

Legalwise Seminar 30 October 2020

Plans for the new Personal Injury Commission

Judge Phillips

The *Personal Injury Commission Act 2020* was assented to on 11 August 2020 and is scheduled to commence operation on 1 March 2021, so in about 4 months' time. Before I discuss the plans to open the new Commission on 1 March 2021, I do want to pay my respects to the Workers Compensation Commission. The Workers Compensation Commission first opened its doors in August 1926. Since that time either as the Commission, the Court or in its second coming as the Commission once more, it has dispensed justice to injured workers, their employers and insurers in this state. But what I would ask you to notice about that history is this. In those 94 years, no matter what was happening with the insurance scheme, prevailing economic conditions including the Great Depression, various recessions, World War II, the 1970s oil shock, the Commission as an independent statutory tribunal or court has always approached its task independently. Indeed, in August 1926 the Commission, which consisted of Judge Perdriau, the Chairman, and two commissioners were given a civic welcome at the Newcastle Council Chambers. Judge Perdriau, in reference to the 1926 Act, said that the Commission would approach it in the following manner:

“There will be no doubt that the Act will be fairly and fearlessly administered.”

I think if you look at the Commission over the past 94 years, those sentiments have been consistently met.

It is my intention that the Personal Injury Commission be conducted along the same fearless and independent ways as its predecessor organisations.

Likewise, the Dispute Resolution Service has a fine history of dealing with a large volume of cases advanced by citizens who have been injured in motor vehicle accidents. At the time of its inception, there was a deliberate policy choice taken to remove the classes of cases dealt with by the DRS out of the mainstream court system and have them dealt with in a way which was very close to tribunal practice. The DRS has over the years established a very efficient approach by leveraging the knowledge and experience of its cohort of assessors. This history and experience will be of great benefit to the new Commission.

I think it is worthwhile though at this point to pause and consider the nature of a tribunal. There is no single definition of the term 'tribunal' and its meaning is quite broad. A court is often called a tribunal, so can any body with the power to make decisions affecting the rights and interests of individuals or corporations. Some tribunals exist in the domestic or private realm, for example sporting, religious or professional tribunals, most, like the Personal Injury Commission are established by statute.

In a paper presented to the ANU's Public Law Conference in October 2014, Pearson identified the following common features of Australian Tribunals:

- 1) They are established by a statute with legal authority to make decisions.
- 2) When exercising the function of reviewing administrative decisions, they are independent of the original decision maker.
- 3) They are obliged to give reasons for their decisions.

- 4) They may be constituted by members with expertise in the matters coming before the particular tribunal.
- 5) They are subject to supervisory or appellate powers of a court.
- 6) Their procedures are intended to be less formal than those of the courts, with an emphasis on negotiated dispute resolution.

A review of the Personal Injury Commission Act reveals that the new Commission has all of these attributes.

You might ask what is the guarantee of independence of this tribunal. Firstly, it has the attributes which Pearson refers to above and these are all indicators of a tribunal's independence and impartiality. Secondly, and I will quote from the Parliamentary debates in August:

“The President is required to be a judge of a court of record and is required to hold judicial tenure and have judicial independence. Therefore, they would not be subject to the threat of dismissal or other undue pressure from the Government of the day. That is why it is essential to have judicial independence for the President of the Personal Injury Commission.”¹

Now that the Dispute Resolution Service is moving into a tribunal, all of the independence associated with that status now will exist in the third party dispute resolution system. In addition, and I will say more about this when I speak about the members of the Personal Injury Commission, I will end the previous practice where the assessors could also be practitioners in the jurisdiction. This will only serve to enhance the independence and perceived impartiality of the process.

If you followed the Parliamentary debates about the *Personal Injury Commission Act*, you might have noticed that various terms were used to describe aspects of what the bill was doing. For example that there was going to be a ‘lift and shift’ of both organisations into the Personal Injury Commission, or that the model adopted was minimalist. Effectively what this means is that the terms of the enabling legislation, that is the workers compensation and motor accidents legislation, were being maintained into the Personal Injury Commission. However, outside of this guarantee, and that enabling legislation hasn't been changed, by necessity the transfer of these functions into the new Commission will produce change. For example, the Rule Committee is currently working on the practice and procedure of the new tribunal. The aim of this Committee is to produce, consistent with tribunal practice, a set of flexible Rules which will enable the efficient discharge of each and every matter filed in the new Commission. One aim will be to try and harmonise the rules across both divisions which means there will be some change.

