



BOARD OF INQUIRY INTO THE COVID-19 HOTEL QUARANTINE PROGRAM

RULING ON APPLICATION BY THE HON MICHAEL O'BRIEN MP

FOR LEAVE TO APPEAR AT THE BOARD'S INQUIRY

1. On 16 July 2020, the Hon Michael O'Brien MP, Leader of the Opposition and Leader of the Liberal Party of Victoria (**the Applicant**) wrote to me, as the person appointed to constitute the Board of Inquiry into the COVID-19 Hotel Quarantine Program (**Board**).
2. By that letter, the Applicant set out a number of his concerns about the Victorian COVID-19 Hotel Quarantine Program and raised six matters which he described as "key issues" that he wished to draw to the attention of the Board. Contained in that correspondence was a request that he be permitted to appear at the Board's public hearings to cross-examine witnesses.
3. On 17 July 2020, a return letter was sent by the Chief Executive Officer of the Board to the Applicant drawing his attention to the Practice Directions issued by the Board, and specifically the practice direction applicable to Applications for Leave to Appear.¹

Application

4. On 31 July 2020, an Application for Leave to Appear was filed on behalf of the Applicant by his solicitor, Mr Alan Cornell. The application was accompanied by a written submission prepared by the Applicant's counsel, Messrs Michael Wyles QC and Rodrigo Pinto-Lopez (**Application**).
5. By that submission, the Applicant alluded to a concern that the one-page limit set by Practice Direction 2 impacted upon the Board's ability to ensure the requirements of procedural fairness both in respect of the Application itself, and more generally to the conduct of the Board's Inquiry.

¹ *Practice Direction 2 – Leave to Appear at the Inquiry*, issued by the Board pursuant to s 64 *Inquiries Act 2014* (Vic) on 15 July 2020. Available on the Board's website at <<https://www.quarantineinquiry.vic.gov.au/lawyers>>.

6. A request was made in that submission for an opportunity for the Applicant to make “*further oral submissions in support should the Board of Inquiry have any concerns or reservations*”. No further detail was provided as to the interaction of procedural fairness and the one-page limit on the written submission in support.
7. Notwithstanding this, on 4 August 2020, Solicitors Assisting the Board wrote to the Applicant and invited him to provide up to a further five pages of written submissions in support of his Application.

Extraordinary Sitting of the Board

8. The evidentiary public hearings of the Board were due to commence on 6 August 2020. In the wake of the Declaration of a State of Disaster on Sunday 2 August 2020 and the Stage 4 restrictions taking effect in Melbourne at midnight on 6 August 2020, the Board issued a public Notice. The Notice advised that the Board would hold an Extraordinary Sitting at 2:00pm on 5 August 2020 to address the impact of the Declaration and the restrictions on the Board’s Inquiry (**Extraordinary Sitting**).
9. At 11:19am on 5 August 2020, the Board received an urgent application by the Applicant to make oral submissions at the Extraordinary Sitting (**Second Application**).
10. Given the purpose of the Extraordinary Sitting, at 1:50pm on 5 August 2020, the Second Application was refused. No other party sought Leave to Appear at the Extraordinary Sitting. Indeed, no other party was present.
11. As is now a matter of public record, at the Extraordinary Sitting,² I explained the need to postpone the planned commencement of evidentiary hearings then scheduled for the following day and set out the reasons for this. My explanation is published in full on the Board’s website.³
12. I adjourned the commencement of the evidentiary public hearings to 17 August 2020. A grant of an extension of time to complete the Board’s Inquiry was also announced.

² Live-streamed via the Board’s website at <<https://webstreaming.lawinorder.com.au/HQI>>.

³ Transcript of Extraordinary Sitting (5 August 2020) <<https://www.quarantineinquiry.vic.gov.au/hearings-transcripts>>.

Further Submission in Support

13. Following the Extraordinary Sitting, at 5:50pm on 5 August 2020, the Board received an email from Mr Glenn Corey JP of the Office of the Hon Edward O’Donohue MP on behalf of the Applicant. Attached to that email were three further pages of submissions prepared by Messrs Wyles QC and Pintos-Lopez in response to the Board’s correspondence dated 4 August 2020⁴ (see above at [7]). A further request for an oral hearing was made in those additional submissions.

