Seminar transcript 21 July 2020: "**Commissions of Inquiries and Inquests – perspective from the bench and each side of the Bar Table**" Nicholas Andreatidis QC, Matthew Hickey, Claire Schneider, Sophie Gibson (Level Twenty Seven Chambers) & John Byrne AO RFD

Nicholas Andreatidis QC (NA): Good afternoon everybody, and welcome to our panel discussion on commissions of inquiry. Before I introduce our esteemed panel guests and participants, can I just point out to everyone please that down the bottom of your screens we should have something called 'chat'. If you'd like to press on that and send some questions or some comments, please feel free to do so. I will do the best I can, as inadequate as that may be, because that will inevitably be up to me to keep up with you and to pass on your questions to those sitting at the table with me.

Yes, the recording and the slides will be posted and emailed to everyone registered. So that will also be done.

Now, moving on to our panellists.

If I could start with the Honourable John Byrne AO RFD. You'll hear me referring to our guest as 'Judge'. Judge has told me to call him 'John' but, for reasons that I suspect almost all of you will appreciate, there is no prospect of me calling him 'John', so I am going to continue calling John 'Judge'. Judge took Silk in 1982. I mean, he's well known to you all so I'll be very brief. Judge took silk in '82, was appointed to the Supreme Court in 1989, was appointed Senior Judge Administrator in 2007, and retired in 2017. And most recently was the commissioner as Chair in the *Paradise Dam Commission of Inquiry*. We are very grateful to you Judge for agreeing to participate in today's session. So thank you very much.

Our other panellists are all Level Twenty Seven barristers, each experienced in complex and difficult and challenging matters. And I'll introduce each of them to you in turn and by order of seniority.

Matthew, before becoming a barrister almost a decade ago, or there abouts, he was a founding member of the 'Ten Tenors', that fabulous group of very talented singers. The experience that Matthew obtained from traveling around the world dealing with people and the performance skills have obviously served him very well as a barrister. Matthew has regularly been briefed to appear in commissions of inquiries and inquests, including the *Royal Commission into Institutional Responses to Child Sexual Abuse* where he was retained by The State of Queensland, and also the *Dreamworld Inquest* having appeared for one of the families of the deceased.

Claire Schneider prior to coming to the Bar was a solicitor at a global law firm and was Associate to Justice Keane when His Honour was in our Queensland Court of Appeal. As a barrister Claire has, relevantly for today's purposes, appeared with Senior Counsel Assisting the

And finally, Sophie Gibson. Sophie, before coming to the Bar, also worked at a global law firm and was also an Associate to Justice Keane - this time His Honour was at the High Court - and as counsel, and relevantly appeared with me, in the *Paradise Dam Commission of Inquiry*. I also know that I got in just in time because others from other parties also contacted Sophie, looking to retain her to act in the Commission.

DIFFERENCES BETWEEN A COMMISSION OF INQUIRY & LITIGATION

NA: Judge if I could start with you. Given your experience as both a judge obviously and the commissioner, are you able to give us some insight into the key differences between the adversarial litigation that we're more accustomed to and a commission of inquiry.

John Byrne AO RFD (JB): Could I begin by reviewing some of the principal features of litigation. It concerns a resolution of a contest between parties and is typically concerned with establishing rights and remedies. Secondly, the dispute, because that's what it is, is adjudication within the judicial branch of government applying familiar adversarial techniques. Thirdly, both the issues to be decided and the information in which the decision will be based, that's to say the evidence chosen, by the disputants. The court or the tribunal has usually no role in either gathering or presenting the evidence, that's done by the parties for practical reasons, which include that the court lacks both resources to investigate the facts and information also. Fourthly, the parties have some but limited and compulsory processes available to them to assist in the investigation of the facts. For example, they can invoke the court's subpoena powers to bring documents or witnesses along. There's also the question of disclosure of documents which provides a means by which information can be extracted from others. And it may be adduced in evidence.

If you contrast that with the typical commission of inquiry there are some very significant differences. First of all, the commission functions as an arm of the executive government, not the judicial. Secondly, as the name suggests, it is an inquiry. Contested questions exist in an inquisitorial system. What that means for practical purposes is that the affected parties at the commission of inquiry don't get to choose the form. They can't choose the issues to be decided. And perhaps most importantly, they don't get to choose the information which will be the subject matter of the investigation. In other words, the evidence to be adduced is no longer exclusively to be decided by the client, the commission decides what facts are going to be investigated and also how that happened. The commission also has extensive powers available under statute to compel the giving of information to the inquiry through witnesses and the production of documents, both in private and in public. The commission will have the staff and budget to undertake this task.

I think that these differences mean that the roles and responsibilities of lawyers, both barristers and solicitors, before a commission of inquiry, are markedly different than in litigation. This, I think is true whether the lawyers are appointed to assist the commission or whether they are chosen by their clients to represent the interests that may be affected during the course of the investigation. Today I'm sure we'll explore these differences and what they mean for lawyers who are engaged in a commission of inquiry in whatever role. But if I can just give one example I think illustrates the point I've attempted to make. At a trial, as we all know, the evidence of a witness will be taken by the advocate for the party in whose interest that witness is being called. The questions that will be posed will be put by that advocate to elicit information in a way that the advocate regards as helpful to the client's case. In a commission of inquiry however, typically the evidence that is to be adduced from a witness who is delivering evidence orally will not be taken by counsel in a party's interest. The evidence will be adduced by counsel appointed to assist the commission. So the way in which evidence emerges at an inquiry is commonly quite different, and in many ways more challenging.

