

UNDER

THE COMMISSIONS OF INQUIRY ACT 1908

IN THE MATTER OF

**ROYAL COMMISSION OF INQUIRY INTO
BUILDING FAILURE CAUSED BY CANTERBURY
EARTHQUAKES
KOMIHANA A TE KARAUNA HEI TIROTIRO I
NGA WHARE I HORO I NGA RUWHENUA O
WAITAHA**

AND IN THE MATTER OF

**AN APPLICATION BY SRECKO (ALEC)
CVETANOV TO THE CANTERBURY
EARTHQUAKES ROYAL COMMISSION WITH
RESPECT TO JURISDICTION**

**SUBMISSION OF COUNSEL ASSISTING IN OPPOSITION TO APPLICATION
TO EXTEND JURISDICTION**

Dated: 6 March 2012

May it please the Commission

Summary of argument

1. The Royal Commission has no inherent jurisdiction. What it has power to inquire into is defined by its Terms of Reference (**ToR**).
2. **Annexed** to this submission is a **Schedule** that sets out the ToR relied on in this submission.
3. The ToR relevant to the present application are in three parts:
 - (a) Matters the Royal Commission is *required* to inquire into.
 - (b) Matters the Commission is specifically directed it is *not* to inquire into.
 - (c) Matters the Commission *may* inquire into if it considers it should do so.
4. Of the matters the Royal Commission is specifically prohibited from inquiring into the one directly relevant here is:
 - (c) The role and response of any person acting under the Civil Defence Emergency Management Act 2002, or providing any emergency or recovery services or other response, after the 22 February 2011 aftershock.
5. In short, the Royal Commission cannot inquire into or report on the conduct of anyone involved in the emergency or recovery response.
6. Despite this prohibition it seems clear from the applicant's written submissions dated 5 December 2011 that the principal purpose of the application is to persuade the Royal Commission to assert jurisdiction in relation to the search and rescue operations: *submission at paragraph 4*.
7. The applicant's written submissions rely on various provisions in the ToR in an effort to avoid this bar. None of them provide a basis for the investigation the applicant seeks. The ToR on which the applicant principally relies all direct the Royal Commission to focus on the performance of buildings and the causes of building failure. The

applicant's written submission acknowledges it was not the failure of a building which caused Dr Cvetanova's death: *submission at paragraph 5*.

8. Quite apart from the specific bar in the ToR, what the applicant asks the Royal Commission to inquire into is not an inquiry into the performance of the CTV Building and why it failed; rather it seeks an inquiry into why, *after* that building failed, Dr Cvetanova died. This falls outside what the Royal Commission is directed to inquire into.
9. The jurisdiction conferred on the Royal Commission for "*Other individual matters arising*" is both limited and discretionary. It does not provide a basis for the inquiry the applicant appears to seek and the Coronial inquiry currently underway is also a relevant consideration.

The argument developed

10. Section 5 of the Interpretation Act 1999 applies. 'Enactment' includes 'regulation'. The ToR come within the meaning of regulation: s.29. In *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] 3 NZLR 767 at paragraph [22] the Supreme Court said:

[22] ... s.5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in light of its purpose. Even if the meaning of a text may appear plain in isolation of purpose, that meaning should always be cross-checked against the purpose in order to observe the dual requirements of s.5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

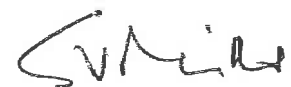
11. It is submitted that the matters the Royal Commission is directed to inquire into all relate to:
 - (a) The performance of buildings in the Christchurch CBD and the components of those buildings.
 - (b) Four buildings the Royal Commission *must* inquire into.

- (c) A single “reasonably representative sample” where the Royal Commission is entitled to exercise its own judgment in selecting that sample, but is directed to make this selection for the purpose of selecting a group of buildings that will assist the Commission in answering a series of questions posed in the ToR.
 - (d) With the exception of two issues these questions are all concerned with the design and construction of buildings. The focus is repeatedly on the “failure” mechanism in the building, “failure” being defined in the ToR.
 - (e) The two exceptions in this section of the ToR to the focus on the performance of buildings are:
 - (i) The inquiry the Royal Commission is directed to make into the post earthquake assessments; and
 - (ii) The inquiry into earthquake prone policies and the extent of compliance with them.
12. The Royal Commission is also directed to inquire into the adequacy of current legal and best-practice requirements for the design, construction and maintenance of buildings in CBD's throughout New Zealand for the purpose of answering a series of questions asked in that part of the ToR. These provisions are not of direct relevance to the present application.
13. In between what the Royal Commission *must* inquire into and what it *must not* inquire into, is a category of matters that come to the Commission's notice in the course of its inquiry that the Royal Commission considers that it *should* investigate.
14. It is submitted that ultimately the applicant must bring himself within this limited category. What the applicant seeks, however, falls well outside the limits of the extended jurisdiction this provision confers. The jurisdiction is limited to matters that arise out of, or relate to, the matters the Royal Commission is directed to inquire into.
15. In addition, because this provision gives the Royal Commission a discretion, the fact that the Coroner's Court has both the statutory authority and the intention to inquire into the matters identified in the application, it is submitted that the Royal Commission