Procedural Fairness

14. Before turning to the substance of the Applicant’s written submissions, I will address the requests for the opportunity to make “*further oral submissions*”, and “[*answer*] any question or concerns that the Board may have in relation to” the Application.
15. Section 59 of the *Inquiries Act 2014* (Vic) (**Act**) empowers the Board to conduct its Inquiry in any manner that it considers appropriate, subject to:
- (a) the requirements of procedural fairness; and
 - (b) the establishing Order for the Board; and
 - (c) the Act, the *Inquiries Regulations 2015* and any other Act.
16. Section 63 of the Act empowers the Board to make practice directions consistent with the establishing Order, the Act and any regulations made under the Act or any other Act.
17. Practice Direction 2 was drafted taking into account matters including:
- (a) those referred to above at [15];
 - (b) the Terms of Reference given to the Board, and the time set for reporting back to the Governor;
 - (c) the anticipated number of witnesses likely to be required to give evidence;
 - (d) the anticipated number of parties who would be served with Notices to Produce Documents and Notices to Attend the Board’s Inquiry;

⁴ Headed “Reply to Letter of 4 August 2020”.

- (e) the anticipated number of those parties and witnesses who may then seek Leave to Appear before the Board; and
- (f) the need to conduct the Board's Inquiry in a fair, efficient and orderly manner in the timeframe set in the establishing Order.

18. Clause 13 of Practice Direction 2 provides as follows:

The Inquiry will generally determine applications for leave to appear without any oral hearing and on the basis of the application and submissions provided.

As such, it makes it plain that applications such as the present one will usually be determined "*on the papers*". Other clauses of the Practice Direction provide the timing of applications for leave to appear (cl 10) and the form and contents of submissions in support (cl 11).

- 19. Consistent with the terms of the Act, clause 13 envisages and permits flexibility, specifically in relation to the possibility of an oral application being made. However, a plain reading of the Practice Direction in its entirety demonstrates that a situation lending itself to an oral application or oral submissions is to be the exception.
- 20. Such exception may be occasioned by circumstances in which the need to seek leave arises unexpectedly, or where it is not possible or practicable to comply with the usual process. For example, where during a public hearing, evidence emerges that is adverse to an individual or a party who was not put on notice prior to that occurrence, that party could seek Leave to Appear and advance submissions by way of an oral application.
- 21. The present Application does not arise from such a situation. It does not arise unexpectedly. Nor are there any other circumstances which necessitate any departure from the general approach as provided by Practice Direction 2. There is no apparent need for it to be the subject of oral submissions. I note the Applicant was extended an indulgence beyond the usual one-page of written submissions. He has proffered an additional three.
- 22. Two sets of written submissions have now been received from the Applicant. It is to those submissions that I refer in order to determine the Application.

Substance of the Application

23. Section 62(2) of the Act sets a number of relevant factors in determining whether a party's participation in the Board's Inquiry ought to be permitted, by a grant of leave to appear or to participate in some other way.
24. The Applicant refers to the apparent link between the Hotel Quarantine Program and the current COVID-19 outbreak in Victoria, and the grave economic and health impacts COVID-19 is having upon all Victorians. In this regard, his submission is uncontroversial.
25. The Applicant further asserts that in 2018, 1.4 million Victorians voted on a two-party preferred basis for the Opposition and that, at the 2019 Federal election, 1.7 million Victorians voted for the Liberal and National parties. His submissions identify that the Applicant seeks to appear on his own behalf, and on behalf of those Victorians that the Opposition represents.