WHY IT IS IMPORTANT TO CONSIDER A COMMISSION'S MANDATE

NA: Thank you judge. Mr. Hickey, from a party's perspective, why is it important to consider - assuming it's important to consider - the mandate or the terms of reference that apply to a commission?

MH: As the judge said, commissions of inquiry differ markedly from the from litigation proper because the parties haven't had the opportunity to set the issues that will be in dispute as between them. The mandate or terms of reference are really quite important because it's those which give the parties the first clue of what it is ultimately they're going to be investigated about. And then relevant to both in terms of the preparation to the commission of inquiry, but then also to the conduct, and I'll deal with that, in turn. As to the preparation of the inquiry, they're important because they give a party, assuming you're for a party who will be called before the commission, some clue as to what your potential liability might be. The first things which might tip you off to the fact that there's something that you might have to be apprehensive about being asked about, they tip you off as to the people within your organisation whom might be required to give evidence. They tip you off about the investigations you might need to take by way of providing documents and that kind of thing.

The first clue that you have about what's coming, to adopt an inelegant analogy, they're a little bit like the Bureau of Meteorology telling you what kind of bad weather is on the horizon. So in that way, they inform your preparation. They tell you something about the kinds of things your client might need to do in terms of getting itself ready for what's coming. They also tell you as a lawyer something about the kind of team that might need to be assembled in order to best support the client given the inclement weather it should expect. That might mean, for instance, that we require a team with a Silk and a Junior and a whole army of junior solicitors.

Do we really only require one Junior that could appear in order to take evidence from somebody in particular? How much money is going to need to be thrown at this thing? The earlier you can turn your mind to these kinds of questions, the more likely you're going to be to be able to shape your strategy.

And that's the second point really, I suppose I wish to talk about is that the mandate in the terms of reference tell you what's going to be the hot topic or most likely to be the hot topic. In my experience, you will always have some sense by reference to the terms of reference about where the danger points are for you. You will always have a sense of how you wish to play your public face in respect of this thing. As the judge identified, this requires a very different skills set in dealing with a commission of inquiry than that which typically you would engage in pure litigation. In a way, lawyers have to turn their mind, whether they like it or not, in order to successfully represent their clients, to what public face will be presented by the litigation by the forensic decisions that you make in dealing with the commission of inquiry's, requests. So you need to ask your client, you need to seek instructions about what is the public position you wish to take on this particular issue, irrespective of what the legal answer might be, because the two aren't necessarily consistent.

The third and final thing I wish to say is that once the commission is on the path to hearings, and indeed when hearings are occurring, the evidence that is called for must be confined to the things that are within the mandate and the terms of reference. And for you as a lawyer representing a client, you want always to ensure that if there are things that you're being asked to provide or that your clients are being asked to give evidence about which are not within the frames of the terms of reference, then that of course gives you a proper basis for objecting to production in terms of giving evidence or documents. So in the absence of pleadings, as one might expect in the in litigation in the strict sense, the mandate and the terms of reference are fundamental to your preparation and appearance at a commission.

NA: Thank you Mr Hickey.

IMPORTANCE OF THE LENGTH OF THE COMMISSION

NA: Claire, does the standard length or duration of the matter pose any importance on the commencement of a matter on which you are retained?

Claire Schneider (CS): Yeah, thanks Nic. Certainly, I think in the same way that the judge has made the observation about the differences between the adversarial system and commissions of inquiry and Matt in talking about the terms of reference, that has been a critical point in terms of understanding the difference between a commission and how it's likely to play out for you and your client as opposed to an adversarial system. The time period that the commission is slated to run across is the next clue that you potentially have about

where this kind of slightly more amorphous journey may take you as opposed to adversarial litigation. In the same way that commissions vary greatly from adversarial litigation, nor are commissions themselves equal and they vary significantly in the process that they undertake and the scope of the inquiry that they undertake. Often, a lot of that is driven, at least to some extent, by the time period between when the executive order is made and the commission's terms of reference are granted and the commissioner is required to report, either on an interim basis or on a final basis.

I think we've all seen examples where, although extensions can be sought, they're not things that are easily sought by commissioners and commissioners are very keen to report within their required timeframe and on budget. That has significant knock on effects in terms of the way in which the commission will be conducted, which is your next clue when preparing to gear up for one of these matters. Things like the length of any oral hearings and the likely timing of any oral hearings, whether the commission will proceed by way of case study, if the terms of reference are extremely broad, it will mean the time for reporting is much narrower, it will naturally be impossible for the commission to proceed down every rabbit hole and there might be a case study approach which is adopted. So the time that the Commission has to report is an important consideration to look at in tandem with the terms of reference when you're trying to get a feel for where this all may go and what your client's role in it may be.

NA: Thanks Claire.

A COMMISSION'S BREADTH OF POWER AND RULES OF EVIDENCE

NA: Sophie, still focusing on the differences between the commission and adversarial trial, can you give us some comments about the breadth of power, and how the rules of evidence apply in a commission?

