

The Work of Counsel in Royal Commissions and Public Inquiries: A Checklist

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Pre-Hearing Work of Counsel

- Strategic Questions: *'what is this about?'* *'Where will it end?'* *'How can we tell our story?'* *'Must we lift the lid?'* *'Can we instruct you?'* *'Should we lawyer up?'* *'How will we pay?'* *'Should we fight or be contrite?'*
- Your Instructing Solicitors – confirming insurance coverage & the problem of panels
- Confirming the source of Client's instructions: managing conflicts of interest
- Clarifying jurisdiction: understanding the Terms of Reference
- Identifying the applicable statutory regime: Royal Commissions Act, Special Commissions of Inquiries Act, ICAC Act, special purpose legislation
- Understanding the abrogation of rights and privileges
- Special protections and prohibitions: injury to witness; interference/obstruction
- Confess or demur: responding to 'invitations' to make early submissions
- Document management: resourcing, retention, destruction
- Weighing voluntary production v. waiting for notices to produce
- LPP & confidentiality applications: relevant legislation & Practice Directions
- Anticipating employee risks: managing whistleblowers, reprisals, suspensions
- Dealing with media advisors and settling Public Statements
- Witness Statements: do's and don'ts
- Witness Preparation: do's and don'ts
- Getting ahead of the 'narrative': assessing culture and governance
- Advising on 'prospects': managing uncertainty & anxiety

Appearing at Hearings

- Appreciating the consequences of the obligation to afford procedural fairness
- Making applications for Leave to Appear/Authorisation to Appear
- Is your witness a target or just a bystander? Advising on limits on privilege against self-incrimination and use immunity
- The important distinction between public and private hearings
- Operationalising the scope and purpose of the Inquiry – the role of Case Studies & Expert Panels
- Understanding the primacy of Counsel Assisting in adducing & testing evidence
- The limited role for objections to evidence when the rules of evidence do not apply
- Cross-examination of other witnesses & limitations on the rule in *Browne v Dunn*
- Re-examination of your witness: whether to clarify or flee asap?
- The limited scope for oral address

Post Hearing

- Handling a media sh*tstorm & defamation claims (noting defence of fair report)
- Preparing written submissions on the evidence
- What role for counsel in written submissions on policy and law reform?
- Advising on rights of action against third parties: are asset preservation orders and/or injunctions / other interim relief required asap?
- Advising on remediation & early dispute resolution
- Advising on the prospects of referrals for further investigation & prosecution
- Appreciating the ability of regulators to use compelled evidence in regulatory action: *X & Y v APRA* (2007) 226 CLR 630
- Understanding timing and role of Interim & Final Reports for client's future action