'Special or Direct Interest' – s 62(2)(a)

26. In light of the above, it appears that the Application is advanced in reliance specifically on those factors identified in s 62(2)(a) and s 62(2)(c) of the Act. In relation to the former, the Applicant asserts, in effect that, as the Leader of the Opposition and Leader of the Liberal Party of Victoria, he has a "direct or special interest in the subject matter of the Inquiry".
27. The phrase "direct or special interest" is not defined within the Act. The Application and submissions in support did not refer the Board to any authoritative pronouncements as to its meaning or how it was to be interpreted. Consequently, consistent with the general principles of statutory interpretation, I shall regard the words as bearing their ordinary English meaning, read in the context of the Act as a whole, having regard to its purpose and structure.
28. In determining the application of the phrase to the extant circumstances, I also have regard to the Order in Council setting up this Inquiry and the subject matter of the Inquiry.
29. In doing so, I consider that, in order to be persuaded that the Applicant has a relevant direct or special interest, I would have to be satisfied that the Applicant, or a section of the Victorian voting public that has voted for his party, either at the 2018 State or 2019 Federal elections, (whom he purports to represent) have an interest or concern in the subject matter of this Inquiry that is different to that of all Victorians. I do not accept that is so.
30. I am left in no doubt that the subject matter of this Inquiry is of enormous significance to all of the people of Victoria. It will be conducted on behalf of all Victorians.

Ability to Assist the Board – s 62(2)(c)

31. The second limb of the Applicant's submissions relies on s 62(2)(c) of the Act. He submits that through his appearance he is able to assist the Board in that he, and the interests that he represents, will bring balance and reason to the Board's task. Further, he submits, that involvement will, *inter alia*, "enable a different voice to be heard, assisting the Inquiry to deliver a process and outcome that is, and is seen to be, above politics".

32. It is at least implied by the Applicant that without his involvement, the Board will not (or will not appear to) bring appropriate "reasoned perspective", or independence to its task. I do not accept this submission.

33. First, I note this is at odds with the Applicant's own letter to me of 16 July 2020 in which he stated:

The community can take confidence in the experience, capacity and impartiality you will bring to this important role.

34. Further, on the question of independence, Mr O'Donohue, Shadow Attorney General wrote to the Board, albeit on a separate issue, by letter dated 6 August 2020 quoting the following extract from the second reading speech made by the then Premier, the Hon Denis Napthine MP in respect of the Inquiries Bill 2014:

The bill provides a modern and adaptable legislative scheme, which strikes an appropriate balance between flexibility and clarity. It also reflects the importance and independence of executive inquiries.⁵

That same letter, whilst distinguishing the Board from a "judicial inquiry", accepted unquestionably the independence of the Board in its statutory structure.

35. This Board is established by an order of the Executive government. However, once created, the Board is and acts independently of the Executive, both procedurally and substantively. That independence is a fundamental feature of the Board and reflects the public purpose which it is intended to serve, as evidenced by the structure of the Act.

36. It is further evidenced by the following words of the former Premier in another part of his second reading of the Inquiries Bill 2014:

⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 August 2014, 2923 (Denis Napthine, Premier). This is the Second Reading Speech of the Inquiries Bill 2014, and is available at <https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2014/Assembly_Daily_Extract_Thursday_21_August_2014_from_Book_11.pdf>

Royal commissions and other executive inquiries serve an important role. They allow issues of significant public importance to be thoroughly and independently examined. They are also a catalyst for change, with the reports and recommendations of previous inquiries delivering far-reaching benefits to the Victorian community.

(...)

Executive inquiries are tasked with examining issues of the highest public importance. This will often require the inquiry to examine the actions of the executive government. The independence of inquiries is essential for this task, and is therefore affirmed by the bill....⁶

37. The examination of evidence, including evidence given by witnesses called before the Board, is a forensic exercise conducted for and on behalf of all of the people of Victoria. This Board is not engaged in a political exercise, nor is its task conducted on behalf of any sectional interests. It is, by definition, “above politics”. That is its *raison d’etre*.
38. Indeed, if it were otherwise, the Board could open the prospect that any range of sectional interests could assert a direct or special interest in the subject matter of its Inquiry.
39. Finally, as to the independence of the Board, I note that five members of Counsel from the independent Victorian Bar have been appointed as Counsel Assisting the Board. They have been appointed to assist the Board in the forensic examination of all witnesses called before it. It is their independence and in the fulfillment of their functions that, along with the Board, a “reasoned perspective” is ensured in the fair and fearless presentation of all issues for, and on behalf of all Victorians.