Sophie Gibson (SG): As the judge mentioned earlier, commissions of inquiry are creatures of statute and each state, as well as the Commonwealth, has an act of legislation which provides for the facilitation of commissions in that jurisdiction. Although each piece of legislation is different, all contain broadly analogous provisions and each of the relevant enactments grants a commission of inquiry very strong powers to compel the production of evidence to it. This includes the power to summon a person to the hearing to give evidence or to produce documents. In practical reality, notices to produce often have very short deadlines and require an enormous amount of work to respond. Similarly, there's a significant amount of work involved in preparing a witness to respond to a notice to appear. Failure to comply has serious consequences. For example, s5(2) of the Queensland act provides that a failure to comply with a summons or a notice to produce is punishable by 200 penalty points or up to eight years imprisonment. It's also a contempt which is referable to the Supreme Court.

On a practical note, there's very little that a party's legal representatives can do to shield that party from the often very onerous conditions of these summons. This is sometimes difficult for litigators to wrap their heads around because you don't have the usual tools that you would utilise in adversarial litigation to protect your client's interests. You can't get together with the other side and agree directions, the issues aren't nicely confined to the pleadings. And as we've mentioned, the terms of reference are often drafted in quite a broad way. So it's difficult to object sometimes on the grounds of relevance. There's also no formal procedure for applying for extensions of time to comply. So these issues are important to canvass with your client from the outset, the message needs to be that once this process starts it will be very onerous and time consuming and potentially very expensive. It's important to explain to your client that there's not really a lot that you can do as a lawyer to protect them once the process sort of gets going.

NA: And more than once…

SG: That's right!

NA: Judge, is there anything that you'd like to add to what Sophie has said in terms of the power?

JB: I think it can be useful for lawyers wherever possible to seek to negotiate these things with counsel assisting or solicitor assisting the inquiry. I'm sure we'll return to this theme as this session develops. That kind of cooperation can be played in the client's interests and used to the efficient conduct of the inquiry.

The other thing I would say is, and it picks up a point that both Matthew and Sophie made, it's often said that there are no rules of evidence, particularly in a commission inquiry. It's only true up to a point. The fundamental rule, that is to say that information which is relevant is admissible, any information that is not relevant is not admissible, holds true in a commission of inquiry also. But is does so because the terms of reference are the source of the commission's authority and conditions to act. The commission may not lawfully extend its inquiry beyond the true scope upon the terms of reference. They will establish, as Matthew has already made clear, the relevance of the issues that may be the subject of investigation, and that provides the parameters for the range of information that may be produced in documents.

NA: Thank you judge.

PRIVILEGE IN THE CONTEXT OF A COMMISSION

Sophie, privilege is something that we as lawyers protect quite zealously at every given opportunity. In the context of the commission of inquiry, is there anything about privilege that you wish to raise?

SG: You're not going to get much joy. But the right to claim privilege can be wholly or partly abrogated by the relevant statute. The Queensland act, for example, provides that a person is not entitled to refuse to answer a question or produce any document on the basis of self-incrimination privilege. Although s14(a) provides that a statement made by a witness during the commission is not admissible in evidence against that witness in any future civil or criminal proceeding. Although that exemption doesn't apply to documents, records, books or property, which have been disclosed.

NA: But legal professional privilege is maintained?

SG: That's right.

I also just wanted to mention, in respect to the rules of evidence, although they don't strictly apply, parties should keep in mind how much weight is likely to be given to the evidence being adduced in support of a position. For example, in the inquiry that Nic and I did together, we made sure that a report that was produced by our expert complied with the expert rules, the requirements on the rule 428 of the UCPR and the relevant Federal Court rules. Although whether or not the report complied didn't affect its admissibility into evidence, we felt as though the evidence would be given more weight if the report set out the expert's qualifications, the instructions and the material facts on which he relied.

NA: Remember, the conversation we had was also directed towards emphasising to the expert each of those things that he was declaring. So he really focused his attention on attendance and not being there just as an advocate for us or for our client. That was the other reason that we thought that was important to do. And in the course of preparing for the CPD, I thought it was really interesting the different perceptions people had, depending on what side of the Bar Table or the bench one was sitting on. And the one of the comments that was made was that, I wouldn't mind discussing collectively, was that while rules of evidence don't strictly apply, procedural fairness is king. I think that was one of the comments that was made. Now, for someone who has only ever acted for a party often I find that really funny, in an ironic way.

PROCEDURAL FAIRNESS

NA: John, if I could start with you about procedural fairness as king, in particular from your perception.

JB: The most important aspect of the commission of inquiry concerning procedural fairness is the responsibility to notify those who are likely to be affected of any adverse evidence that is on the cards. Usually that means alerting them to the evidence which might justify a conclusion that is adverse to economic interest, for example, or reputation.

Everyone knows that this must be done but judgment and will effect when it's done. It must be done in sufficient time to enable the party to whom notice is given to respond either by producing evidence or inviting the commission to take other evidence in consideration. Or by addressing arguments through submissions that is made. From the commission's point of view, this requires attention to be given at a relatively early stage to the timing because it must be done in sufficient time also to enable the commission to complete its report on the fixed date. There's a tendency, I think, to try to calculate the date by which this must be done by working back from the time when the report must be delivered. This is perhaps the most challenging aspect that relates to procedural fairness.