should decline jurisdiction on the ground that the Coronial inquiry is a more suitable forum. The relevant provisions of the Coroner's Act are **annexed** to this submission, together with a Minute from the Coroner dated 22 February 2012. The Minute records that the Coroner's inquiry has been adjourned pending the decision of the Royal Commission on the present application, but the Coroner intends to move forward with his inquiry if the Royal Commission declines jurisdiction.

Conclusion

16. The relevant part of the ToR direct the Royal Commission to inquire into *why* certain buildings collapsed. The fact that this includes a reference to buildings collapsing causing injury or death does not alter the fact that the focus is on why buildings failed. The purpose of the inquiry it to assist the rebuilding of Christchurch and to avoid, as far as possible, any repetition of the building failures suffered in Christchurch and elsewhere in central business districts throughout New Zealand.
17. What the application seeks is not an inquiry into why buildings collapsed or otherwise failed, but what happened to people after those buildings collapsed. While the argument for jurisdiction has been put in different ways, in each case the Royal Commission has been asked to examine not the performance of the building but the resulting injury and death as a discrete enquiry.
18. The only issue the applicant has identified in its written submission that does appear to come within the ToR is the desirability of collapse survival zones and escape routes. However, this is a discrete issue from the inquiry into the CTV Building collapse. If there are specific matters the applicant wishes to bring to the attention of the Royal Commission that involve the design and availability of safety features such as escape routes, the ToR provide ample authority for the Royal Commission to inquire into and report on this.



Stephen Mills QC
Counsel Assisting

Dated: 6 March 2012

SCHEDULE

Excerpts from the Terms of Reference relied on in the submission are set out below. All emphasis has been added.

Terms of Reference:

...Inquiry into *Building Failure*...

Recitals

WEREAS ...because of the *failure* of certain buildings ...

WHEREAS *other buildings... failed...causing injury and death.*

WHEREAS the Department of Building and Housing has begun to investigate the causes of the *failure of 4 buildings...*

WHEREAS it is desirable to inquire into the *building failures...* to establish –

- (a) why the 4 specified *buildings failed severely*
- (b) why the *failure of those buildings caused* such extensive injury and death
- (c) why certain *buildings failed severely* while others failed less severely

WEREAS the results of the inquiry should be available to inform decision-making on *rebuilding and repair work ...*

Inquiry into sample of buildings and 4 specified buildings

- (a) (i) Why some *buildings failed severely*
- (ii) Why the *failure of some buildings caused* extensive injury and death
- (iii) Why buildings differed in the extent to which -
 - (A) they *failed...*
 - (B) their *failure caused* injury and death

Whether there were *particular features of a building... that contributed to whether a building failed*, including (but not limited to) factors such as –

(D) the design and availability of safety features such as escape routes.

- (b) (i) Whether *those buildings* (as originally designed and constructed and, if applicable, as altered and maintained)...

Other incidental matters arising

- (e) Any other matters *arising out of, or relating to, the foregoing* that come to the Commission's notice in the course of its inquiries *and that it considers it should investigate.*

Matters upon or for which recommendations required

- (a) Any measures necessary or desirable to prevent or minimise *the failure of buildings in New Zealand...*
- (c) The adequacy of legal and best-practice requirements for ...managing risks of *building failure.*

Exclusion from inquiry and scope of recommendations

But, We declare that you are not, under this Our Commission to Inquire into, determine, or report in an interim or final way upon the following matters...

- (c) The role and response of any person acting under the Civil Defence Emergency Management Act 2002, or providing any emergency or recovery services or other response, after the 22 February 2011 aftershock.

Definitions

failure

In relation to a building, includes the following, regardless of their nature or level of severity:

- (a) The collapse of the building; and
- (b) Damage to the building; and
- (c) Other failure of the building.

