ROYAL COMMISSIONS AND BOARDS OF INQUIRY
DOMESDAY TO EUREKA AND THE MODERN DILEMMA

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Delivered at a Meeting of the Medico-Legal Society held on 12th August, 1978 at 8.30 pm at the Royal Australasian College of Surgeons, Spring Street, Melbourne. The Chairman of the Meeting was the President, Mr. S. E. K. Hulme, Q.C.

If some of you have not read Lord Hailsham's most recent book of essays collectively entitled "The Dilemma of Democracy", or have not recently read the First Book of Kings, I should not like you to leave tonight without hearing the striking passage from the latter which is included as a frontispiece to the former. It is this:

> "And Elijah came unto all the people and said: 'How long halt ye between two opinions? If the Lord be God, follow him, but if Baal, then follow him.' And the people answered him not a word."

Now, that is not to be taken as a text and I am not going to preach a sermon. My simple point is that at this hour, no less than in ancient days, if people are confronted by a basic dilemma they are likely to say "not a word"—unless, at all events, the choice is clearly identified. My proposal is that the modern use by governments in this country of the institutions of Royal Commissions and Boards of Inquiry does pose problems the solution of which involves a real dilemma, and that we should give due consideration to both the problems and the dilemma. Happily, it is no part of this Society's function to make the choice but we will be doing at least ourselves a service if we recognise that the choice exists. So I should like to examine the institution of the Royal Commission of Inquiry in its modern context to see if I can discover where it is leading us as a governed people. It is a truism, but fundamental, that the Royal Commission is an institution of government. Living in a federation with seven responsible governments, we therefore face a proliferation of Royal Commissions and their like from an equal number of sources. Rather than attempt a wide survey, I shall confine most of my remarks which aim to be specific to the Victorian experience (because it is with that that I am most familiar) and I shall occasionally contrast our own development with that of the English prototype. Fortunately, too, a glimpse at what has happened in this State provides an especially rewarding insight into

the system which now pervades the whole country, so that a good deal of what I shall have to say applies to all States as well as in the Commonwealth sphere.

I should begin by defining my terms and drawing some distinctions. Quite often—too often to make it exciting—one hears a call from an individual or a group in the community, professing an interest in a prevailing state of affairs, for the appointment of a government inquiry into the subject matter of a particular affection or dis-affection or irritation or disgust or admiration or what you will. Usually the demand is for what is termed a "full-scale inquiry"—often a "full-scale *judicial* inquiry". "And of course" (the postulant will often say) "of course it ought to have the powers of a Royal Commission"—as though a Royal Commission were a kind of supereminent conclave endowed with an authority and powers enjoyed by no other. More often than not these demands go unheeded or at least do not produce the desired appointment. Governments are rather more likely to appoint an inquiry ostensibly of their own motion than to acknowledge that the appointment is made at the behest of publicised clamour. The West Gate Bridge Royal Commission was an obvious exception. But it is nevertheless difficult for the outside observer to discern the extent to which public discussion or privately-exerted pressure has contributed to a reaction within government circles which leads to an appointment of an inquiry. If the government decides to appoint, it will generally have a choice to make between a Royal Commission of Inquiry and a Board of Inquiry.

Probably no one who stands outside government will ever know exactly how or why, in any given case, that choice is made. Historically there was a practical distinction between the two: Royal Commissions used to be issued by the Crown independently of the executive; Boards of Inquiry and other comparable tribunals (such as Departmental Committees of Inquiry in England) were appointed by the executive government or by a minister. That distinction is now obsolete in England and if it ever existed in Australia it is now of no practical importance. In Victoria the Royal Commission is conventionally issued by letters patent under the great seal following an order-in-council, and occasionally it will be authorized by statute. Boards of Inquiry, on the other hand, will ordinarily be appointed by order-in-council alone. Subject to their terms of reference, Royal Commissions issued and Boards of Inquiry appointed by order-in-council have identical powers to compel the attendance of witnesses and to require witnesses to answer on oath all questions put to them which are considered to be relevant. One tends to function in much the same way as the other. Save for their descriptive names there need be no distinction between them. Why, then, preserve a distinction? There are probably no hard