There is another I should mention. A commission often has to exercise notice judgment, not only about when notice is given, but the content of the notices. Let me give you an example. Not every item of evidence that is potentially adverse, I think, should be given to a party, either as soon as it's received, or in some cases, ever. I say that because it may be that during the course of the investigation some information that at first blush looks to be disadvantageous to the party and that might trigger an obligation to give notice, might as the investigation proceeds prove to be without substance altogether. So if you give notice of every potential adverse item of evidence you're likely to require the parties to sometimes to do unnecessary work and to put in jeopardy the timeframe that needs to be put in place right from the start of a commission to ensure that it finishes on time.

Everyone I am sure is conscious of the need for procedural fairness of hearings, but as I say, there are no strict rules.

NA: Thank you judge.

Claire, I think you are the one that coined that procedural fairness is king. Is there something, someone who acted as counsel assisting, that you'd like to add?

CS: I think at the end of the day, as the judge has said, and it picks up on something Sophie said as well, although the rules of evidence are statutory aligned, the rationale for a lot of our rules of evidence still need to be afforded significant consideration when it comes to the reliability of evidence, and the use to which evidence can and ought to be put. At the end of the day, the role of a commission is to investigate and to report on findings of fact and conclusions that are able to be drawn. A commission is hampered from doing that if there are

concerns about procedural fairness or inappropriate use of evidence. That is why, although the rules of evidence and the court rules and procedures as we are accustomed to them as litigators, don't apply. The rationale that underpins them will often be fairly tightly observed by the commission to ensure that its work and the work of all the lawyers who are contributing to the work of the commission is used in a valuable way to achieve the outcome, which is to provide the report in accordance with the terms of reference.

NA: Thank you. Now switch to the other side of the court table. Hickey and Gibson, anything you'd like to add from the perspective of those who appear on behalf of the parties?

MH: Inevitably when you're appearing for a party you always feel like you've been taken by surprise. When we were preparing for this, I think I was having only ever appeared on that side was surprised I suppose by the insights that the judge gave about that. And similarly Claire about there might well be legitimate reasons why decisions have been taken behind the scenes to defer things until later or not to trouble you with things with things that might end up being non issues. Of course, when you're on this side of the Bar Table you know that any issue that is thrown up is one that you immediately become spooked and fearful about that creates a flurry of activity for the teams behind the scenes. I think it's useful to have that that kind of insight and to be guided, I suppose, in a way by how you approach these things. It feeds into another topic that we'll talk about in due course, which is why it's important to have good and cooperative and collaborative relationships with others who are involved in the commission, because it makes that process much more useful ultimately, I think, for your client.

NA: Yes. Sophie?

SG: I don't have anything to add.

NA: Thank you. All right.

'TOOLING UP' A COMMISSION

NA: Now moving on. Schneider, you're going to talk to us about tooling up but from the perspective of the commission. Do you mind when you comment answering a question that's come through from the audience which is "whether or not there is something that defines the role of counsel assisting?"

CS: That's a difficult question to answer because I think at the outset the nature of each commission varies greatly. Therefore the role of the counsel assisting team and the office of the solicitor assisting team will vary greatly. Once again, when it comes to the commission forming and getting its processes set in place, the fundamentals will always come back to terms of reference and time. That will often dictate the timing of hearings and the length of

any hearings and it will often lead to the early appointment of Lead Counsel Assisting and Lead Solicitor Assisting and then what will follow is that those teams will be built as they need to be, much in the same way that parties might start by deciding they want to brief a particular Silk or particular Junior to have them locked in. Then the team will build as the issues build.

Where that all leaves people, when you're acting for a client to understand, is to understand in that early period of forming a commission there will be a lot of information released from the commission about how the commission is to proceed, who the people are at the commission who are involved in certain aspects. That starts to give you an idea, to pick up on something Matthew said, about who are the people within the commission team who are likely to become the people that you need to interact with in order to best represent your client and achieve your client's interests. Those early decisions will be made and that information will be made public, the nature of the commission is that it is a public beast and information is published publicly, in the modern era on the website, as soon as it is decided upon and signed off on. Remaining on top of that information in those early weeks, I think, is critical to understanding the likely path that the commission might take.

NA: Mr Hickey, if I could return to you. Tooling up from the perspective of a party.

MH: There are three broad groups of people that I think one needs to turn one's mind to when presented with the likelihood of a commission of inquiry that need to be considered. The first is lawyers. The second is within the client. And the third is external providers.

As to lawyers, I think it's really quite important to consider not just who it is that you typically like to work with, but who brings the right kind of expertise and personal qualities on any particular matter which is going to be necessary for the substance of the particular commission of inquiry. When this is done successfully, it is a very powerful tool for the client. What I mean by that is, as I mentioned earlier, it's not just a legal process this but it's often a public relations exercise. I have in mind, without mentioning a particular inquiry in which I was involved, where there was a party who was, let's say, wearing the black hat. They knew, it seemed to me from the outside, that it would be necessary to aggressively cross examine some people who would put adverse things to them, but also to have a very effective and friendly and amiable public facing profile. They engaged two Silks who, was obvious to me, were given separate jobs. One was to be the head kicker and to aggressively cross-examine those who needed to be cross-examined, the other was to be pleasant and outwardly amiable. I use that as an example of where it's necessary to give thought to what's the purpose the barristers in the courtroom will serve, quite apart from advancing legal arguments.

