73 at 94 deals with the history of commissions of inquiry. The warrant or letters patent "commission" ("commission") was issued under the Royal prerogative; think of the commissions of assize of oyer and terminer, of gaol delivery, of nisi prius and of the peace which sent the King's Justices on assizes.

In Australia a practice was followed for some time of passing a special Act of Parliament to constitute a Commission of Inquiry or Royal Commission. There is now Commonwealth legislation and legislation in each State which empowers persons appointed by Order in Council to conduct such inquiries. The legislation has advanced to a stage where most questions about the powers of a Commission of Inquiry will obtain answers from a construction of the legislation eg. what are the rights and obligations of a witness?

Originally, inquiries were investigatory with or without a request for recommendations. The task was to assemble information. More recently we have become accustomed to inquisitional inquiries where the answer to a specific question is sought. Coercive powers may be desirable in the case of investigatory inquiries but will be essential in the case of inquisitional ones.

There were questions raised whether a commission could be in contempt of court by inquiring into matters of which a Court was seized and in particular whether an inquiry could be made as to whether a crime had been committed and who had committed it: a clear contempt of the criminal courts, it was argued. These arguments were rejected over time: *Clough v Leahy* (1904) 2 CLR 139, *McGuiness v AG (Vict)* (1940) 63 CLR 73 and *Victoria v Australian Building Constructions Employees' and Builders Labourers' Federation* (1982) 56 ALJR 506.

These are cases where the very existence of the Inquiry was claimed to be in contempt. Cases have arisen where the

* *Cedric Hampson is a member of the Queensland Bar.*

course the inquiry takes may impinge upon ordinary litigation. In *Johns & Waygood Ltd v Utah Australia* (1963) VR 70 it was argued before Scholl J that an inquiry into why part of the King Street bridge had collapsed would interfere with pending civil litigation arising from the collapse. He thought relief could be given if there was a "real and substantial present danger of interference with the course of justice" but held that, in the circumstances, there was not. On the other hand the proximity of the trial of Hammond who had been charged with an offence arising from alleged export meat substitution justified an injunction to restrain Woodward J, a Federal Judge, who had been appointed Royal Commissioner by the Commonwealth and Victoria to inquire into allegations of unlawful substitution of meat for export: *Hammond v The Commonwealth* (1982) 152 CLR 188.

The remedies which may be obtained against those conducting an inquiry could be declarations and injunctions and, formerly prerogative writs, but judicial review has now taken over from the prerogative writs as the appropriate remedy: *Lloyd v Costigan No. 2* (1983) 53 ALR 402 (Federal Full Court). The decision to be reviewed will have to be something other than the ultimate report or recommendations which is not a decision: *Ross v Costigan* (1982) 41 ALR 319.

It is a moot question whether an incorrect finding of fact could ever have been rectified by certiorari but there is no doubt that a Royal Commission must afford natural justice and will have an order it makes without according natural justice overturned: *Mahon v Air New Zealand* (the Mt Erebus tragedy) (1983) NZLR 633.

What a Commissioner is investigating must be able to be objectively identified. In *Mannah v State Drug Crime Commission* (1988) 13 NSW LR 43 a challenge was made to subpoenas. The Commission had had referred to it by notice under the Act which constituted it a "relevant drug activity". It was held by the Court of Appeal that it was impossible objectively to identify the subject matter of the inquiry and the subpoenas were bad.

There will always be difficulty in restraining a Commission from seeking certain evidence on the ground that the evidence sought falls outside the terms of reference. *Lloyd v Costigan No. 2* (1983) 53 ALR 402; *Ross v Costigan No.2* (1982) 41 ALR 337. Even where a Commissioner is charged with recommending prosecution only on the basis there is a prime facie case, it seems he cannot be prevented from relying on inadmissible evidence to reach his conclusion: *Jackson v Slattery* (1984) 1 NSW LR 599.

The Acts to which I have referred protect Commissioner, counsel and witnesses against liability for defamation.

