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# In the spotlight: assisting Royal Commissions-reflections from Counsel

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SCHOOL OF REGULATION  
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# Challenges for Counsel Assisting

- Selection criteria and appointment issues
- Authority, ethical duties, and immunities
- Appreciating the political context: a 'brave' choice for government
- Delivering the mandate: the authority of a royal commission and its terms of reference
- Rule 101: procedural fairness
- Apprehending bias
- Wide-ranging coercive powers call for sophisticated judgements
- Preserving Parliament's privilege
- Assisting with report writing
- Developing effective recommendations
- Live-streaming and the media

# Functions and responsibilities of counsel assisting

- advising commissioners on legal issues (eg threats of judicial review, evidential issues, applications for anonymity)
- reviewing of evidence in advance of hearings and analysing the evidence
- formulating lists of issues for the hearings and questions for witnesses as the inquiry progresses
- advocacy, including delivering opening and closing statements and final submissions
- responding to applications received from interested parties, including proposed questions submitted and deciding what is appropriate
- liaising with interested persons and their legal representatives
- assisting with adverse notices processes, including identifying proposed criticisms, advising on responses
- assisting the commissioners with the drafting of the report

*The Practical Guide to Public Inquiries*, (Hart Publishing, Oxford, 2020), pp 29-30.

# Functions and responsibilities of counsel assisting

- drafting letters, public notices, summonses and other commission documents as requested
- drafting directions that the commission may wish to apply to bring order to the conduct of the investigation and hearings
- to act as a buffer between the investigation and the commissioner so as to enable objective and impartial assessment of an issue or a witness
- to advise on, define, and list areas of investigation for public exposure
- to assist in maintaining the integrity of the investigation and the commission

Jeremy Gormly SC: *The Role of Counsel Assisting: A Handbook Approach* (NSW Bar Association, 2014)

# Skills of counsel assisting

- to extract information and test it for reliability
- to appropriately expose the information needed
- to act objectively
- to have awareness of what information is useful for executive decision making
- to do all these things without avoidable collateral damage to persons, businesses or public institutions, and
- to give order to emerging investigative conduct and direction to the investigation.

*The Role of Counsel Assisting: A Handbook Approach* (NSW Bar Association, 2014)

# Counsel assisting - ethical rules

## ***Legal Profession Uniform Conduct (Barristers) Rules 2015***

- **Rule 97** A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must fairly assist the tribunal to arrive at the truth and must seek to assist the tribunal with adequate submissions of law and fact.
- **Rule 98** A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must not, by language or other conduct, seek to inflame or bias the tribunal against any person appearing before the tribunal.
- **Rule 99** A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must not argue any proposition of fact or law which the barrister does not believe on reasonable grounds to be capable of contributing to a finding on the balance of probabilities.

- **Rule 100** A barrister who appears as counsel assisting an investigative tribunal must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing or any potential proceeding in which a barrister is likely to appear, other than:
  - (a) a barrister may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of any witness already called, the nature of the issues in the proceeding, the nature of any orders, findings, recommendations or decisions made including any reasons given by the investigative tribunal, or
  - (b) a barrister may, where it is not contrary to legislation, in response to unsolicited questions supply for publication:
    - (i) copies of affidavits or witness statements, which have been read, tendered or verified in proceedings open to the public, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection,
    - (ii) copies of transcript of evidence given in proceedings open to the public, if permitted by copyright and clearly marked so as to show any corrections agreed by the witness or directed by the investigative tribunal, or
    - (iii) copies of exhibits admitted in proceedings open to the public and without restriction on access.

# Royal Commissions in Australia: expectations & impact

## Royal Commissions an entrenched feature of Australian public life

- *Expectations loom large*: qualities of independence, neutrality, and transparency, as well as delivery of a reasoned report, make them attractive tools to government
- *Potential for considerable impact*: can extend far beyond specific investigations & remit, with changes to public policy & government administration
- *In the balance*: cost, efficiency, timeliness, commitment, capacity for recommendations to be implemented

## Reasons why Government may establish a Royal Commission

- *Urgency*: Government confronted with an issue or problem where *immediate* action is 'necessary'
- *Fills a gap*: Government agencies lack expertise, coercive powers, or public confidence, to handle an issue or investigation
- *Big & tricky*: want to explore a very complex matter in manner beyond scope of administrative resources
- *Messy & ugly*: want to investigate allegations of impropriety where government, or individual working in government, involved

## Instrument of Executive power – type of "public executive inquiry"

- *Historic*: Traces back to the *Domesday Book* in England
- *Ad hoc* and temporary
- *Unique*: Non-judicial and non-administrative governmental investigation
- *Exercise of the prerogative*: established by Letters Patent issued by the Governor-General acting with advice of Executive Council with possible complementary Letters Patent by State Governors
- *Compulsory powers*: depend on legislation



# Delivering the mandate

## *Royal Commission into the Home Insulation Program*

- ‘the processes by which the Australian Government made decisions about the establishment and implementation of the Program, and the bases of those decisions, including how workplace health and safety and other risks relating to the Program were identified, assessed and managed.’