Then, of course, there's the solicitors that will be supporting. Within the solicitor's team, real thought needs to be given to what tasks will be necessary to be undertaken. In some

conditions there's an awful lot of grunt work. Of course, it's a matter of public record that many firms were flooded in the *Banking Commission* with the amount of work that needed to be done and going through disclosure and preparing statements and the like.

It is important, as early as possible, to understand what are the likely jobs that will need to be done and to educate the client as to how much money they're going to have to throw at this thing in order to be properly representing their interests.

That leads me to the client side which is within the client side, it's necessary immediately to tool up, to turn its mind to what are the issues that we're going to become confronted by, who within our organisation can answer these questions, who within our organisation, if at all, if anybody can provide the practical support to the lawyers who are going to be representing us in order to get the documents in order to hunt down the relevant facts that will need to be had in order to talk to the people within the organisation who can provide the answers.

Something that's often overlooked in my experience is that this provides an awful lot of work for the Human Resources sections in big organisations. There's a lot of supportive stuff that needs to happen that people are often taken by surprise with. So there really isn't any part of the client's organisation which is left untouched, I think, by commissions of inquiry, especially if they're in the gun.

The third thing is external providers. By that I mean experts, legal technology suppliers, and indeed public relations and media support. As we've already mentioned, these things are public facing, they tend to engender a lot more interest than ordinary litigation usually engenders. And so it's necessary to have people who have expertise in how to deal with the public, how to deal with the media, how to ensure that your people know how to do all of those things. And again, those things cost money. The sooner you get the client to understand that this is a fast moving beast typically, it's not going away. As much as they might prefer to bury their heads in the sand and ignore the budgetary consequences that are going to follow, they really need to take it seriously because of the coercive powers that Sophie's talked about. There are real problems if they just ignore it. Those are the three areas I think it's important for, certainly for a lawyer in the first instance, to turn his or her mind to in helping a client work out what it needs to do.

NA: And we should never forget that slowness might end up being misinterpreted by some as intentionally trying to avoid certain things and being obstructive. All of those type of things fit into the character, again in my experience, the character of the commission of inquiry, which really is much more public than litigation and engaging. Yes, justice is public and people can come in and out of court but commissions tend to attract a lot more publicity.

MH: Typically it is a matter of public controversy which has given rise to it within the first place. The public at large are more interested in it, yes, than a dispute between private individuals or companies.

NA: I think that really underscores your comment about it being an intersection between the legal world which is black and white, very clinical in its approach, and the PR exercise that is inevitably engaged if you are acting for a party particularly if it is a high profile participant in the process. There's a real skill in walking that line between those two processes that are going on.

JB: May I just say something in relation to the question that was concerning the role of counsel assisting. Now, again, it'll vary somewhat from commission to commission. But anyone that isn't particularly well resourced, I think barristers need to appreciate that if they are appointed as Counsel Assisting they are not really advocates of public hearing. They will be expected to think through and in many instances actually conduct investigations. Some of them may be reluctant to thinking of this as solicitors work. But in a small commission where there aren't the resources to justify the usual bifurcation of responsibilities, Counsel Assisting must be willing to participate in the investigation.

Secondly, the question that needs to be thought about is one of the relations between the counsel assisting and the commission. This is an important thing to address because I've been encouraging, and I'm sure others will, for the lawyers to discuss among themselves the progress of things, the scope of notices to produce and so on. When barristers who act for clients are engaged in the process of negotiation like this one of the things I want to know is who do you speak for as Counsel Assisting, am I dealing with the agent for the commission, or am I not? Now I take the view that, generally speaking, what counsel assisting ought to do is what the title of the position suggests, they're there to assist, but they don't decide. The critical aspect of this, in my view, is that the whatever goes on behind the scenes nothing should be done to indicate to the parties that whatever counsel assisting submits at the end of the case, is the thing dutifully adopted by the commission. The parties need to have confidence that the commissioners will be assisted by counsel assisting, but will not be at their beck and call. If parties don't have confidence then it's destructive of the process. That means that some distance has to be maintained between counsel assisting and the commission in the interests of public confidence in the process.

On the other hand, there are times when counsel assisting will need to engage with the commission to respond sensibly to these negotiations about the scope of the documents to be produced, the witnesses who might be called, and sometimes even administrative arrangements about when things will happen. It's a challenging position and for many barristers the experience is novel.

MH: I think the fact that that question is asked is indicative of the fact that it's a bit of a mystery sometimes. It's one of those things that we all know about, we hear about that. But often, one finds practitioners aren't sure what the role entails. And indeed, whether you're permitted to talk to them to engage in the kind of negotiation that you refer to judge in the way that you would do as a matter of course in adversarial litigation, of course, you would engage with your opponent if he or she was sensible. I think some people think that it is improper to engage with counsel assisting in that way, and of course, it's not improper and it's quite an important part of getting the job done efficiently and properly.

NA: Absolutely. I think you've commented quite appropriately that if a questions is raised when counsel assisting or counsel assisting's team, and it's something that you don't want to or won't answer, you'll tell us pretty quickly. The worst you'll be told is, no I'm not going to answer that. Hopefully, that's the worst.

SEEKING LEAVE

NA: Moving on to the next slide, seeking leave. Sophie, when should that be done? When do you make the decision to do it, if at all, and what's involved in doing so?

