QUEENSLAND FLOODS COMMISSION OF INQUIRY

SUBMISSIONS ON BEHALF OF CERTAIN MEDIA ORGANISATIONS

SEEKING TO SET ASIDE A NON-PUBLICATION ORDER

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1. This application is made on behalf of a number of media organisations, namely the Australian Broadcasting Corporation, Seven Network (Operations) Ltd, Queensland Television Ltd, Network Ten Pty Ltd, and Queensland Newspapers Pty Ltd (the **Media Organisations**). Written application has been made for leave to appear.

2. This application is to set aside the Commissioner's non-publication order dated 12 April 2011 at T56, L47 to the effect:

> "The Inquiry has arranged an internet feed for the benefit of the public so that the proceedings are available on the internet as a live stream. It is not designed to be rebroadcast in segmented form by news outlets, and to avoid any confusion about that at all, I order that the evidence and exhibits in the Inquiry not be published by way of rebroadcast of the internet feed." (underlining added)

3. The non-publication order appears to have been made without any submissions during public hearings and without any evidence as to the need or purpose for the order, and the transcript discloses no stated reason for the order.

4. It is respectfully submitted that the order should be set aside for two reasons, developed further below: first, the order is beyond the Commission's powers in the *Commissions of Inquiry Act 1950* (the **Act**); secondly, the principles of open justice (which should apply to this Commission) and the discretionary considerations strongly tend against the order.

The order is beyond power

5. Section 16 of the Act provides:

> **"16 Power to prohibit publication of evidence**
>
> A commission may order that any evidence given before it, or the contents of any book, document, writing or record produced at the inquiry, shall not be published." (underlining added)

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6. It is not disputed for the purpose of this application that a video-recording taken in a hearing is a document or record produced at the inquiry. The key words are "shall not published".

7. Here, the Commission has arranged for an internet feed of the proceedings for the stated purpose of the benefit of the public.[1] The Commission has already exercised its discretion in favour of publication to the world at large by way of the internet (which would include publication in other States and territories, and indeed overseas, once that material is downloaded).

8. The Commission may have the power to, in the first instance, prohibit the initial publication of video-recordings of its hearings pursuant to s16 of the Act (that is not presently in issue). But having exercised its discretion to allow initial publication to the world at large, the Commission has no further power or discretion to prohibit or restrict a "rebroadcast", or to prevent a further broadcast, on the proper construction of s16.

9. The start point for the consideration of the Commission's powers in s16, as for all questions of statutory interpretation, is the words used in the section itself – the statutory context. There is no power of the Commission to be found in the Act with respect to subsequent broadcasting or "rebroadcasting", or the power to deal generally with material once it is legitimately in the public domain and available to the world at large. The power in s16 of the Act is limited with respect to being "published" – that is, publication at first instance. Once the Commission has made the material available to the world at large, it has no further power with respect to that material.

10. That must be the correct position. How can the Commission control material once it has made it available to the world at large? What if someone emails part of the internet feed to a friend, a colleague or other interested parties? Is that a re-broadcast? What if part of the broadcast is placed on facebook? What if someone posts a blog concerning part of the publicly available material? What if someone overseas rebroadcasts the internet material?

11. The Commission's powers are properly construed as limited to publication at first instance and do not extend to republication of all or part of publicly available material through the internet. Thus, the order is made without power and ought to be set aside.

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[1] T56, L47.

Principles of open justice and discretionary considerations tend against the order

12. Further, even if the Commission has the power to make the order contrary to the submissions above, there are discretionary considerations that tend to strongly favour setting aside the order.

13. The starting point is that the terms of reference provide that the Commissioner is to "make full and careful inquiry in an open and independent manner...".[2] The terms of reference also provide for the reports "to be made public."

14. Further, section 16A of the Act provides to the effect that the Commission shall not refuse to allow the public to be present at any of the sittings of the Commission unless for the reasons stated in the provision.

15. Thus, on the basis of the terms of reference and having regard to the Act, the well-recognised principles of open justice apply to this Commission. Some of those principles, and why they favour the setting aside of the order, are noted further below.

16. There is understandably a high-level of public interest in this Commission and the internet feed is recognition that it is not feasible or practical for all interested persons to attend the public hearings, particularly when public hearings will be conducted at times in remote and distant locations. It is to be reasonably expected that people in the far corners of the State will seek to log on and watch the hearings.

17. For the very same reason, the Commission should set aside the non-publication order.

18. Not everyone who may be interested in this Commission has reasonable access to computers or the internet. It is most likely that situation will apply to people in remote areas (some directly affected by the floods). Some people may not be "computer-literate" or have the knowledge or experience to know how to use a computer, even if they could obtain access.

