The role of counsel assisting in commissions of inquiry

By Justice Peter M Hall

Introduction

There is public benefit derived from briefing counsel to carry out the usual duties imposed upon an advocate in an inquiry established to investigate serious matters: *Bretherton v Kaye & Winneke* (1971) VR 111 at 123.

The appointment and role of counsel assisting a commission of inquiry is central to the inquiry process. It may arise under or in the context of state or federal royal commission legislation or other forms of inquiry established on an ad hoc basis under legislation such as the *Special Commissions of Inquiry Act 1983* (NSW). Additionally, there are, in Australia, today many standing or permanent commissions of inquiry and it is customary for members of the private Bar to be called upon to act as counsel assisting in the conduct of proceedings in relation to a particular investigation[1].

Statutory provisions providing authority for the appointment of counsel assisting are in a fairly standard or common form but one will search in vain to find provisions that address in any specific way the role or the functions to be performed or fulfilled by a person so appointed.

Given the varying nature of commissions of inquiry and the diverse issues that they may be called upon to investigate, it is hardly surprising that relevant legislatures do not attempt to either prescribe or address such issues.

Leaving to one side, for the moment, the factors which influence the function and the role of counsel assisting, it is generally true to say that, once appointed, he or she will be required to assume obligations to the commissioner(s), to the members of the legal profession acting in the proceedings on the inquiry, to commission staff and to witnesses.

In this paper, attention will be given to some of the specific functions and responsibilities that fall upon counsel assisting. In general terms, they fall to be considered in terms of:

1. The management and administration of inquiry processes and procedures.
2. The development of investigation strategies and investigation programmes.
3. The proper and effective conduct of commission hearings (in public or, as appropriate, in private).
4. The report writing phase of the inquiry and the constraints that operate in that respect.

Appointment of counsel assisting

As indicated in the introduction to this paper, the statutory provisions for the appointment of counsel are usually in fairly common form. It is sufficient here to refer to the provisions of s7 of the *Royal Commissions Act 1923* (NSW).

Section 7(1) of that Act, dealing with the right of appearance, specifies:

Counsel assisting, Wayne Martin QC (right) at the start of proceedings of the HIH Royal Commission at Sydney's Federal Court.
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> Any counsel or solicitor appointed by the Crown to assist the commission may appear at the inquiry.

As to his or her participation, s7(3) of the Act provides:

> Any counsel or solicitor so appointed, and any person so authorised or his counsel or solicitor, may with the leave of the chairman or of the sole commissioner, as the case may be, examine or cross-examine any witness on any matter which the commissioner deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by the commissioner.

These provisions, it can be seen are confined largely to an aspect of the role counsel may play at hearings conducted by a royal commissioner. There is no guidance to be found there as to what is expected of counsel assisting in terms of the four areas indicated above. Those will be separately discussed later in this paper.

The terms of reference and inquiry statute

The functions of counsel assisting to a significant extent will be shaped and influenced by two instruments. The first is the terms of reference (often contained within letters patent), which prescribe the subject matter of the investigation or inquiry. The second is the statute under which the inquiry is conducted.

As to the first, inquiries vary greatly in subject matter as determined by the terms of reference. Questions of interpretation sometimes arise concerning their scope. It is the subject matter which will influence and sometimes determine what procedures, methods or approaches are to be adopted for a commission of inquiry to effectively and properly discharge its responsibilities. The subject matter may be broad ranging, such as an inquiry into a whole enterprise or undertaking (e.g. the functioning of a whole industry such as the building and construction industry[3]) or it may concern particular allegations, e.g., allegations of maladministration or suspected illegality,

impropriety or corrupt conduct by one or more government officials.

Plainly, as the subject matter will have a far-reaching influence on the approach and method considered appropriate and to be employed, it will also shape and influence the role that will be expected of counsel assisting.

The statute under which an inquiry is to be conducted will have an impact upon the way in which it is conducted and it will be essential for counsel assisting to be well-acquainted with the coercive powers at the disposal of the commission and how those powers may and are to be best employed and in what circumstances.

Apart from these general observations, there is one other matter, a matter of legal principle, which is fundamental to the inquiry process and which again counsel assisting must attend to. I refer in this respect to the principles of procedural fairness. These have application, of course, both during the conduct of the inquiry in relation to the hearing process and also towards the end of it in relation to possible adverse findings at the report-writing phase.