and fast rules about this, at least in Victoria. So far as one can tell, any government inquiry (not being a Parliamentary inquiry or one conducted by the Public Service) which is to be established in this State will probably be a Board of Inquiry unless special considerations suggest otherwise. Such distinguishing features as there are between a Board and a Royal Commission are usually said to be questions of tradition and prestige. By tradition, some subjects which fall to be considered "in depth" by some kind of inquiry have been the subject of Royal Commissions. Other subjects of a more ephemeral kind would traditionally be considered by a less exalted body—in Victoria a Board of Inquiry, in England a Departmental Committee of Inquiry. It might be supposed that Royal Commissions should deal and do deal with issues of major or widespread public importance. Of course they do, but not always. The truth is that since Royal Commissions and Boards of Inquiry are both institutions of government they will be influenced by political matters in the form of their appointment as much as by the reasons for their appointment, their terms of reference and their composition. All bodies of inquiry of this kind are appointed for a governmental purpose. Of course, the purpose may be purely political or it may be substantially non-political. The nature of the purpose and the extent to which it is political or apolitical will, as much as its subject matter, decide whether it is to be a Royal Commission or not. One of the purposes for the appointment of a governmental inquiry is to make an impact on the community and the nature and quality of the impact desired to be made will also tend to suggest the form of the inquiry. Royal Commissions are supposed to have a greater prestige than Boards of Inquiry, partly because of their ancient tradition but also because they are rarer than Boards of Inquiry. Royal Commissions also tend to be identified with the government as a whole whereas Boards of Inquiry are often linked with a particular department or agency of government. Without intending to be unduly cynical, one may fairly say that a government will rarely appoint a Royal Commission if the likely outcome is forecast to be unfavourable to it as a government. Specific ticklish matters which are to be the subject of an inquiry are more likely than not to be consigned to Boards of Inquiry. The prestige of a Royal Commission might assist it to attract a wider and better press than a Board of Inquiry and it might induce more interest groups to take the time and effort necessary for the serious and careful presentation of their views; and it may be that some would regard the findings of a Royal Commission as being more acceptable to the public than those of a Board of Inquiry. Conversely, the extra publicity which a Royal Commission might be expected to achieve above that of a Board, and the greater store which the public might set

on its findings, could well be regarded as a liability in some matters which could embarrass the government. Obviously the government will do what it can to make its choice of inquiry having regard to all these considerations.

Because the distinction between Royal Commissions of Inquiry and Boards of Inquiry is very largely formal, rather than one of substance, I shall hereafter use the expression "Royal Commission" to include both kinds of inquiry save where it seems necessary to draw any verbal distinction.

The fact that Royal Commissions are continually being sought from outside government is some evidence of their acceptance, if not their popularity, in the community. Their fairly frequent appointment by governments, whether in response to public demand or independently of it, is evidence of a recognition they they have a place in the modern governmental environment. Royal Commissions are in fact accepted on all sides as an institution of government. Of course that is not to say that they are universally approved; and they have indeed for centuries attracted their share of critical analysis. Lord Kennet, a British observer, has provided an interesting framework which serves to introduce an appraisal.

Lord Kennet was a man of remarkably diverse cultivation. He was a barrister of the Inner Temple, naval officer, member of Parliament, cabinet minister in the British National Governments of the 1930s and a considerable man of affairs. He managed to combine these interests for some years with the presidency of a series of learned societies much akin to our own, and most notably the Poetry Society. It is perhaps of more particular relevance to notice that during the 1920s he was chairman of at least five Royal Commissions or Departmental Committees of Inquiry in England and he can therefore be assumed to have been qualified to comment on the functions of bodies of that kind. This he did in some remarks he made in 1937 to a meeting of the Royal Statistical Society (of which he was then also president) the subject being "On the value of Royal Commissions in Sociological Research". Lord Kennet said:

> "I would like to detain the meeting with a few remarks on the natural history of Royal Commissions. It is well known that the functions of the governors of a democracy are largely the functions of a medicine man. They have to distract the attention of democracy as a whole from really vital matters by displays calculated to keep them happily occupied—a function in which they receive the greatest and most constant assistance from the press. Anyone who, like myself, is a superficial student of an-