SG: Parties don't have leave to appear to be represented in a commission of inquiry as of right. Commissions have budgetary and time restraints, as we've been discussing. So not all parties with an interest in the subject matter of the inquiry will be given leave. It's a good idea to keep an eye out for the practice directions issued by the commission as those will usually dictate the process for applying for leave. Any application is usually required to be made prior to the commencement of the hearing in writing. You can be expected to identify why the party has an interest in the terms of reference, how their interest might be materially affected by the outcome of the inquiry, whether the party has any particular knowledge or expertise in some old parts of the terms of reference which would enable that party to assist the commission. So it's important to think about applying for leave early, for obvious reasons, and not leaving it to the last minute, not least so the commission can appropriately timetable the hearing.

NA: Thank you Sophie.

Mr. Hickey, the question of openings. You're instructed, you're acting for a party. What is the thinking and the strategising you go through in deciding whether you want to open or not, and whether you're going to ask permission to open?

MH: Of course the council assisting will open. The council assisting will say some things at the opening of the commission which will give the parties, and indeed the world at large, a sense of what this is going to be about, what the major issues of all the issues of the inquiry are going to be, who's expected to be heard from, that kind of thing. It doesn't necessarily follow that

each and every party will then be given an opportunity to say something by way of opening. So there's a decision to be made about whether indeed you will ask to say something by way of opening. Of course, you'd expect to have some sort of sensible explanation as to why you should be permitted to do that.

As to the decision of whether or not you should, I think the major strategic reason to consider giving an opening, particularly if you're the person who's in the gun, is that it gives you an opportunity at the very beginning of things to, if not control the narrative, to at least plant the seed of where the alternative case may be. Often, in my experience in commissions that I've been involved in, there's a very obvious factual finding that will be made. There is an event which has occurred but there's a particular problem which has been discovered and everybody thinks they have an understanding of what it's all about. It might be important for your client's purposes to establish some sort of counter narrative, some counter explanation, and it may simply mirror what you'll ultimately say by way of closing because you know all of the things which will be discovered through the course of the inquiry, but it might be quite important for you to plant that seed early. It might be your opportunity to explain to the commissioner that you're going to hear a lot of evidence about a whole lot of things but this is in fact that you're ultimately going to discover.

Of course, the judge might have a contrary view to this but my approach to advocacy is always that the person making the decision is a human being. We are all trained of course as lawyers to look at the evidence before us but we are susceptible to persuasion, even at a subconscious level. So, if there is an alternative narrative to be had, you should plant that seed as early as possible, particularly given there are no pleadings. In ordinary adversarial litigation you've got the opportunity to poison the well with the defence. But here, the best you can do is perhaps to put in early statements, but an opening gives you the opportunity to tell the commissioner and everybody else there is an alternative story here.

NA: As you mentioned earlier Matthew, commissions are called as a consequence of a matter of public controversy or something that has happened. And if you're acting for the party using the gun, you may well need to take a stand that is contrary to the public outrage. Not suggesting of course for a minute that the outrage is not justified or the people don't genuinely believe it, but that planting that seed could become critically important in terms of how you can try to orchestrate within the confines of your role and you're obligations of course and the story that you want to tell.

MH: And that might not be merely defensive, but it might be deflecting.

NA: Absolutely.

MH: If everyone apprehends that you're the one with the target on your back but you want to say "no it's not us, it's them", that's your opportunity both as a matter of defensive strategy, I suppose but also one of fairness. If you're ultimately going to be submitting that it's not us it is them then you need to tell them as early as possible that's the approach you're going to be taking. I think that's another reason why you might consider opening in that way.

NA: Thank you.

And Judge, going back briefly to the question of leave, is there anything you want to say that that is appropriate about whether it will be given or won't be given.

JB: Ordinarily, I think most commissions operate on the basis that if an economic interest or reputational interest might be adversely affected, then the party would be offered an opportunity to participate through leave. Occasionally, someone who hasn't applied for leave might be encouraged to do so. Otherwise I think Sophie has well canvased the considerations.

NA: Thank you Judge.

THE PROCESS – PRACTICAL CONSIDERATIONS

NA: Right, now some practical considerations. Schneider going to you, if we could, I think we've actually already discussed this briefly, be familiar with a range of things, the practice directions, the document management, something I haven't really touched on yet.

CS: Yeah, I think we've started speaking about the practice directions and the importance of getting on top of those very quickly. I think it's a feature of the modern world that the number of documents that may fall within the scope of any inquiry are likely to be significant. They can go back for a very long period and therefore the scope of documents that might be caught by a request to produce or a notice to produce issued by the commission team could be very substantial. Sophie and Matthew have touched on those considerations for your client.

In terms of your team, understanding very quickly how electronic documents are to be managed and what the system is. And making sure that you understand that your system is ultimately compatible with the system that you're required to produce documents into, will save you a lot of pain and suffering, I think, in the future. So that very practical issue of setting up early on an appropriate platform for the management of documents as you're collecting them and reviewing them is critical, particularly when you add the overlay of the volume of documents likely to be caught in the timeframes that you're likely to be dealing with.

The second point I think is early consideration needs to be given to is the prospect that your client may have commercially sensitive or confidential material that is likely to be caught by

the terms of reference, and therefore may be the subject of a notice to produce. If that is the case, understanding early on what the commission's approach is to commercially sensitive material, recalling of course that these are public inquiries. The practice has shown that they publish exhibits and materials that are produced to them, so they are publicly available. So having an understanding as to what you need to do to make claims for confidentiality and commercial sensitivity and what the commission's preferred approach to, for example, redacting documents or summarising documents in a way that excludes any commercially sensitive material.