Investigation v litigation

The ordinary litigation processes for determining rights and liabilities call for specialist knowledge and skills that are also valuable in the conduct of most commissions of inquiry. However, as the inquiry process does not involve the resolution of issues between competing parties, its landscape will exhibit both familiar and exceptional features. Some of the latter may be readily identified. They include:

1. The fact that counsel assisting does not have, or act on behalf of, a client.
2. The proceedings of a commission of inquiry do not arise out of charges laid against specific individuals.
3. The proceedings do not involve issues in the same way or sense as occurs in inter-partes litigation.
4. Counsel assisting may, in appropriate circumstances, choose to examine witnesses before a commission by leading questions.
5. The right to claim privilege may be wholly or partly abrogated by statute.
6. There is, strictly speaking, no onus of proof upon counsel assisting and no specific requirement to prove any particular matter or thing[4].
7. There is a relationship between counsel assisting and the person or persons constituting a commission of inquiry that exists and operates both inside and outside the hearing room.
8. An investigation of unlawful or criminal conduct by a commission of inquiry does not in any sense constitute criminal proceedings.
9. There are no remedies to be awarded or final orders made at the end of the inquiry process.
10. The rules of evidence are usually not binding on a commission of inquiry (unless otherwise specified in the terms of reference).
11. There is no *outcome* of an inquiry which is dependent upon who establishes what.

In summary, it has been stated:

> It is well recognised that the discipline of royal commissions or boards of inquiry is essentially different from that of the courts. On the one hand, there is also a well recognised adaptation by commissioners of those principles to which judges and jurors traditionally resort when engaged upon the critical process of fact finding …[5]

I will turn to examine aspects of the specific functions and responsibilities referred to in the introduction.

1. Functions of counsel assisting in the management and administration of commission processes and procedures

Additional to counsel assisting's advocacy role, there are other diverse functions to be performed in relation to the co-ordination, management, administration, direction and control of commission processes and operations. He or she may be responsible for ensuring that appropriate processes are in place including those necessary for document control and document registration, data analysis, intelligence gathering operations, investigative procedures, target development, profile analysis and financial analysis. These are important functions involved in the investigation of widespread illegal activities. They are not applicable to all inquiries which may call for a particular approach that reflects the subject-matter to be examined.

Counsel assisting will often then be expected to undertake particular advisory functions in the establishment of

The HIH Royal Commission.
Photo: Jeff Darmanin / News Image Library

Commissioner McInerney at the Waterfall Inquiry. Photo: Robert Pearce / Fairfaxphotos

commission processes having specific regard to the terms of reference. A commission of inquiry should always be conducted upon a disciplined and accountable basis. It is for that reason that appropriate processes and controls need to be designed, documented and implemented thereby ensuring the due and proper exercise of its compulsory powers. To this end, documented guidelines are often drafted and as necessary periodically revised.

The integrity of commission processes (e.g., search warrant applications) may influence later criminal proceedings. The ability to demonstrate that officers of a commission of inquiry have complied with statutory requirements in the event of a challenge to evidence sought to be adduced in such proceedings and obtained through commission processes upon an application to exclude it can be therefore critical.

It is accordingly usually the responsibility of counsel assisting to ensure that appropriate processes are established and that they are appropriate to the particular statutory powers available to a commission of inquiry. The issue of summonses for production of documents pursuant to the compulsory powers for example should, wherever possible, be supported by an application made by the relevant officer of the commission that records the basis and grounds for the issue of a summons. This is merely an illustration of the principle that, given the extensive and sometimes invasive nature of compulsory or coercive powers, a corresponding obligation exists on commission officers to use them responsibly and in an accountable manner.

In some inquiries, there may be a need to create groups or teams with specialist or multi-disciplinary staff who are to develop and progress strategies, methodologies and operational procedures for the inquiry. This will occur in the case of broad-ranging inquiries that possess extensive powers. Examples include the Fitzgerald commission of inquiry and the Wood Royal Commission. Counsel assisting will usually play something of a co-ordinating and, in some circumstances, a managing role to ensure proper liaison, supervision and co-ordination between the various arms or groups within a commission of inquiry. The obligation of accountability includes the duty to ensure that commission resources are properly and efficiently employed and that necessary advice from appropriate specialists is taken on matters such as the strategies and the methodologies considered necessary or appropriate to achieve the purpose of an investigation.