> thropology, will know that one of the favourite devices of a medicine man is the tribal dance, and in order to persuade his tribe that something really important is going on in the way of activity, he will put up a dance in the middle of the tribal circle. That is the first function of a Royal Commission—a tribal dance to persuade the general public to believe that something very active is in progress. The continued study of the ways of the medicine man will bring out another device—the medicine hut. This is a hut shrouded by curtains into which he retires for a long period with the object of persuading the tribe that something very important is going on and that it is essential that they should wait for his emergence. This is the second function of a Royal Commission, and both are totally illegitimate.
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> There is a third function, even more illegitimate, and that is the promotion of the dog fight. When a government finds itself extremely hard put to it to distract the attention of the public from one of the fundamental ills for which the public expects a remedy from the government, and for which the government is sorry it can find no remedy, it promotes a dog fight between the people with different views; and for starting a dog fight there is no method so valuable as that of a Royal Commission.
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> I would make one further observation upon the natural history of a Royal Commission. Like other drugs (if I might be allowed to change the metaphor) if it is to be used efficiently, it must be used sparingly, or it becomes exhausted in its effect. I have known governments, of which I have myself been a humble member, which have made too great a use of the dope of a Royal Commission with the consequence that it lost its effect. I have indeed known a time when a self-denying ordinance had to be passed by a succeeding government that no further Royal Commissions should be set up because the name had become a matter for derision. No government more deserves the hatred of its successors than one which exhausts the use of this valuable method of distracting the attention of the public."[1]

These are what I would call fairly traditional grounds of criticism. They rely on a foundation of healthy cynicism and one from time to time hears them applied to other fields of government activity as well as to Royal Commissions. When applied to Royal Commissions they proceed from the view that if the government were doing its job properly the appointment of Royal Commissions ought to be unnecessary; that if an appointment is made it is *prima facie* evidence of a failure to govern in an efficient manner; that appointments are just a convenient means of fobbing off or postponing problems in the hope that if there is an inquiry about them they will disappear; and that the reports made by

Royal Commissions are often easy to ignore, and indeed much easier to ignore than to implement. You might liken the publication of some Royal Commission reports to the publication of poetry, which in turn was once said to be an experience akin to tossing a rose petal into the Grand Canyon and waiting for the echo.

Having adverted to these traditional criticisms, I leave them on one side because they are pretty well known. Instead, I want to pursue another path of analysis which is not so well-known but ought to receive more consideration than it has, especially in Australia. I commence with a little potted history.

The origins of Royal Commissions are old enough to be obscured by time. Certainly they were used by the Normans. William I (the Conqueror) appointed some of his barons and justices to make the inquiries which produced the Domesday Book in 1086. Henry I and the early Plantagenets also used them in the course of effecting legal reforms in the Twelfth and Thirteenth centuries. They were, however, regarded as overdone, or as leading to abuses in their execution, and in the reigns of Edward III and Henry IV parliament frequently petitioned against them. As a result there was a decline in the use of Royal Commissions of Inquiry until the accession of Henry Tudor in 1485. Under the Tudors the Royal Commission, along with the notorious Star Chamber, became established as a regular institution of government, and it has so remained. Then, as now, it was used as a device for the investigation of social issues such as the enclosure of land and the consequent shifts of population in rural areas. A wide extension of the practice of appointing Commissions of Inquiry dates from the breach with the Church of Rome under Henry VIII in 1534 and the consequent dissolution of the monasteries. There was a commission for the valuation of benefices in 1535, and one for the regulation of divorce; and in 1551-1552 there was one relating to the collection of lead, plate and ornaments in churches. A later commentator has said that "From this time the ideal of a Royal Commission was never absent from the mind of politicians".[2]

Under the early Stuarts, maladministration, corruption and bribery in public office abounded. Sir Edward Coke, reversing his previous stance in Queen Elizabeth's time, was voicing the perils to the nation's liberties of any loose or indiscriminate use of the royal prerogative. While James I was asseverating that *rex* was *lex*, Coke argued that the common law was a more divinely potent force than the prerogative. Numerous attempts by King James to appoint, under the guise of commissions, new species of courts for the purpose of obtaining verdicts and raising money were strenuously resisted by Coke and by the Parliament. The argument of Parliament and the

courts was that all *ad hoc* commissions not falling within the existing framework of the courts should be restricted to work which it was not the task of the courts to perform. Pure commissions of inquiry, involving discovery of facts, generally by non-compulsive process and testimony, were acceptable. But any *ad hoc* commission which sought to usurp the functions of the courts to hear and determine issues affecting subjects was anathema. So punctilious indeed was Coke in the preservation of the supremacy of the common law against invasion by the prerogative that, upon being appointed to an ecclesiastical commission the legality of which he doubted, he insisted upon standing up whilst it was read lest he should be accused of "sitting" under a commission in which he declined to act.[3]

In 1641 the Star Chamber was abolished by statute.[4] With its abolition went any opportunity to the Crown to compel the attendance of witnesses at commissions of inquiry or to compel them to testify if they were present, unless by means authorized by the Parliament.