Tricontinental Royal Commission

40. The Applicant’s submission makes various references to a “precedent” for inclusion of the Leader of the Opposition and Leader of the Liberal Party of Victoria to be granted leave because, *inter alia*:

We are informed by contemporaries of the Tricontinental Royal Commission that, given the significance of facts of that Royal Commission to the Victorian community, all the more present in relation to the present Inquiry, that the Opposition’s request to appear at that Royal Commission was embraced.

41. Suffice to say, this Board’s Inquiry arises under an Act of Parliament that did not exist at the time of that Royal Commission. Nor, it ought be noted, is this Board a Royal Commission.

⁶ Ibid, 2923–4.

42. This Board has fewer than 13 weeks from now to complete its task and provide a report to the Governor.
43. There is no binding “precedent” which can be relevantly called in aid of the Applicant’s submission and I do not find the invocation of the circumstances of that Royal Commission of any assistance to him. The Tricontinental Royal Commission and this Board’s Inquiry are markedly different, including in respect of their reporting time and the number of hearing days available.

Determination of the Application

44. For the above reasons, the Application is refused.
45. Nevertheless, should the Applicant be seized of any evidence or information that he considers relevant to the Board’s Inquiry that he is concerned will not be otherwise found in the volumes of documents currently being examined by the legal team assisting the Board, I call upon him to make contact with Counsel Assisting the Board and provide details of that evidence or information to assist in the decisions as to what witnesses to call and matters to be examined.

Otherwise Participate in the Board’s Inquiry

46. I note that s 62 of the Act contemplates not only leave to appear, but also broader ways in which a person may *participate* in the Board’s Inquiry.
47. Having refused Leave for the Applicant to Appear, I turn to the other important task of the Board: To make recommendations it considers appropriate arising from the Terms of Reference of, and evidence that will be put before, the Board.
48. In that regard, I note that the Applicant is an experienced legislator. He has considerable experience in the development of policy across a range of areas. In terms contemplated by s 62(2)(c), I consider the Board would likely be assisted by having the Applicant provide written submissions as to any recommendations he submits the Board should consider.
49. Consequently, notwithstanding the Board’s refusal of the Applicant’s Application for Leave to Appear, the Applicant is granted leave to participate in the Board’s Inquiry as follows:

After the close of the evidence, the Applicant may provide written submissions to the Board as to any recommendations that the Board should consider on matters of:

- (i) *legislative changes,*
- (ii) *governmental structures,*
- (iii) *developmental planning, or*
- (iv) *policy,*

touching upon any matters within the Terms of Reference of this Inquiry.

50. As for all written submissions at the close of the evidence, the time for the delivery of those submissions will be fixed closer to the close of the evidentiary public hearings.



**BOARD OF INQUIRY INTO THE COVID-19 HOTEL QUARANTINE PROGRAM
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAR AT THE PUBLIC
HEARINGS OF THE INQUIRY**

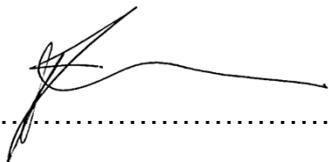
The Hon Michael O'Brien MP

Applicant

ORDER

1. The Applicant's application dated 31 July 2020 for leave to appear at the public hearings being conducted before the Board is refused.
2. Pursuant to s 62(1)(a) of the Act, after the close of the evidence, the Applicant may provide written submissions to the Board as to any recommendations that the Board should consider on matters of:
 - (i) legislative changes,
 - (ii) governmental structures,
 - (iii) developmental planning, or
 - (iv) policy,touching upon any matters within the Terms of Reference of this Inquiry in the form and at the time directed by the Board.
3. The leave now granted to the Applicant is subject to any further order by the Board extending, narrowing or revoking such leave.

Dated this 12th day of August 2020



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The Honourable Jennifer Coate AO
Board of Inquiry into the COVID-19 Hotel Quarantine Program