

## Appendix E Conduct of the Commission

- E.1 On 26 November 2009 the Senate referred matters relating to HMAS *Success* to its Foreign Affairs, Defence and Trade References Committee for report by 18 March 2010. The committee's hearings were due to begin on 4 February 2010. The Chief of the Defence Force and the Chief of Navy met and briefed the committee on 3 February 2010, seeking a deferral of hearings until Defence administrative procedures had been completed.
- E.2 On 11 February 2010 the Chief of the Defence Force announced that he had directed that 'a fresh Inquiry into a range of matters arising from Equity and Diversity issues onboard HMAS *Success* be conducted'. Shortly after that I was approached on behalf of the Chief of the Defence Force and asked if I was prepared to conduct that Inquiry. I said I was. I was informed that one criterion for appointment was no previous professional association with the Defence Force. I was consulted about the form of the Inquiry and the selection of counsel assisting, who had to be Defence Force Reservists but with no connection with the Navy. My appointment and the appointment of Mr Douglas Campbell SC as counsel assisting were announced on 23 February 2010. The announcement included the statement that there would be no Navy involvement in the Inquiry's legal team.
- E.3 Planning for the conduct of the Commission began pending settlement of the final terms of reference and the formal Instrument of Appointment. This was because it was necessary to start hearings urgently for two reasons. The first was that the Senate Committee had adjourned its inquiry until the outcome of this Inquiry was known. The second was that HMAS *Success* was due to deploy overseas in early April, and so far as possible evidence would need to be obtained before that time from those members still serving on *Success*.
- E.4 The Instrument of Appointment, including the terms of reference and the Inquiry context, was issued on 9 March 2010. Practice Note Number 1 was issued on 11 March (see Appendix F). It was largely based on a Practice Note issued by the Commission of Inquiry into HMAS *Sydney*, conducted by the Hon. Terence Cole AO RFD QC. The first public hearing for my Inquiry was held on 12 March 2010: a number of documents were tendered, and the Commanding Officer of *Success* began to give evidence. Public advertisements had been published on that day. Hearings were adjourned to enable preparations to be made for taking the evidence of subsequent witnesses. The hearings resumed on 24 March 2010 and continued until 15 April 2010, evidence being taken on 13 days. By then, HMAS *Success* had deployed, and hearings

were adjourned until 21 June 2010 (there having been a hearing for special reasons on 1 June 2010). Evidence gathering and analysis continued in the meantime. Hearings resumed on 21 June 2010, after *Success's* return, and continued until 13 August 2010, evidence being received on 29 days. Overall, oral evidence was heard from 102 individuals, and affidavits of evidence were received from 12 individuals. Some documentary evidence was received after 13 August 2010. In all, 402 exhibits were received, many containing multiple documents.

- E.5 Between 14 August and 26 September 2010 notices of possible adverse findings open on the evidence were given to 31 individuals; 30 written submissions and one response in reply were received as a result. On 27 and 28 September and 7 October hearings were held in order to receive supplementary oral submissions from counsel. The transcript of the hearings runs to 4866 pages.
- E.6 Because of the volume of issues and material relevant to them, and because there was urgency associated with the Chief of the Defence Force receiving an account of what occurred on the March–May 2009 Asian deployment of HMAS *Success* and the immediate aftermath of the deployment, it was decided to deliver a report on those aspects as soon as practicable, leaving other aspects to be dealt with later. Thus Part One of my report was delivered in January 2011. That part of the report essentially involved findings based on the evidence received and recommendations arising from the findings.
- E.7 Part Two of the report dealt with management of the allegations and the personnel involved in them during the Asian deployment and in its immediate aftermath. It covered the period until the decision was made to institute this Commission. This involved making findings based on the evidence received, plus evaluation of the significance of established or undisputed facts. Part Two was delivered in May 2011.
- E.8 Part Three of the report does not involve fact finding as such. Preparation of it required assessment and evaluation of the insights and impressions gained from Parts One and Two but ensuring, so far as possible, that those insights and impressions were taken in the context of the many reforms and changes that have occurred in the Defence Force during the past 15 or 20 years. It was also necessary to take account of the views of others who have examined the same matters. Locating and assimilating that content proved a demanding and time-consuming task. Sources consulted in addition to the evidence are listed separately.
- E.9 I was asked to make observations that might be helpful to persons conducting Chief of the Defence Force commissions of inquiry in the