With the rise of the civil service, royal commissions were apparently less used in the eighteenth century than they had been formerly. The nineteenth century however saw a grand revival and in that century three hundred and ninety-nine royal commissions of inquiry were appointed. That average of four per year over a whole century far exceeds any average achieved in any century before or since. Every institution seems to have a so-called "Golden Age" ascribed to it, and many had theirs in Victorian England. That of the Royal Commission is said to have occurred in the mid-nineteenth century, for in the decade 1850-1859 no less than seventy-five were appointed during the governments of Lord John Russell and Lords Derby, Aberdeen and Palmerston. I burden you with these statistics because it was of course during this so-called Golden Age in Great Britain that the Colony of Victoria introduced the institution of royal commissions into our own system of government. The institution has been with us almost since Victoria's inception as a separate colony and, as it happens, the Victorian development of the idea has been unique.

The institution was bound to develop differently here from the way it had in England since the Stuarts, and indeed it did. Virtually from separation in Victoria the legislature gave to Royal Commissions and Boards of Inquiry an indiscriminate power to compel testimony. I say "indiscriminate" because the power was conferred upon every Royal Commission and every Board of Inquiry by virtue of its appointment, whether it really required the power in the circumstances or not. That was first done by the Legislative Council in an Act of December 1854 which was entitled "An Act for the more ef-

fectual prosecution of enquiries by Boards and Commissions". This Commissions of Enquiry Statute of 1854 (to give it its short title) can be identified in retrospect as a measure of the first importance, although it was probably not so regarded at the time it was enacted, because it was expressed to last for only one year. But in 1864 the powers which it conferred were revived and they have been perpetuated until the present day.

The power to compel the attendance of witnesses seems to me to have been responsible for attracting a good deal of legal paraphernalia around many Royal Commissions and Boards of Inquiry which they could often have done without. Once the inquiry is invested with such a compulsory power, and everyone knows it, the tendency is for witnesses not to come voluntarily; and the issue of subpoenas gives the inquiry to the public mind one of the characteristics of a court. Furthermore the right of the commission or board to compel a witness to answer questions, once it secures his attendance, immediately raises the issue whether there ought to be circumstances in which the witness may refuse to answer on the ground that it is his privilege to refuse to say anything that might tend to criminate him. Even if an answer might not tend to criminate him he might find it highly inconvenient or embarrassing to answer and he is likely to want legal representation, if he can afford it, with a view to seeking such protection as he can and to putting as favourable a light on his evidence as may be. Once this kind of situation arises the Royal Commission and the Board of Inquiry become at once a tribunal or forum with trappings of a court. You tend to find a body of adversaries ranged against one another in a courtroom atmosphere in circumstances in which proceedings of that kind are often not necessary and are sometimes actually inimical to the primary purpose of the inquiry.

I believe it is true to say that, from the time of the abolition of the Star Chamber in 1641, no Royal Commission in the British Empire had conferred upon it, merely by virtue of its appointment, a power to extract information compulsorily from any man from whom the Royal Commission chose to extract it under pain of penalty, until the enactment of the Commissions of Enquiry Statute in Victoria in 1854.[5] Yet that early Victorian statute provided the genesis of a system which later became the norm throughout Australia and which still subsists.

Is that system now justified?

In attempting to answer that question I think you might find it interesting to discover why the Commissions of Enquiry Statute of 1854 was enacted in the first place. The contemporary story is well enough known but, so far as I am aware, the historians have not tied the

Commissions of Inquiry Statute in with it. Let me sketch in the background.[6]

In June of 1854 Vice-Admiral Sir Charles Hotham arrived at Melbourne from London, a reluctant replacement of La Trobe as Lieutenant-Governor of the Colony of Victoria which was then just three years old. He found the government's financial affairs in chaos. Highly strung, irritable and formidably strong-willed, he started at once on what he saw as a Herculean task of retrenchment and reform. A month after his arrival he sent home an alarmist dispatch to Whitehall advising that—

> "Inquiry of a searching, probing character must be made into the administration of every department and the expenditure of every shilling . . . Jumble and confusion exists—a want of order and regularity, such as man can hardly conceive, is everywhere apparent . . . The chief of every Department acted independently of the Governor, and controlled the appointments of his office. I am told that contracts are concluded in the loosest manner and at the most extravagant rates—the wonder is that in such a chaos, Government was possible—nor are matters on the Goldfields much better. Out of a population of 77,122 male adults only 43,789 paid a licence fee, whilst a frightful staff exists on paper for the collection."