2. The development of investigation strategies and investigation programmes

It is a primary role of counsel assisting to participate in determining the evidentiary issues, the order in which they are to be pursued and to assist the commissioner(s) in the approach that is to be taken with respect to them. This will include the obligation:

- to ensure that relevant witnesses are identified with a view to them being called to give evidence. This will include determining the means for identifying witnesses whose identity may be unknown and who may have relevant information or knowledge;
- to ensure that the commission's compulsory powers to acquire information are effectively used to obtain, from relevant sources, documentation or records necessary for both the effective examination of witnesses and in generally establishing the facts in relation to relevant issues.

In all of these matters, the terms of reference provide the metes and bounds for the inquiry and they, in turn, will determine what matters are to be investigated and sometimes by what method they should be investigated.

The advisory role, of which I have earlier spoken, requires counsel assisting to advise the commissioner on the conduct of hearings and this may embrace the question as to whether such hearings should be conducted initially in private or in public or in both. There are particular considerations which will determine whether or not evidence from particular witnesses ought be taken in private or public. The approach to be taken in this respect, for example, by a royal commission established to investigate a public scandal or an allegation of corruption or maladministration or a disaster, generally speaking, will favour public hearings although not necessarily without exception. There may be good reason for evidence to be taken, at least initially, from relevant persons in private hearing. In the case of standing or permanent anti-corruption commissions, private hearings may often be indicated or required or may be preferred for strategic, tactical or for operational reasons. This is but an illustration of the subject matter of an inquiry influencing the selection of alternative processes.

In relation to witnesses, counsel assisting has the obligation to ensure that there is a sound and cogent basis for calling evidence from witnesses in public hearings of a commission. It follows that often there will be a need for pre-hearing interviews to be conducted. This, of course, will not always be possible as there will often be unco-operative witnesses who will only give evidence in response to the exercise of the coercive powers of the commission.

The general point here is that, wherever possible, attempts should be made to minimise the risk that, for example, scandalous material will emerge for the first time in public hearings from unreliable persons or persons who are motivated by malice or otherwise acting in bad faith and which can cause serious, if not irreparable, harm to the reputation of others. The risk of such material emerging of course will often be unavoidable and necessary. Counsel assisting will need to assess that risk and determine whether it is avoidable or not.

Sam Bargshoon and Nabil Gazal answer questions at the ICAC's Orange Grove inquiry. Photo: Robert Pearce / Fairfaxphotos

Reference has already been made to the fact that in some commissions of inquiry, inter-disciplinary teams of specialists, will be engaged on behalf of the inquiry. Counsel assisting may be called upon to tender advice as necessary to commission officers, including investigators as to the commission's powers and processes in order to ensure that coercive and invasive powers are invoked properly and according to law. As discussed earlier, it may, for example, be important to ensure that search warrant applications are properly made and, where other powers are available to a commission of inquiry (e.g., listening or surveillance device or telephone interception surveillance) applications for authorisation are made in accordance with the relevant statutes.

In inquiries involving broad ranging issues, counsel assisting may be required to establish an appropriate division of labour so that individual issues are referenced or allocated to specific teams headed by a legal officer. In such cases, counsel assisting necessarily will, to some extent, participate in the co-ordination and conduct of diverse investigations. In doing so, he or she effectively acts as a filter and offers some separation between investigative staff and the commissioner who may wish to remain somewhat independent on particular day-to-day investigative issues.

3. The role of counsel assisting in the commission hearing process

General matters

It is conventional for counsel assisting to call witnesses before a commission of inquiry and to adduce evidence from them[6]. In some limited circumstances, there may be exceptions. There could, for example, be a specific reason as to why counsel for an 'affected person' may be permitted to adduce evidence from his or her client rather than that being done by counsel assisting. There is no hard and fast rule in this respect but, having said that, it is usually an exceptional procedure.

In some circumstances, evidence may be adduced partly by written statement and partly by oral evidence during the course of examination by counsel assisting. Once again, the nature of the issue will determine whether it is appropriate for prepared written statements to be utilised in this way and whether the legal representatives acting for affected persons or witnesses should be permitted or asked to draft the statements. In some investigations, including those involving unlawful or corrupt conduct, this may not be the preferred or advisable option and there may be tactical considerations that favour a witness being called on short notice and without providing the opportunity to prepare a statement of evidence. In other cases, such as accident investigations, for example, it may be appropriate to receive prepared statements on historical and technical matters. It will often depend upon the particular witness and his or her role or involvement in the matter under investigation.