future. I make some recommendations for reform in the body of this part of my report in relation to where amendment to the Defence (Inquiry) Regulations is required. Those recommendations reflect, in part, the view that Chief of the Defence Force commissions of inquiry are not part of a complaints and discipline system and are not proceedings against anybody. They are a means whereby command can be informed as to controversial matters. Practice Note Number 1 was intended to assist in overcoming the tendency to treat an inquiry as adversarial. The present provisions of the Regulations made that task quite difficult, as did the adversarial—indeed, confrontational—tactics of various counsel representing potentially affected persons.

- E.10 There is a limit to the extent to which the conduct of one commission of inquiry can be transposed to another. The subject matter and circumstances will vary enormously and will dictate the most suitable approach. Furthermore, there is no single correct approach. Each president will have his or her own experience and opinions. Comparison of the topic of this Commission of Inquiry with that of the inquiry conducted into the sinking of HMAS *Sydney* and with inquiries into service deaths illustrates the diversity of subject matter and circumstances.
- E.11 In the present Inquiry the practice was that counsel assisting lead the evidence of witnesses. I am satisfied that was the correct procedure in this case. Allowing counsel representing to call evidence would reinforce the notion that there was a series of cases against individuals. Generally speaking, witnesses were proofed in advance by one of the counsel assisting—not necessarily the counsel who actually led the evidence. This, too, was demanding and time-consuming, but it made the conduct of the hearings much more efficient. On occasion it might have affected the spontaneity of evidence, but to throw the number of witnesses involved in this case into the box without preparation would have made the hearing much longer and more difficult to control than it was.
- E.12 The best order of witnesses is always a matter of judgment. In the present case, starting with the Commanding Officer of the vessel and those who had made the complaints to him was both convenient and logical. The only question in my mind, on reflection, is whether it was wise to hold back the evidence of potentially affected persons until so late in the proceeding. This tended to reinforce the notion that there was a case to be made against each of them and gave them a forensic advantage over unrepresented witnesses who had appeared beforehand.
- E.13 One matter that warrants further consideration concerns the wearing of uniform by counsel representing. With the concurrence of the Chief of

the Defence Force, I required that Mr Campbell SC and Mr Johnston of the Queensland Bar appear in mufti. I permitted the wearing of uniform by counsel representing. I would have some hesitation about doing that again. The significance of rank and the different service backgrounds that are revealed by uniform each have the potential to affect the attitude of witnesses of more junior rank.

- E.14 The manner of receiving submissions caused some controversy. Rather than counsel assisting giving an address contending for particular findings, notice of possible adverse findings was given with reference to material that might support those findings. A commission of this kind is inquisitorial, and the role of counsel assisting is not to present any case or cases. What is more, if counsel assisting contend for a particular set of findings that effectively removes them from being able to assist in the preparation of the report. A report of this magnitude simply could not be prepared without the involvement of counsel assisting, who are familiar with the subject matter and the evidence. Properly drawn notices are perfectly adequate to enable those seeking to make a submission to focus their submissions.
- E.15 Counsel representing were also limited in the scope of the submissions they were permitted to make in that they were to address potential findings against the party represented but not to stray into other matters of controversy or matters of policy that did not directly affect their client. That properly reflects their role. The president of a commission of inquiry is responsible for the findings made, and counsel assisting have a duty to contribute to that process.
- E.16 Problems relating to confidentiality are discussed in paragraphs 3.27 to 3.37 of this part of the report.
- E.17 There was a question about whether the hearings should have taken place at Defence Plaza—Sydney. No other suitable premises were readily available, and I was satisfied with the arrangements for unimpeded public access.
- E.18 Some witnesses appeared to be affected by the presence of some of the potentially affected persons during the giving of their evidence. Normally, witnesses would not be present until after giving evidence. I took the course of excluding potentially affected persons during some of the evidence. In paragraphs 3.15 to 3.37 of this part of my report I recommend amendments to the Regulations in order to provide a more secure foundation for such orders.
- E.19 Finally, those who contributed to the conduct of this Commission of Inquiry are listed in Appendix G.