In terms of how the new Commission will operate, of course it must be grounded in the Act and the best practice as specified by the Council of Australasian Tribunals. But it also must be guided by this. Whether you are an injured worker or have been injured on the roads, you have already suffered trauma. That trauma cannot be added to by the new Commission's processes. In this regard we can take our cue from the Latin expression *primum nil nocere* which means ‘first do no harm’. This is a popular term related to medical ethics and is thought to be derived from the Hippocratic oath.

In terms of the Act itself, the objects are found in section 3. The objects include the establishment of an independent Personal Injury Commission and to provide a central

¹ David Shoebridge, Legislative Council, 4 August 2020.

registry for that purpose. The Commission is to be accessible, professional and responsive to the needs of users, have open and transparent processes and encourage early dispute resolution. As in all tribunals, it has to deal with the real issues in proceedings justly, quickly, cost effectively and with as little formality as possible. Importantly the decision making has to be timely, fair and consistent and of a high quality and must cause to promote public confidence in the Commission and its members. Section 42 sets out the guiding principle, to facilitate the just, quick and cost-effective resolution of the real issues in proceedings, and imposes upon parties and lawyers a duty to cooperate with the Commission in giving effect to the guiding principle.

The Act specifies that there will be two divisions, workers compensation and motor accidents. There will be specialised decision makers in both divisions. In terms of workers compensation, all of the existing Workers Compensation Commission arbitrators will transition to the Personal Injury Commission. There will therefore be great continuity in terms of dispute resolution in that division and all of the knowledge and experience will transfer too. There will be no change to the processes in terms of the members being the first instance decision makers, with appeals then lying to the Presidential members. That will not change.

In terms of the Motor Accidents Division, the DRS assessors have asked me to conduct a recruitment for both full-time and sessional members ahead of the 1 March 2021 commencement date. They have done this because of a number of reasons, one of which relates to their wish to continue in practice if they are not successful in gaining appointment as a member. Whilst the transitional provisions would transition all of the DRS assessors, given that the principled decision has been made that they can no longer practise in the jurisdiction and simultaneously be decision makers, the assessors have asked me and I have agreed to conduct the recruitment well ahead of time, and I will proceed to do that. I must say I have had a very collegiate discussion with them all and they understand why this rule is being imposed. Indeed it is a rule which is already enforced at NCAT, has been enforced at the Workers Compensation Commission for years, is generally enforced in tribunals all around Australia, and reflects the Barristers' Rules of Conduct. I think that it is a rule which is completely in conformity with the objects of the Act to promote public confidence in the Commission and its members. That recruitment process will be underway soon and it will be my intention to appoint in the Motor Accidents Division a mixture of full-time and sessional members. The indication I have been given is that there is a great amount of interest in these roles in the Motor Accidents Division from both the existing assessors and experienced practitioners and so we will have in the Motor Accidents Division a very skilled group, which is completely the Parliament's intention.

Additionally, I will also be publishing a code of conduct for members and all service providers in the new Commission. Under s 16 of the PIC Act I have this power and it will be designed to enhance public confidence in the independence and impartiality of all decision makers, members, non-members and medical assessors. Actual or perceived conflicts of interest and other behavioural standards will be clearly spelt out.

While on the members, I should make a passing reference to the publication of decisions. Section 58 requires the Commission to publish its decisions. Now you might think this is a small thing, but in the motor accidents field it is not. Previously as the DRS was not sitting in a commission or tribunal, it did not enjoy all of the exclusions from the privacy laws that a court and commission enjoys. This is now over. All decisions will be published, certainly on our website but also on AustLII and JADE and they will be available for all practitioners whether you are here in Sydney or practising in regional NSW. This is a significant step forward.

The Act also provides for an 11-member Rule Committee chaired by myself. Minister Dominello in his second reading speech on the bill discussed the Rule Committee. He said:

“The PIC Rules Committee was not designed to be a vehicle to raise stakeholder issues; rather, the rules made by the Rule Committee will be statutory rules, and will provide for the practice and procedure to be followed in commission proceedings ...”

The Rule Committee has already been convened and is working on the rules for the new Commission. As I said before, the Rules have to have regard to the guiding principle in section 42 of the Act to facilitate just, quick and cost-effective resolution of the real issues in dispute. But what we are trying to do in the Rule Committee is this. We want to make it as easy and as intuitive as possible for practitioners to navigate both divisions. That is, in so far as we can produce rules which are common to both divisions, that is our aim. Obviously each scheme, either workers compensation or CTP, has its own idiosyncrasies and they need to be dealt with separately in rules, but there is a lot that is common and we will work hard to produce rules which make it easy for either individuals or practitioners to navigate both divisions.