In adducing evidence, the object of counsel assisting should be to elicit material in the fullest and fairest manner in relation to the subject matter of the inquiry. That said, it is not possible to comprehensively state the full scope and extent of obligations in respect of the leading of evidence from witnesses. However, a number of general propositions may be stated:

- As an aspect of that duty, counsel assisting has the responsibility for establishing the truth or the facts concerning a particular matter and that responsibility may include eliciting evidence that tends to support or contradict a matter or issue of importance (or both) leaving it to the commissioner to make the necessary factual findings.
- On some issues it may be appropriate to adduce evidence without leading or making direct suggestions to a witness. On some issues of importance, it is preferable to allow the witness, as far as possible, to rely upon his/her own independent knowledge or recollection of events.
- In other circumstances, it may be necessary or desirable in the interests of establishing the true facts to cross-examine a witness or to put matters to a witness[7].
- The conduct of counsel assisting in the examination of witnesses, of course, must be in accordance with standards of fairness, but what is *appropriate* conduct, may vary according to the circumstances. In this respect, for example:
    - The fact that there is no contradictor to a particular witness or in relation to a particular issue may mean that counsel assisting will need to take an active role in confronting or challenging a witness in an endeavour to establish the truth on a particular matter.

- Particular investigative material available to counsel assisting may justify, and indeed require, vigorous examination in the nature of cross-examination.

Procedural fairness and the responsibilities of counsel assisting

In general terms, following the practice of courts, it is part of counsel assisting's function in the hearing process to formulate and present opening and closing submissions: *Bretherton v Kaye & Winneke* [1971] VR 111-125.

In some circumstances, a detailed opening submission may be regarded as inappropriate and indeed inadvisable. This is especially so with respect to inquiries into illegal activity or suspected corruption or other forms of impropriety. An inquiry will often proceed along the lines of a criminal investigation in which the hearing process is but part of a broader investigation with a view to establishing the relevant facts concerning the conduct of persons of interest. However, where a royal commission is established there is usually an expectation that its proceedings will largely be conducted in public with some form of opening address by counsel assisting.

Where an opening is appropriate, it can serve the purpose of providing notice of issues and as well provide a context for the examination of witnesses and matters of likely inquiry[8].

Whilst a topic opening cannot be definitive, it can serve a purpose in facilitating procedural fairness. However, consistent with the note of caution made above, ordinary prudence indicates that it is very often unwise for counsel assisting at the outset to predict or forecast where the evidence is likely to go or what it is anticipated will be established by it. An investigative inquiry, almost by definition, is an open-ended process and often unpredictable, in terms of issues and evidence.

Counsel assisting should take, at least as a starting point, the decision of the Privy Council in *Mahon v Air New Zealand Limited* (1984) 1 AC 808 as a guide to what is required in ensuring that the commission of inquiry adheres to the relevant rules of procedural fairness. In that matter, the board, inter alia, expressed the view that:

> Any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding, even though it cannot be predicted that it would inevitably have that result.

See also *Annetts v McCann* (1990) 170 CLR 596 and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

Counsel assisting is directly concerned with ensuring that the necessary steps are taken to comply with this 'rule'. Accordingly, he or she must be familiar with procedural

Steven Rushton SC and the Hon Joe Tripodi MP depart from the ICAC's Orange Grove inquiry. Photo: Ben Rushton / Fairfaxphotos

fairness requirements as they affect the inquiry process. It has been observed that the following questions may arise as to what procedural fairness entails[9].

1. *Is it necessary to observe the rule in relation to persons who have not sought and received leave to be represented?*

As a practical matter, it would seem unwise to proceed on the basis that the relevant duty is not owed to any person to whom a grant of representation has not been made. As has been pointed out in the first place, the status of an unrepresented person may change later in an inquiry[10]. Additionally, it is difficult to accept that findings might properly be made which were adverse to the reputation or other relevant interests of a person who had not sought representation, but who had not been called or otherwise notified of evidence given to his or her discredit. In other words, such persons, one may safely assume, are not excluded from the benefit of the rule. Accordingly, the preferable course is for notice of adverse material and of the possibility of an adverse finding to be given to such a person by appropriate means[11]. In other words, there is usually, or often, a coincidence of the requirements of natural justice with the objective of establishing the truth about the matter in question[12].

2. *Is it necessary to provide written or other particulars of matters adverse to a person which, in the expectation of counsel assisting, will be established by the evidence to be called in the inquiry?*

The short answer is no. It again is to be remembered that proceedings of a commission of inquiry are investigative in nature and not adversarial. There is a solid body of authority which establishes that there is no necessity for notice to be given in advance of evidence to be led or to include an outline by way of notice of matters adverse to one or more of the participants in the inquiry. Indeed, as it has already been indicated above, the search for the truth may be prejudiced by such an approach.