There was a privilege against answering a question which would incriminate the witness: *Sorby v Commonwealth* (1983) 152 CLR 281. Nowadays however section 6A of the Commonwealth Act and section 14(1A) of the Queensland Act require a witness to answer but the evidence given by him under compulsion cannot be used against him except for prosecution for an offence (eg perjury) against the Act. This view is supported by *R v McDonnell* (1978) 78 ALR 393. However the evidence given by a willing witness will be admissible against him: *Reg v S* (1953) SR(NSW) 460. A witness under the Commonwealth Act has a wider protection because of the form of section 6DD: *Giannarelli v The Queen* (1983) 154 CLR 212. There has been some alteration of the legislation from time to time and care should be taken in using authorities. The objection to answer voluntarily cannot be taken in a "blanket" fashion: *C v National Crime Authority* (1987) 78 ALR 338.

Legal professional privilege is a good reason for refusing to answer questions or to produce information *Baker v Campbell* (1983) 153 CLR 52.

Dr Hallett of Victoria wrote a doctoral thesis *Royal Commissions and Boards of Inquiry* (published in 1982 by the Law Book Company). This is a very useful book as it sets out such things as the procedural rulings which have been given by Commissioners over the years. Two matters that arise are obtaining leave to appear and the order of proceedings.

Usually, to obtain leave to appear generally it is necessary to show a special interest in the inquiry over and above that which every member of the public has. General leave really makes the person represented a party to the inquiry. Limited rights of representation can be given, eg for a person summoned as a witness for the time he is giving evidence. These days the Commissioner most usually adopts the procedure announced by Gibbs J in the *National Hotel Inquiry* (1964) QWN 65. He said:

> I intend to follow the practice that has been followed in many, although not all, Royal Commissions in Australia of requiring that all witnesses should be called and examined in the first instance by counsel assisting the Commission.
>
> If a witness is represented by counsel, he may next be examined by his own counsel, and he may then be cross-examined by other counsel in the order of their appearances, although it is hardly necessary to say that I expect counsel to avoid duplication or repetition in their cross-examinations.
>
> If any counsel who has been granted leave to appear desires that any person be called as a witness, he should request Mr. Byth, as counsel assisting the Commission, accordingly, and should furnish him with a statement of the evidence that the proposed witness is expected to give.
>
> If Mr. Byth declines to call the witness when so requested, counsel who desires him called may make application to me at the hearing, supported by an affidavit annexing a copy of such statement.

Commissions have statutory powers to prohibit publication of evidence received by them. They are not obliged to conduct their proceedings in public although the better view is that they should do so unless there is a good reason to the contrary. The case for public hearings is well made in the Commission chaired by Lord Justice Salmon, *Report of the Royal Commission into Tribunals of Inquiry*, 1966 UK.

> As we have already indicated it is, in our view, of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have a complete confidence that everything possible has been done for the purpose of arriving at the truth.
>
> When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.

Recent years have seen the establishment of bodies which have most of the characteristics of a Royal Commission and might be described as standing Commissions. Their role is to assist police in more sophisticated areas of crime for which purpose they are given wide powers of coercion and of investigation generally. Additionally they have a particular mandate to detect corruption. These roles are entirely investigatory and usually the bodies will wish to keep secret the information they

have assembled until a prosecution brief emerges. The courts have recognised the propriety of keeping information secret even to the extent of allowing the person conducting the inquiry to refuse to allow the same legal practitioner to appear for witnesses for the prosecution and for the defence: *Re: Whiting* (1944) 1 Qd R 561. Another example is *National Crime Authority v A* (1988) 78 ALR 707. There are useful comments by Lockhart J in *ASC v Bell* (1991) 104 ALR 125 upon the obligations of a legal practitioner when conflicts of interest may arise because of representing a particular person.

The two bodies of the kind I have been discussing which will be of importance to Queensland practitioners are the Criminal Justice Commission and the National Crime Authority. They and their powers are creatures of their particular constituting Acts which must be studied by any person proposing to appear before them. It should be noted in particular that rights to claim privilege are seriously circumscribed