Correctly or not, Hotham regarded the Colony as facing ruin. Morale was further depressed by the invasion of the Crimea in September. The prospect of assault by a Russian squadron believed to be cruising off the Philippines was regarded as not impossible and a volunteer militia was organized in Melbourne with a view to repulsing any possible attack.

The heavily populated goldfields of Ballarat, Sandhurst and Castlemaine were rife with bitter discontent. The administration there had been scandalously incompetent, brutal and corrupt under La Trobe, and the abuses were continuing. The gold licence fee, thoroughly reviled by the diggers, was seen as a swingeing fiscal impost on labour or as an inadmissible poll tax and evasion was commonplace. But the fees were desperately needed as revenue and in September Hotham made an unpopular order that searches for licences be made at least twice weekly. These "licence hunts", as they were called, were habitually undertaken by police and troopers in circumstances of crudely calculated provocation.

On 6th October, 1854 a drunken Scot, James Scobie, in search of more liquor, pestered the proprietor of a shanty tavern at Ballarat known as the Eureka Hotel. The enraged proprietor, a Vandiemonian ex-convict named Bentley, and his friends pursued Scobie and

his mate and Scobie was kicked to death. The coronial inquest was inconclusive. The hotel was a favourite drinking place of some of the government officials and Bentley was popularly supposed to have had a business association with a corrupt local magistrate named D'Ewes. Subsequent public agitation arising out of Bentley's supposed complicity with the authorities gave rise to his arrest and to committal proceedings before a court which, as it happened, included D'Ewes. In spite of evidence which warranted Bentley's committal for trial, he was discharged. A mass meeting of miners agitated for the re-opening of the proceedings against Bentley and when the meeting dispersed the Eureka Hotel was pillaged and burnt.

The Lieutenant-Governor's reaction was swift and firm. He immediately ordered the re-arrest of Bentley, who was ultimately convicted of manslaughter. But the populace was already seething with a sense of general corruption in the government service and, by the end of October, Hotham had appointed three magistrates to be a Board of Inquiry to inquire into the administration of Ballarat. At about the same time he also sent four hundred and fifty more troops as reinforcements to Ballarat and ordered the Commissioner in charge "to use force whenever legally called upon to do so, without regard to the consequences that might ensue". He also ordered the arrest of the Eureka arsonists, and three scapegoats were promptly arraigned and convicted.

The Board of Inquiry made a perfunctory report on 16th November in respect of which the *Argus* subsequently commented (on 6th December, 1854)—

> "Considering the reluctance exhibited by the diggers to furnish evidence to an official commission, a great deal of information was elicited; and the judicious recommendations laid down as a result of the inquiry would, if promptly acted upon, have prevented the subsequent unhappy occurrences."

Upon receipt of the report of the Board of Inquiry, Hotham appointed a Royal Commission to report generally on the goldfields but its immediate implementation was delayed because the Legislative Council was in session and some of its members were also members of the Royal Commission. The "unhappy occurrences" which the *Argus* attributed to the delay have passed into history. Before the end of November Hotham had received and rebuffed a deputation of diggers which demanded the release of the convicted scapegoats for the Eureka Hotel arson. He bade the diggers abide the Royal Commission, saying: "Tell the diggers from me, and tell them carefully, that this Commission will inquire into everything, and everybody, high

and low, rich and poor, and you have only to come forward and state your grievances, and in what relates to me they shall be redressed".

Meanwhile, the Royal Commission pending, Hotham sent all further available troops to Ballarat, a move which unquestionably sorely provoked the mob. In the last days of November, licences were burned in public at Ballarat as a gesture of ritualistic defiance of the authorities. Rede, the District Commissioner, spoiling for a fight, thereupon ordered a licence-hunt. The Riot Act was actually read and shots were exchanged. It was the nearest to civil war that this country has known. A stockade was feverishly constructed above the Eureka lead. The diggers manned it for two days, confused and indecisive, before being stormed by troops early on the morning of Sunday 3rd December. In the ensuing melee about thirty diggers were killed or mortally wounded and five soldiers died.