3. *Must the tribunal give written notice of any tentative adverse conclusion to the person concerned before bringing down its report?*

The answer to this question must be that it is not always necessary. There is some authority to support the proposition that if witnesses who have had matters or issues raised with them in the course of examination whilst giving evidence before the inquiry, then they are to be taken to be sufficiently on notice. In *Bond & Ors v Australian Broadcasting Tribunal (No. 2)* (1988) 84 ALR 646, Wilcox J stated that it may be sufficient if, 'the subject matter of a potential criticism has been flagged as an issue, in the presence of the affected person, during the course of the inquiry'.

However, in other circumstances, more may be required as additional material may have been subsequently received during the course of the inquiry's proceedings or alternatively a revised view may be taken as to the significance of material that has been received at an earlier point in time[13].

In some circumstances it may be necessary for counsel assisting to recall a witness in order that such additional matters or revised perceptions be put to him or her. Apart from procedural fairness considerations, the search of truth may require that to be done in any event.

Counsel assisting has an obligation, at the conclusion of the evidence, to provide notice by way of closing submissions of the issues upon which adverse findings may be made. Written submissions may need to be forwarded both to persons who have been granted leave to be represented at the inquiry in relation to particular matters and also to persons who have not been represented and against whom adverse conclusions have been proposed in the submissions of counsel assisting. Such persons can be provided with particulars as to the way in which they may respond.

As a practical matter, counsel assisting, wherever possible, ought to put matters that are adverse to the interests of a person whilst they are giving evidence. If that is not done but is left to be raised in submissions at the end of the hearing process, practical problems may arise in the need to recall witnesses to obtain their version upon any matter of importance. That can disrupt the orderly programme of an inquiry given particularly that often there is a finite reporting date which must be met.

It has been stated that in relation to final or closing submissions, it is the function of counsel assisting to:

- provide notice to all persons who might be adversely affected (whether or not that they have been granted authorisation to appear and be represented) of possible adverse findings;
- make final submissions as to:
    - the possible of findings of fact that could be made by the commission including references to the evidence that support such findings and references to contrary evidence; and
    - the possible findings that should be drawn having regard to the terms of reference.[14]

Particular issues may arise which require counsel assisting to take steps to ensure that witnesses who are unrepresented are not unfairly prejudiced or unfairly suffer detriment. This may, for example, arise in respect of claims for partial immunity in respect of evidence to be given. Unrepresented witnesses may be unaware of their rights. The question has arisen as to whether or not it is the responsibility of counsel assisting to ensure that such persons are made aware of their rights[15]. There is no universal rule. Relevant issues are discussed in the text referred to in footnote 15.

4. The report writing phase of the inquiry - constraints

In some circumstances, it is appropriate for counsel assisting to assist in the compilation of factual and expert material for the purposes of the commissioner's report. There is no universal rule or principle that applies in determining what role, if any, counsel assisting should play in the compilation of the commission's interim and/or final reports.

Generally speaking, there is much to be said for the view that it is inadvisable for counsel assisting to be involved in those activities in inquiries where allegations of criminal or illegal conduct are involved and, in some cases, where serious impropriety has been alleged.

Reference in this respect may be made to the New Zealand Court of Appeal in *Re Royal Commission on Thomas' Case* [1982] 1 NZLR 252. In an application for review of a report of a royal commission, closing observations were made in relation to counsel assisting's participation in the formulation of the report with respect to persons who had been the subject of the inquiry being police officers against whom very serious allegations of impropriety had been made. The court stated at 273:

> Before parting with this branch of the case we add that it emerged in evidence before us that, after the commission concluded its hearing, counsel who had assisted the commission at the inquiry took part with the commissioners in the conferences on the contests of the report, which were arrived at by a process of seeking consensus, and in the actual drafting of the report. When a commission is inquiring into allegations of misconduct, the role of counsel assisting becomes inevitably to some extent that of prosecutor. It is not right that they should participate in the preparation of the report. But as this was not a ground of complaint by the applicant in the present proceedings, we merely draw it to attention so that it is not treated as a precedent.

The question of the role of counsel assisting in the report writing phase, then, is one to be determined by reference to general principle, having regard to the particular nature of the issues that fall for determination. It is inappropriate, in my view, for counsel assisting who has put submissions before a commissioner calling for adverse findings involving illegality or serious impropriety to then, as it were, cross over and participate in the fact-finding necessary to determine whether

or not counsel assisting's submissions should be accepted or rejected.

