

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