The same can be observed in relation to legal professional privilege. If it is likely that the scope of the terms of reference are such that advices to client are likely to be caught, understanding what the commission's approach is to claims to legal profession privilege and contested claims of legal professional privilege because, once again, you're operating in an environment where the timeframes you will be working to, in some cases, will be unlike anything you've ever seen before, so having an understanding very early on as to if these issues arise, how am I going to deal with them to protect my client and do it in an efficient but comprehensive way are very important.

NA: And Mr. Hickey, witnesses and managing them?

MH: We've already spoken in a number of the previous topics about the need to turn your mind early to who might be the witnesses within your organisation who will give the evidence. Assuming that you've done that, you're also confronted by the fact that the commission itself might have a view about who it should be on behalf of your organisation, who will give the evidence.

A practical consideration for you and for your client is the manner in which that evidence will be given. Now, the mode with which most people will be familiar, I suppose, is by provision of a statement. That's the usual approach in a commission observing an inquiry. The evidence in chief will be the provision of a statement. And then typically, the counsel assisting will lead the witnesses. The judge has said earlier that they will be the person who asked questions by reference initially, to the statement, but there are other ways in which evidence might be obtained in the commission of inquiry. One way, for instance, is that your client, or your witness rather, might be invited to come in for an interview with the counsel assisting or other officers behind the scenes and a transcript of that conversation taken and then that becomes a form of evidence.

Similarly, with experts there are different processes by which their evidence can be given. Expert's report, of course, is one but frequently one sees experts being asked to participate in conference, both separately and in front of the commission, increasingly. So one needs to turn

their mind to what's the most effective way for your particular witness to give the particular evidence that they're asked to give. Having regard to the things that they're asked about, typically one receives from the commission a list of questions that the witness is asked to respond to. So in terms of the practicalities of providing that evidence, particularly if it's in statement form, I think it behoves those representing witnesses to try to tailor the evidence in a way which minimises the opportunity for further questions to be asked when they are asked to get in the box and defend their statements, I suppose.

Of course, as I mentioned earlier, in referring to HR people, one of the things that I think people grossly underestimate is the impact that these things have on the individuals who have to give evidence, particularly lay evidence, for the reasons we've already canvassed. It being a very public spectacle, it can be very stressful and confronting for people. Often they are asked hard questions, and frequently, although you internally know who the best place to answer questions about particular things, for whatever reason, the commission of inquiry might have a particular interest in very junior members of your staff who don't necessarily have all of the answers, it can be a very, very difficult process for them. I think lawyers have to prepare witnesses as well and they need to prepare their clients to have their internal Human Resources processes ready to support individuals, because it can be a very difficult process.

NA: Yeah. And we've already talked about the reality that your witness, your client's witnesses, or staff, for example, aren't actually being called by you. They're examined by counsel assisting or a member of the counsel assisting team. Again, completely different to the way litigation is normally conducted. It's not done in chief. It could be, but it's generally done more in the cross-examination style. But if you decide you want to re-examine your own witness or personnel called from your client's staff, something that I think we've all talked about, and all agree, is that as a matter of persuasion and trying to give weight to the evidence by your own client's witnesses, you should still nevertheless do it in chief when it's your turn rather than cross-examining. That way you can say at the end, make the observation to the commissioner, it won't escape the commissioner's attention that you've done it that way.

MH: You mean asking questions in the style of in chief, rather than asking Dorothy Dixon's?

NA: Precisely, so don't cross-examine your own witness. Get 'yes' or 'no' answers, for example, then ask the question.

THE ATMOSPHERE OF A COMMISSION

NA: Now, the final item on this slide is 'atmosphere' and that might seem an odd topic for some of you audience to understand why we picked it. But each of us, having lived through commissions, acknowledged in our preparation of this CPD that atmosphere is actually

something that really becomes important. It's like nothing else I've experienced. Claire, would you like to comment on that?

CS: I think it comes back to this idea that each commission is a different beast and the subject matter can vary greatly. The difference between doing a commission on a construction project gone wrong is quite different to doing a commission, for example, with institutional resources commissions with a subject matter when they're even within that commission vary quite greatly. And so if you bring with that the pace, the public nature of the commission and the pressure that will inevitably be brought to bear upon the lawyers by their clients to make sure that things are being done as quickly but as comprehensively as possible, you do often find yourself being in a scenario where the pressure is something that you haven't seen before, and understanding how to deal with that and to come, to pick up Matthew's point, to assist your witnesses in particular, to whom this is an uncomfortable process, even as a lawyer. It's an entirely uncomfortable process for the lay people who are called to give evidence. Understanding how to deal with that, and some of the things we've already discussed that may assist are things like the relationship, whether you are able to engage with the office of the solicitor assisting or the office of counsel assisting to, if notice is to produce are served that cannot be complied with, to discuss breaking it down into tranches. What is the commission interested in most, can that be produced on the due date and then tranches to follow? Those are tools that can quite appropriately be used to ensure that the work of the commission is able to proceed on the timetable it requires, but to ask people to achieve the feasible and not the impossible.

NA: Thanks Claire.