Ethical standards of advocacy and conduct of counsel assisting

Counsel assisting may be called upon to make ethical judgments in progressing particular investigations and in dealing with internal controls by which the commission is required to function and operate, including the steps to be taken to obtain evidence and to otherwise ensure accountability in the use of the commission's powers and procedures.

Earlier in this paper, I have made reference to the obligation upon counsel where possible in some situations to evaluate witnesses before they give evidence in public hearings having regard to the nature of the evidence that they are likely to give. In this respect it has been said that evidence that may be relevant for it to be admissible may not meet a standard of *sufficient materiality* in respect of particular named individuals, at least for the purposes of public hearings[16].

The point has been made that relevance, cogency and overall fairness are all factors that must bear upon the decision to make use of evidence in any particular way[17]. It was also there pointed out that each inquiry will present its own considerations in the decision to call evidence and that a number of matters have been identified in the context of balancing the rights of the individual and the need to conduct a full and fair proper inquiry:

(a) In striking the balance between probative and unreliable evidence, it is not to be overlooked that counsel assisting is bound by the rules of conduct of the Bar, which require standards of fairness to be adhered to and inhibit the use of scurrilous or irrelevant material.

(b) Suppression orders or the use of pseudonyms may be appropriate in the conduct of a public inquiry, having regard to considerations in relation to the protection of the name and identity of informants. This may be subject to specified qualifications and will be a matter for the commission to determine.

(c) Circumstances in which it may be appropriate to suppress the name of a person or other material, having regard to overall considerations of fairness, include:

- cases where there is a need to protect the interests of a person awaiting trial;
- where the person involved is young, or shown on expert evidence to be ill, psychiatrically vulnerable or deceased;
- it is necessary for the person's physical protection, because of a perceived risk to their safety;
- public interest immunity considerations;
- the evidence does not meet the standard of *sufficient materiality* referred to above;
- evidence is shown to be no more than suspicion or rumour and/or unassociated with the terms of reference.

Attention should be given to the provisions in New South Wales of the *New South Wales Barristers' Rules*, in particular Rule 72 which incorporates by reference Rules 62, 64 and 65[18].

1 E.g., *Independent Commission Against Corruption Act 1988* (NSW); *Police Integrity Act 1996*, *Crime & Misconduct Act 2001* (Qld); *Corruption & Crime Commission Act 2003* (WA).

2 see, for example, the *Royal Commission Act 1902* (Cth), s5FA.

3 eg. Royal Commission into Productivity in the Building Industry in New South Wales (the Gyles Royal Commission) and the Royal Commission into the Building and Construction Industry (2003) (the Cole Royal Commission).

4 The question of the appropriate standard of proof of a matter may, of course, be significant to fact-finding by a commission of inquiry.

5 *Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly and Other Matters* (1991) Tasmania, Vol. 1 at p.37.

6 See in relation to programming evidence and procedures, Peter M Hall *Investigating corruption and misconduct in public office: Commissions of inquiry – powers and procedures*, Law Book Co. (2004) at p.673-676

7 See discussion 'Procedural aspects of the royal commission, Part 1', by MV McInerney QC. (as he then was) (1951) 24 ALJ 386 at 387-388.

8 HIH Royal Commission: the failure of HIH Insurance, Vol. 1, *A corporate collapse and its lessons*, paragraph 2.15 at p.41.

9 The points below area derived from 'Some notes on natural justice in relation to inquisitorial proceedings', by John Stowe QC. Seminar at New South Wales Bar Association, 2 November 1992 at p.4.

10 ibid.

11 ibid at p.5.

12 ibid.

13 ibid at p.7.

14 Royal Commission into the Building and Construction Industry, Vol. 2, *Conduct of the commission – principles and procedures* (February 2003) para.39 at p.55.

15 see discussion in Peter M Hall *Investigating corruption and misconduct in public office* Chapter 12, 'Commissions of inquiry' at 12.180.

16 See the discussion of the approach adopted by the Fitzgerald commission of inquiry: *Investigating corruption and misconduct in public office*, ante at pp.678-679.

17 See 'Reputation: does it matter and can administrative law protect it?' A paper by Gary W Crooke QC at the 1996 Administrative Law Forum, Hotel Inter-Continental, 11-12 April 1996 at p.7.

18 See discussion in *Investigating corruption and misconduct in public office* at pp.679-680.