DIRECTIONS MINUTE

Date 22 February 2012
Name of Deceased TAMARA CVETANOVA

Discussion

I have just received a letter from Mr Taylor, Counsel for Mr Cvetanov. Mr Taylor advises that his letter was emailed on the 21st February 2012 to Mrs Chalklen. The letter was not received. In any case I have it now and will consider it alongside the letters from Ms Smith and Mr Lange.

Mr Taylor advises that at this stage Mr Cvetanov is not planning to give evidence to the Royal Commission on the 6th March. AN interlocutory application is being made to address the ambit of that inquiry. Presumably, Mr Cvetanov will be asking the Royal Commission to extend its brief to cover the matters Mr Cvetanov is seeking to raise in this court. Mr Taylor advises that no documents have been received from the NZ Fire Service and would like to see that evidence as soon as possible. Ms Smith for the Fire Service advises that the process of taking statements has taken longer than was anticipated, that they were planning to disclose everything at once but that now they are happy to provide whatever they have now with the rest to follow later.

Mr Lange agrees that the conference should be adjourned.

Having considered the letter from Mr Taylor I set aside the directions I made this morning and reconsider the matter. I note that Mr Cvetanov is seeking to address the Royal Commission on, "... certain aspects of the ambit of jurisdiction that the Royal Commission has." Presumably this means that Mr Cvetanov will be seeking an extension of that ambit to include his issues. If that is so, then that is even more reason in my view, to adjourn any conference held in this forum. If the application is successful then it is likely that I will adjourn my Inquiry until the completion of the Royal Commission and then assess the need to resume at that stage. If this issue remains removed from the ambit of the Inquiry then I will steadily move it forward. However, at this point, any conference should be adjourned until Mr Taylor's application has been heard and a decision made. The conference can be rearranged at that point. In the meantime, disclosure should be made by the Fire Service of whatever information is available now and further disclosure as more statements become available.

Directions :

1. The conference scheduled for 1March 2012 is adjourned to a date yet to be fixed.
2. Further review in 2 months or following the outcome of the application to the Royal Commission being known, whichever is the sooner.
3. Mr Taylor is asked to advise me of the outcome of his application once the outcome is known.

4. Ms Smith is directed to make immediate disclosure of all material relating to the emergency response to the CTV Building to all parties (including the court). Any material held in relation to the PGC Building is to be provided to the court only at this stage, as it becomes available.



Coroner Matenga

Databases > NZ Law Partner Legislation and Cases > Statutes of NZ > C > Coroners Act 2006 > Part 1
General provisions > 4 Coroner's role



Coroners Act 2006

4 Coroner's role

- (1) A coroner's role in relation to a death is—
- (a) to receive a report of the death from the New Zealand Police; and
 - (b) to decide whether to direct a post-mortem and, if one is directed, to determine whether to authorise certain people (other than the pathologist) to attend; and
 - (c) to authorise the release of the body (including determining, if a post-mortem has been directed, whether the pathologist wishes and is permitted, on the release of the body, to retain body parts or bodily samples); and
 - (d) to decide whether to open an inquiry (and, if one is to be conducted, whether an inquest should be held); and
 - (e) if an inquiry is to be opened and conducted,—
 - (i) to open and conduct it for the 3 purposes stated in subsection (2) (and in section 57), and not to determine civil, criminal, or disciplinary liability; and
 - (ii) to determine related matters such as whether to prohibit the making public of evidence and whether to authorise the making public of certain particulars of deaths suspected or found to be self-inflicted deaths; and
 - (iii) on completing it, to complete and sign a certificate of findings in relation to the death; and
 - (f) to give members and representatives of the immediate family of the person who is, or of a person who is suspected to be, the dead person concerned, and certain others, notice of significant matters in the carrying out of the duties and processes required by law to be performed or followed in relation to the death.
- (2) The 3 purposes referred to in subsection (1)(e)(i) are—
- (a) to establish, so far as possible,—
 - (i) that a person has died; and
 - (ii) the person's identity; and
 - (iii) when and where the person died; and
 - (iv) the causes of the death; and
 - (v) the circumstances of the death; and
 - (b) to make specified recommendations or comments (as defined in section 9) that, in the coroner's opinion, may, if drawn to public attention, reduce the chances of the occurrence of other deaths in circumstances similar to those in which the death occurred; and
 - (c) to determine whether the public interest would be served by the death being investigated by other investigating authorities in the performance or exercise of their functions, powers, or duties, and to refer the death to them if satisfied that the public interest would be served by their investigating it in the performance or exercise of their functions, powers, or duties.

- (3) This section is only a general guide to a coroner's role.