## *Royal Commission into the Robodebt Scheme*

- ‘how risks relating to the Robodebt scheme were identified, assessed and managed by the Australian Government in response to concerns raised by the Australian Taxation Office, other departments and agencies, affected individuals and other people and entities’;
- ‘how the Australian Government responded to adverse decisions made by the Administrative Appeals Tribunal’;
- ‘how the Australian Government responded to legal challenges or threatened legal challenges’;  
‘approximately when the Australian Government knew or ought to have known that debts were not, or may not have been, validly raised’;
- ‘whether the Australian Government sought to prevent, inhibit or discourage scrutiny of the Robodebt scheme, whether by moving departmental or other officials or otherwise’.

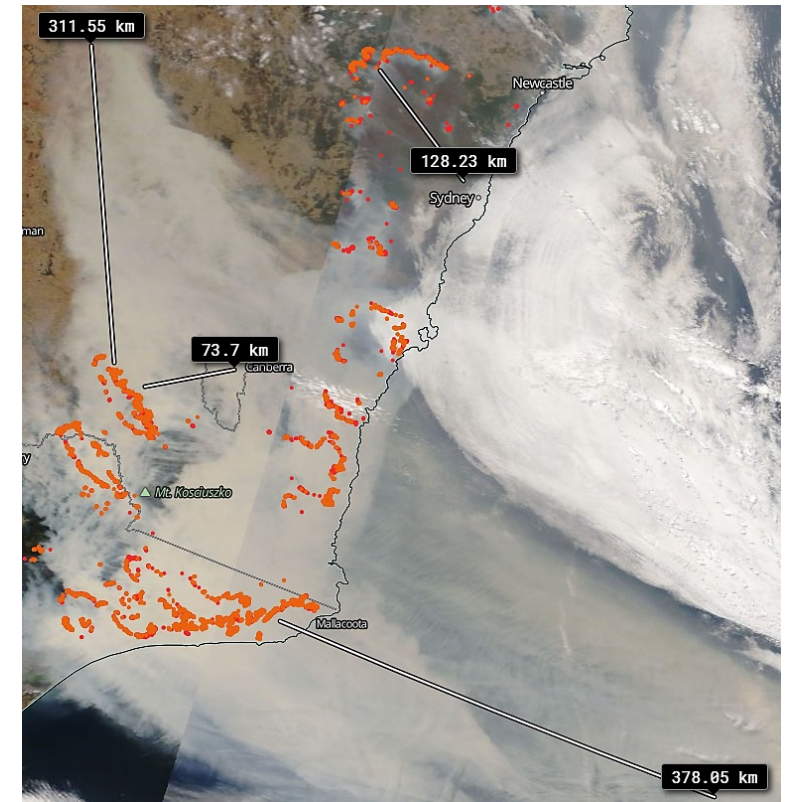
# Royal Commission into National Natural Disaster Arrangements: A fast-tracked joint inquiry, with a national policy focus, during COVID

## Model and purpose:

- Joint Commonwealth & States' complementary Letters Patent
- 3 Commissioners, with mix of expertise
- First Royal Commission to review all 3 levels of government across the nation
- TOR called for broad examination of issues at a national level
- Reporting date before next disaster season
- Not a 'blame game'
- Policy and forward focussed
- Constructive, not adversarial

## Methodology:

- 10 weeks of hearings
- 301 witness appearances
- 3,079 exhibits tendered
- 1,772 public submissions
- 16 community fora
- 6 expert consultation fora
- 5 Background Papers
- 4 Issues Papers & responses
- Notices to produce documents & statements of information
- Interim Observations of Commissioners
- Draft propositions developed by Counsel Assisting & responses
- Final submissions





# Gathering information: on the road



*Namadji National Park, ACT, April 2020*



*NSW/Victorian Border*



*Mogo Town Centre, regional NSW, May 2020*





# Undertaking Counsel Assisting's primary functions and obligations

*'Servants of all, yet of none'*  
*'Represent the public interest'*

## Hearing preparation:

- 'Bring alive' the terms of reference (TOR)
- Direct enquiries along particular lines a/c to TOR
- Superintend re evidence:
  - Collection
  - Analysis
  - Collation
- Presentation of evidence:
  - Hearing themes
  - Selection of witnesses
  - Documents for tender