19. In addition, many people are still displaced by the floods and have lost their belongings (such as computers) in the floods, and will not have access to a computer and the internet to watch the hearings. It is to be reasonably expected that those people will have access to a television or a newspaper, and that many people (including those directly affected by the floods) will be very interested and moved to watch a rebroadcast of the proceedings.

20. Those people that do have access to a computer, may not have sufficient internet capacity or data to download and watch the hearings.

21. Of course, many people will not have the time (due to work or family commitments) to watch an entire day of hearing, although they may very much like to if they had time. A good example would be those displaced and directly affected by the floods. It is to be reasonably expected that they will be engaged with seeking to repair their houses or to re-build their businesses, and will not have the time to watch the internet broadcast.

22. The Media Organisations facilitate the passage of information to the public and assist in overcoming the problems and issues identified above.

23. As noted, the Commission has recognised the importance and necessity of streaming its hearings publicly on the internet. That has been done for good reason. But it would be an inherently inconsistent and odd position not to make use of other technologies and methods of communication (such as television) to allow for the maximum distribution of that information. It is respectfully submitted that the Commission should embrace that technology and allow for people in the far reaches of the State, and those even in urban areas without sufficient internet access, to have the opportunity to view the broadcasts.

24. The media has an important role to play in this Commission. The media is the eyes and ears of the public, and it is expected that the media will report objectively and critically in the public interest. They are the "guardian and watchdog of the public interest in the maintenance and preservation of open justice".[3] The media will play a critical role with informing the public and generating debate and interest in the issues before the Commission. The media should not be stymied in performing that task.

25. As noted, the principles of open justice should apply to this Commission in considering whether to set aside the non-publication order by reason of the terms of reference and s16A of the Act, and noting the very public nature of the natural disaster being inquired into.

26. The fundamental principle of the administration of justice is that it be carried out in public.[4] The principle has two aspects: all evidence is communicated publicly and nothing should be done to discourage the publication to a wider public of fair and accurate reports of hearings that have taken place.[5]

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[2] Terms of reference, first paragraph under section 2.
[3] *R v Felixstowe Justices Ex parte Leigh & Anor* [1987] 1 QB 582 at 597 per Lord Watkins.
[4] *Re Bromfield, Stipendiary Magistrate; Ex parte West Australian Newspapers Ltd* [1991] 6 WAR 153 at 165; *Scott v. Scott* [1913] AC 417.
[5] *Attorney-General v. Leveller Magazine Ltd & Ors* [1979] AC 440 at 450 per Lord Diplock.

27. The comments of McHugh JA in *John Fairfax and Sons Pty Ltd v Police Tribunal* (NSW) (1986) 5 NSWLR 465 (albeit with respect to the principle in court proceedings) are equally apt in the present matter:

> "The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of the court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication." (underlining added)

28. In considering the application of section 12 of the *Bail Act 1980* (Qld), Douglas J in *Queensland Newspapers Pty Ltd v Stjernqvist* [2007] 1 Qd R 171 concluded that although the power under s12(1) is a statutory power influenced by the legislative context in which it appears, any court exercising that jurisdiction should keep in mind the general principles about the limited, necessary circumstances in which non-publication orders might be made.[6]

29. Here, the non-publication order is not necessary to secure the proper administration of justice in the hearings, or to secure the proper conduct of this Commission. The order is not reasonably necessary, particularly when one has regard to the fact that the recordings will already be available publicly on the internet. There is no evidence or material before the Commission (so far as the Media Organisations are aware) upon which the conclusion can be reached that it is necessary to make or sustain the non-publication order.

30. There are no stated reasons for the making of the order.

31. The possibility that the video-recordings of the hearings might be embarrassing to a party or witness is not sufficient to restrict in any way the scrutiny which publicity brings to bear

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[6] *Queensland Newspapers Pty Ltd v Stjernqvist* [2007] 1 Qd R 171 at [33].

upon the Commission's hearings.[7] In the context of court proceedings, the "mere consideration that the evidence is of an unsavoury character is not enough".[8]

32. The discretionary considerations outlined above, and having regard to the well-recognised principles of open justice, strongly favour the setting aside of the order in this case.

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12 April 2011

[7] See for example, by analogy: *Scott v Scott* [1913] AC 417, 439 (Viscount Haldane), 463 (Lord Atkinson); *Herald and Weekly Times Ltd v Medical Practitioners Board of Victoria & Anor* [1999] 1 VR 267, 294 to 295 (Hedigan J); *Herald and Weekly Times Ltd v Williams* (2003) 201 ALR 489, 498 [34] (Merkel J); *Herald and Weekly Times Ltd v The Magistrates' Court of Victoria & Ors* [1999] 2 VR 672, 679 (Beach J); *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 45 (Fitzgerald P, Lee J).
[8] *Scott v Scott* [1913] AC 417, 437-438 (Viscount Haldane LC).