Separate to the Rule Committee, I am forming a new User Group for the Personal Injury Commission. This body will comprise stakeholders from both workers compensation and motor accidents fields including members from the professional bodies and this will be the appropriate venue to raise stakeholder issues.

Those of you who followed the Parliamentary debates regarding the Act will recall that in the Minister’s second reading speech he said as follows:

“Service delivery will be a key focus of the new commission. There will be a single digital registry that phases out paper applications, provides customers with visibility over their disputes and quickly informs them of outcomes.”

Those of you who practise in both areas know that since the start of this year the Workers Compensation Commission has abolished hard copy filings, rather everything is filed online through the Commission’s digital portal. The DRS has a similar platform which commenced in May.

It will be my intention to not only continue with these two digital systems but to enhance them. Ultimately by 2022 I want to have a single IT platform which services the Commission, but I can confirm to everybody here that the new Commission will not be accepting paper filing.

Secondly in terms of hearings, obviously during the pandemic we have all become skilled in the conduct of hearings by various modalities such as MS Teams or Modron Spaces. I have written in various articles that in the future I think it is a very real opportunity for heads of jurisdiction to adopt a portfolio approach to the hearing of matters. That is, those matters which require an in-person hearing and where it would be unfair not to have an in-person hearing will be conducted in person. But a range of other matters can be conducted by one of the audio visual platforms which are getting better every day of the week. I see this as a real boon for country practitioners and clients, in that there is no reason why their cases could not be heard as quickly as their city cousins in circumstances where the hearing is online. We will still and will always sit in a number of country venues but with the digital platform we are developing, effectively we can sit anywhere in New South Wales with timeliness benchmarks which would be the same as in the city. I actually think as time goes by clients, if given a choice, will be asking their lawyers as to why the matter can’t be heard more quickly online rather than waiting for an in-person hearing if that’s how it ends up. But I actually think if cases where for example no evidence is called, it’s all submissions on the papers, are done on line and the cases which absolutely need an in-person hearing are conducted in person, it will have beneficial effects on both the in-person and online lists.

Medical Panels in third party matters

The Act now provides that a medical panel in motor accidents matters is to be constituted by two medical assessors and one member of the Commission who is assigned to the Motor Accidents Division. Depending on who you speak to this is either the end of the world as we know it or a long overdue and positive development.

As a reform, I think it is very welcome. Medical panels constituted by 2 medical assessors and 1 commission member have operated very well in the Workers Compensation Commission for many years. The medical assessors I have spoken to uniformly value the contribution of the legal member, especially when a lot of court challenges to such decisions fairly regularly go to the adequacy of the reasons given by the panel. Adequacy of reasons, as we all know, is a legal rather than a medical construct. My view is that this will help make for more consistent, robust and durable decision making by the panels in the Motor Accidents Division.

It is also completely in simpatico with tribunal practice wherein panels include both legal and non-legal members. But given that this is what I would consider to be a slightly new aspect of the approach in motor accidents, we will be undertaking training for both the medical assessors and legal members in order to ensure that they are best placed to discharge their obligations.

Conclusion

The opening of a new tribunal is a significant event in the justice system. This does not happen very often at all. There are a lot of moving parts to opening a new tribunal; members, rules, new regulations, IT, website. This says nothing either of staff and premises. But as I stand here today it is all on track for the 1 March commencement, which given we are doing all of this establishment work remotely is really quite some achievement.

But lets all keep in mind why all of this is happening. It is to make sure that our fellow citizens who need the Commission's services can have their matters dealt with as quickly and as efficiently as possible and in a way which does not increase the burden on them. Whilst this is our aim, I think there is a challenge of an equal magnitude for the legal profession. This includes complying with the rules of the new Commission which would therefore guarantee a swift passage through the list and an efficient dealing with the matter. I also think this includes being quite careful with the language you use, particularly with regards to injured persons. Telling them that they are in a titanic brawl which will dictate their future happiness is, I suggest, not in their best interests. Remember as an individual citizen's lawyer you are looked up to and trusted. Anything you say about the process or what you are doing can have an effect, good or bad, upon your client. Remember at the end of the case you want them to be happy with not only the result but with the process.

What we at the new Commission will work hard to produce is a modern tribunal where people will have their cases heard fairly, quickly and in a cost-efficient way. We do not want injured people tied up in the Commission's processes for years and we will provide a venue where that aim can be achieved.

Finally, pandemic allowing, there will be a ceremonial sitting of the new Commission on 1 March 2021. This sitting will not only mark the commencement of the Personal Injury Commission but will note the passing of one of the older tribunals in this country, the Workers Compensation Commission, into the pages of legal history.

I would now be pleased to take any questions.