Even before the news of Eureka reached Melbourne, by fast horse, in time for Monday morning's newspapers, the city was alive with rumours of a general insurrection. There was even a fear that the diggers would march on the capital and pillage it. Some 1500 men were sworn as special constables and a rifle brigade was mooted by some shopkeepers to defend the city in the absence of the troops. On that Monday martial law was proclaimed for Ballarat from the following Wednesday. It was in this atmosphere that the Legislative Council met on Tuesday 5th December 1854. On the previous Friday it had received a message from the Lieutenant-Governor requiring the passage of a Commissions of Inquiry Bill. The Attorney-General, William Foster Stawell, the strongest and ablest member of the Executive Council, had no doubt proposed it and on the first sitting day after Eureka he presented it to the House where it was read for a first time. The measure made it lawful for any member of a Board or Commission appointed or issued by the Lieutenant-Governor in Council to summon persons to attend and give evidence on oath and to produce documents (not being private documents). The persons so compellable were those who, in the subjective opinion of the member issuing the summons, could give evidence material to the subject matter of the inquiry or who held documents, production of which appeared to be "necessary for arriving at the truth of the things to be enquired into". Witnesses received a measure of protection against the future use of their evidence against them and an indemnity against any liability for defamation to which their evidence might otherwise have subjected them. Breach of these provisions involved an offence carrying a maximum fine of twenty pounds. The Bill received a second reading as a matter of urgency and, on the day following its first reading, with virtually no debate, it was committed and passed the

same day. A week later the Bill received the Royal Assent, the House adjourned and the Goldfields Royal Commission immediately began to hear evidence at the diggings, armed with its new-fangled compulsory powers.

Obviously these were times of exceptional character. They were highly charged with extreme prejudice and real financial and physical fear. The extent of the Colony's anguish can be gauged from the fact that thirteen men were tried for high treason following the Eureka incident. No one would reasonably doubt that extraordinary measures designed to cope with an extraordinary situation were well justified on the part of the Colonial administration. That the Commissions of Inquiry Statute was regarded as extraordinary and *ad hoc* at the time it was enacted is indicated by the fact that it was expressed to remain in force for only one year. So far as I know it was not extended, but as a precedent it was certainly far-reaching.

Ten years later, having achieved full responsible government, the Colony set about consolidating a batch of statute law, including that on evidence. When the Evidence Statute of 1864 was pushed through Parliament it was lumped together with a number of other important consolidating measures, apparently as a kind of package deal. It was supposed to be a consolidating statute and remarkably little attention seems to have been paid to its terms during the course of its passage through either of the two new Houses of Parliament. In fact its purpose was not wholly to consolidate existing law, for it resurrected with little alteration the heart of the provisions of the 1854 Commissions of Inquiry Statute. So that once-temporary measure, which had been conceived *ad hoc* in such highly special circumstances, passed almost without notice into the standing law of the Colony, and Victoria has not been without comparable legislation ever since.[7] The other Australian Colonies did not follow suit until years later, but they all ultimately did so even though none had had its Eureka or anything like it; and the Commonwealth also followed in 1902.[8]

Inevitably, some of the inquiries which were automatically given compulsory powers by virtue of these statutes attracted resentment because of those very powers, and some people who were summoned as witnesses refused, for one reason or another, to answer questions which were put to them. In 1904, not long after its establishment, the High Court was asked to hold that a Royal Commission in New South Wales having such powers was unlawful. There must be some limit, it was argued, to the legal power of the sovereign or of the government to direct a public inquiry. The circumstances were certainly such as to arouse grave suspicion about the New South Wales Government's good faith. They arose out of a factional fight between

two trades unions. The Australian Workers' Union was anxious to have a rival union (The Machine Shearers' Union) deregistered and three times unsuccessfully applied to the New South Wales Arbitration Court for a cancellation order. The general secretary of the A.W.U., who happened to be a member of the New South Wales Legislative Assembly, arranged for the appointment of a Parliamentary Select Committee, with himself as chairman and seven of his more sympathetic colleagues as members, to inquire into the case. It was found that the Select Committee had no coercive powers to require attendance of witnesses and the production of documents so the Select Committee was abandoned and a Royal Commission was appointed, again with the general secretary of the disgruntled Australian Workers' Union as president and the membership corresponding to that of the previous Select Committee. The purpose of the Royal Commission was, in substance, to inquire into the subject matter of the proceedings which had taken place before the Arbitration Court. In the words of the Chief Justice of New South Wales—

> "Common decency at last prevailed and led to an alteration of this, and after having been made a member of the Royal Commission [the general secretary] is finally excluded, his nominees however remaining as members and a District Court Judge being nominated as president."[9]

One Leahy, the secretary of the rival Machine Shearers' Union, which had succeeded in the Arbitration Court, was required to testify before this Royal Commission and, perhaps understandably, refused, claiming that the inquiry was a farce and that moreover it was unlawful because it sought to inquire into a matter which, having been the subject of private litigation, had been concluded between the two unions in a properly established court. The Supreme Court of New South Wales very indignantly upheld Leahy's claim, invoking shades of Sir Edward Coke, and for the first time I think in modern legal history a Royal Commission was held by a court to be unlawful. But Leahy's triumph was short-lived because on appeal the High Court reversed the New South Wales Supreme Court.