## Witness examination:

- Impartiality
- Procedural fairness
  - 'Notice rule'
  - 'Hearing rule'
- Proper basis for allegations of fact or law, challenge to credit

## Other work:

- Opening statement
  - used caution & restraint
- Issues Papers
- Closing statement
  - evidence & recommendations
- Assisted in report preparation



*Examining NSW's Emergency Leaders*



*Examining Australia's Chief Scientist*

# Behind the scenes of a national inquiry in a national emergency

## Logistical Challenges:

- Early declarations of States of Disaster/Public Health Emergencies due to pandemic created significant logistical challenges
- Everyone co-located in Canberra or WFH to manage border closures
- Capacity and participation by State and Territory governments & their emergency/health agencies seriously affected
- Major delays in document production and difficulties in witness availability, and approaches to certain topics (eg health)

## Recalibrated Witness Examinations:

- Hearings not held in person but 'virtual', livestreamed
- 301 witness appearances (some more than once) by video-link, often using panel format
- Community witnesses also pre-recorded to reduce risk of trauma, and logistics
- 38 witness appearances from Australian Government
- 107 witness appearances from state and territory governments
- 22 witness appearances from local governments
- 134 witness appearances from broader community and experts



*RCNNDA: Behind the scenes*

Photo © D Hogan-Doran 2020

# Risk of apprehended bias

- examination of witnesses which illustrates a disdain or contempt towards certain witnesses (e.g. aggressive assertions, contemptuous or dismissive comment)
- favourable treatment of some witnesses, contrasted with hostility and disparagement towards others (e.g. referring to a witness as a 'hero' or profuse commendation of a witness)
- interrupting counsel for a witness in a way which is designed to deter cross-examination of a particular witness
- sarcastic and flippant remarks
- failing to investigate or refer for police investigation leaking of material to the media.

# Risks in report writing

- there is no evidence to support a finding
- a finding is not reasonably open on the evidence
- the commissioner would be acting without probative evidence
- there is an absence of material capable of supporting a finding on a material issue
- a finding has been arrived at on the basis of a process of reasoning that is neither logical nor rational
- a material issue is not addressed, or material evidence is overlooked
- the commission has not considered a submission of substance which, if accepted, would be capable of affecting the outcome.

# RCNNDA Counsel Assisting's hearings program

## Ceremonial Hearing

- Formal commencement of proceedings; reading of Letters Patent; Chair's opening address; Counsel Assisting's opening address.

## Hearing Block 1 – Setting the scene (2 weeks)

- The changing global climate and natural disaster risks; the impact of the 2019-20 bushfires; and the responsibilities of the Australian Government in relation to natural disaster arrangements.

## Hearing Block 2 – Investigating natural disaster management in Australia (6 weeks)

- Hazard reduction: the division of responsibilities between Australian, state and territory governments; bushfire fuel load management; and Indigenous land management practices.
- Local government responsibilities for, and experiences of, natural disaster risk mitigation, preparedness, response and recovery.
- Interconnection and communication: Community messaging and information; cross border commissioners; delivery of essential services; firefighting volunteers and sharing of resources.

- States' and territories' land-use planning, resource sharing, accountability mechanisms and recovery.
- Scenarios testing states' and territories' preparation and response management in relation to natural disasters; and emergency sector experiences of the 2019-2020 bushfire season.
- Non-governmental recovery support: Barriers to small business recovery; access to and coordination of recovery support; charities; wildlife recovery issues.

## Hearing Block 3 – National coordination (1 week)

- Situational awareness, decision making and resource sharing at a national level; the COVID-19 response, including national coordination and decision-making arrangements.

## Hearing Block 4 – Looking to the future (1 week)

- The potential role of national information systems and coordination; potential changes to national coordination arrangements in relation to natural disasters; responses received to Counsel Assisting draft propositions; Counsel Assisting's closing address; and Chair's closing address.



# Report writing: reflecting the multi-level governance challenges which had emerged

## Evidence and submissions indicated significant governance & data challenges:

- Complex set of governance arrangements in place to guide resilience, disaster policy and security policy.
- Responsibilities for disaster risk management & climate adaptation mainly rest with emergency management organisations at Commonwealth and state level, as well as local government level.
- Outcomes at local level often influenced & driven by investment & operational decisions made by, eg, asset owners & service providers at other government levels & within private companies.
- Local decision makers may not have the right tools or data to make informed decisions.
- Strategic, whole-of-system perspective not defined and embedded through national, state and territory and local levels.