We've already commented several times on the importance of engaging with counsel assisting and the parties. But I'll just ask the question in an open way. Sophie and Claire, is there anything that you'd like to add to what's already been said? Judge? Matthew? We all think it's a good thing. And in fact, I can't think of a circumstance where you would not want good relations with counsel assisting.

MH: I think it's all the more important if you apprehend you are the one with the target on your back. It seems counterintuitive, you would think, you would keep all your cards close to your chest but I think it's all the more important than to try to establish rapport and cooperative relationships with the counsel assisting.

SG: And that's particularly so where you need counsel assisting sometimes to tender documents that you wish to attend or call witness that you want to call, you can't decide to do it yourself. You really do need that open communication, I think, with the counsel assisting.

NA: Actually Judge, what will happen if, as a party, you want to tender? This hasn't occurred to me which is why I'm asking you that question. The practice directions make it clear the only parties who can tender to counsel assisting. Let's assume hypothetically, counsel assisting says to me, "No, I'm not going to attend to that document". How would you react to Matthew or I or Sophie standing up and saying "I want to make an application to tender a document"? Would you be open to that application?

JB: Yes, certainly. Most practice directions will say something like, "the evidence will be adduced by counsel assisting, unless leave is granted to a party to produce". So I would definitely grant.

NA: Well, that makes it easier. Again, not that that's ever happened.

And the next slide is something that we've, I think, broadly touched on. So I will ask Matthew and Judge if there's anything in terms of the your witness proposition that you wish to add to what we've already said.

MH: For my partner, no. I think I've covered all the things already that I wish to talk about.

JB: May I speak about the application of the rule of practice in *Browne v Dunn* for a moment?

NA: I love the fact that judge you are asking me permission.

JB: There are really two considerations that underpin the rule of practice in *Browne v Dunn* which requires that if it's intended to submit that a witness's testimony is not accurate, then the witness ought to be confronted with the suggestion and any evidence to support it to afford an opportunity to answer. It's an aspect now famous, we tend to think of procedural fairness as something that must be extended only by a tribunals or by commissions. But I think Matthew made the point before that fairness is to be expected by those who appear in the commission. The observance of the rule of practice in *Browne v Dunn* definitely conduces to efficiencies because you're not confronting the prospect of having to recall a witness. But it's also procedurally fair for those who are going to be challenged and have the opportunity to answer the material that is relied upon. So I think, while it is true that the rules by and large don't apply, as we can see, it is in everyone's interest to observe the rule in *Browne v Dunn*.

NA: Thank you, judge.

THE PROCESS OF EXPERT EVIDENCE

NA: Once again, this is something we've already touched on, the process of expert evidence. Mr Hickey, is there anything you would like to add to what you've already said about that?

NA: Probably not really. The only thing I would say is that this is one of those things which you cannot turn your mind to early enough. Once you understand what the terms of reference are, start identifying who your expert is, because even if you're not going to tender a report by them, if it's something that's highly technical, you're going to need their support. So don't delay upon this, get cracking as soon as you can.

NA: Thanks. And judge, of course in the commission you ran your co-commissioner was in fact an expert. Did you find that useful?

JB: Yes, because it is a long tradition in common law of decision makers sitting with advisors. The admiralty jurisdiction has a venerable tradition of having a judge sit with assessors. They don't play a role in making a decision beyond giving advice and assistance to the decision maker. The same is true in Queensland in the Mental Health Court where a Supreme Court Judge sits with two psychiatrists who are there to assist the judge but did not participate in making the actual decision.

Now, it's different if your co-commissioner is an expert in the sense that the expert will do more than advise the chair of that expert's view. The expert is actually going to participate in the decision making, and that is a novel aspect. But in areas which involve highly technical matters, it's logical enough to have within the decision making body one or more people who are actually experts in the field that is under investigation. I think you'll see more. The Commonwealth in particular seems to be attracted to the idea of multiple commissioners with different backgrounds and levels of expertise.

NA: All makes perfect sense. Something that was done in the *Paradise Dam Commission of Inquiry* that worked very well, I thought, was when multiple experts from different, globally different, all leading experts in a particular dam design and building, they were all called at the same time. It was a mix of people who were genuinely third party experts who had been retained by a party and employees of engineering firms who were nevertheless experts, but we're also giving evidence and five of them, six of them, at the same time. I had my doubts as to how it was going to work but it worked brilliantly. No doubt in part to the excellent conducting by Counsel Assisting, Jonathan Houghton QC, and the parties cooperating at the beginning and agreeing effectively on the agenda on the types of topics to be dealt with, and each party, of course, been committed to address the witnesses or ask questions afterwards. That was something that had been done that I thought was excellent. I've never seen that done in a trial, where a mix of lay and experts all called literally at the same time.

JB: The taking of concurrent evidence though is going to be different, typically, at a commission of inquiry than at a trial. At a trial it's the judge who would be expected to manage the process. At a commission of inquiry, you have someone who is independent,

counsel assisting, who will take that burden from the commissioners. And as you say, work with the lawyers representing the clients to develop an agenda and process that is suited.

NA: Well, we are at the conclusion. On the last slide are our hot tips, our top takeaways, if I can use that expression.

Can I thank each of you. Judge, thank you. Matthew, Claire, Sophie, thank you very much. Thank you, audience. We hope this has been as much fun for you and as it has been for me, and hopefully everyone else. Thank you all very much for your time. Thank you. Ciao.