The High Court regarded the power of inquiry, the power of asking questions, as a power which every individual citizen possesses. He can ask any question he chooses and provided that in asking these questions he does not violate any law, no court can prohibit him from asking them. The Crown's right to inquire is not different from or greater or less than that of the man in the street. It does not, therefore, depend on any prerogative right. Sir Samuel Griffith, the Chief Justice, said:

"It is not unlawful for me to make the most impertinent inquiry into my neighbour's affairs. It is very undesirable but it is not unlawful. It cannot be suggested that the Crown would do such a thing, but if it did it would be no more unlawful for the Crown to make such an inquiry than for an individual. If I make impertinent inquiries as to my neighbour's private affairs, I may bring down upon myself the censure of right thinking people. If the Crown makes an inquiry into the affairs of private persons, the advisors of the Crown may incur the censure of public opinion. They may also incur the censure of Parliament. And every person is equally free to form an opinion as to the propriety of the inquiry, but it would be a strange thing if courts of justice were to assert the right to inquire into the propriety of executive action—whether it was a thing which, according to rules or action commonly received in the civilization in which we live, ought to be done. That is a question which a court of justice has no right to inquire into. It is for a court of justice to inquire whether the law has been transgressed."[10]

That simple passage really outlawed for Australia any notion that there was a prospect that a commission of inquiry which was endued with power to compel testimony could be stopped by reason only of its power of compulsion. It followed from this that a Royal Commission may certainly be appointed to inquire into questions which might ultimately have to be decided by a court of law—for example whether a criminal offence has been committed by a specified individual in a set of circumstances to be made the subject of the inquiry. This indeed had long been recognized. For example, in 1806 the Crown issued a commission to investigate charges of adultery and infanticide which had been made against the Princess of Wales, afterwards Queen Caroline, consort of King George IV. She protested through her advisers against the legality of a commission to inquire even in the case of high treason or any other crime known to the laws of the country. Since the members of this commission included the Lord Chancellor and the Lord Chief Justice of England of the day, the protest was scarcely likely to be successful and it was not. The commissioners examined a number of witnesses and reported to the king that they were of opinion that the princess was innocent of the charges which had been levelled against her, but it is notable that in accordance with the English practice the commissioners had no coercive powers to call witnesses.

But an inquiry made with a view to determining whether a crime has been committed is no less valid if it is armed by statute with coercive powers. In 1939 the *Truth* newspaper published some articles suggesting that funds were being collected in Melbourne for the purpose of bribing members of the Victorian Parliament with a view to preventing

the passing of a Money Lenders' Bill and a Milk Board Bill. A Royal Commission was established constituted by Mr. Justice Gavan Duffy, a judge of the Supreme Court, to investigate these suggestions and to ascertain whether a bribe had been accepted by or offered to any member of Parliament. F. V. McGuinness, the editor of the *Truth*, refused to answer a question asked of him by the Royal Commissioner directed to ascertaining the source of his information for the newspaper articles in question. He was duly convicted and fined under the then current successor to the Eureka legislation. He appealed to the High Court which, in affirming his conviction,[11] recognized the principle that the Crown cannot grant special commissions, outside the ancient and established instruments of judicial authority, for the taking of inquests, civil or criminal. The court further recognized that the principle extends to inquisitions and to matters of right and supposed offences, but affirmed the view that the principle does not affect commissions of mere inquiry and report involving no compulsion, except under the authorization of statute, no determination carrying legal consequences and no exercise of authority of a judicial nature *in invitos*.

It is still theoretically possible for courts to limit the activity of a Royal Commission or a Board of Inquiry (if not established by statute) to the extent that its conduct would interfere with the course of justice in the ordinary courts. When a part of the steel structure of the King Street bridge failed in 1962 a Royal Commission was appointed to inquire into the failure. The fabricator of the steel sought an injunction from Sholl J. in the Supreme Court to restrain the commissioners from proceeding with their inquiry on the ground that to do so would constitute an unfair interference with the proper hearing and determination of a pending Supreme Court action which the fabricator had commenced against the bridge contractor and the Country Roads Board, the authority responsible for building the bridge on behalf of the Victorian government. The claim for an injunction failed and the Royal Commission went ahead. Sholl J.[12] considered that, even though there might be some overlapping between the evidence taken by the Royal Commission and evidence to be later adduced in the action in the Supreme Court, no Supreme Court judge would be embarrassed at any future trial by any findings which the Royal Commission might make, even though one of its members was a judge. One must conclude that in future it will be extremely difficult indeed to inhibit the conduct of any Royal Commission or Board of Inquiry on any basis once it has been shown to be regularly established.

Mention of the prospect that a judge sitting in a court might be called upon to try an issue which has been the subject of a Royal Commission presided over by another judge leads me to say

something very briefly about the composition of Royal Commissions and Boards of Inquiry. The choice of the right people to constitute Royal Commissions has provided a ripe subject for polemics. In particular, there is the perennial question whether judges should sit as Royal Commissioners at all. There are of course two views about this which it is perplexing to try to reconcile. The first begins with the undoubted fact that the proceedings of a Royal Commission of mere inquiry and report are not judicial proceedings at all; and that is so even if a judge happens to be a member of it. This view proceeds by saying that—

> "The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary."

This was the nub of the well known Irvine memorandum of 1923, a letter written by the Chief Justice of Victoria, Sir William Irvine, to the Attorney-General of the day, Sir Arthur Robinson, in which the Chief Justice declined to accede to a request to invite a judge of his court to act as a Royal Commissioner to inquire into certain charges made in connexion with the construction of a breakwater at Warrnambool. This appears to remain the strongly preferred view—if not the inflexible rule—of the Victorian Supreme Court, although not necessarily, I believe, that of the County Court. It stems from a conviction that judges should not allow themselves to be placed in a position which might invite public controversy in circumstances in which the nature of their judicial office will not of itself afford an answer. Such controversy, or even the likelihood of it, is calculated to damage public confidence in the impartiality of the superior courts. Significantly, the attitude of Sir William Irvine finds an echo some twenty years later in a letter written by Chief Justice Stone of the United States Supreme Court to President Roosevelt. "A judge", he said—

> " . . . and especially the Chief Justice, cannot engage in political debate or make public defense of his acts. When his action is judicial he may always rely upon the support of the defined record upon which his action is based and of the opinion in which he and his associates unite as stating the ground of decision. But when he participates in the action of the executive or legislative departments of government he is without those supports. He exposes himself to attack and indeed invites it, which because of his peculiar situation inevitably impairs his value as a judge and the appropriate influence of his office".[13]

In other words, if a judge is criticised for the performance of his judicial task, he can turn to the defined issues which were raised before him for his decision and say that he decided those issues, and no others, in accordance with the law of the land as he understood it. In a Royal Commission there are no issues and no parties and there is nothing to be decided in accordance with the law. The matters raised will or might fall to be considered by reference to a host of undefined pressures and prejudices. Better to leave Royal Commissions and the like well alone. The result of the application of the view inherent in the Irvine Memorandum has been that in Victoria, since the Second World War, there has been no occasion on which a member of the Supreme Court has sat on a Board of Inquiry and there have been only three Royal Commissions of which Supreme Court judges have been members. Two of these Royal Commissions (one constituted by Sir Charles Lowe inquiring into communism[14] and another of which Mr. Justice Barber was chairman inquiring into the failure of the West Gate Bridge[15]) were established by statute and the other sat only for one day. In the same period County Court judges have been involved in only eight Royal Commissions or Boards of Inquiry. This position is in strong contrast to that which has prevailed in some other States (notably New South Wales) and in the federal sphere, where the view seems to be that it is not only proper but sometimes desirable that judges should be involved in Royal Commissions and Boards of Inquiry. This second view concedes that the function of determining questions as an ordinary step in advising the executive upon the exercise of executive power is not a proper function for judges. But the proponents of it seem to rely on the fact that the institutions of social regulation are not now as simple as they once were, and that the area of social regulation which is left to the courts is proportionately reducing as the years go by. There are many decisions which affect the interests of citizens which are made outside the courts for which judicial skills are required and for which the community is entitled to expect that judicial expertise will be made available (or so the argument runs). One federal judge has only this year summarized the argument in this way:

> "The inhibitions of costs and procedural complexities [presumably in the courts] further limit the use of judicial skills in social regulation. If the skills be in scarce supply and if the mechanisms of social regulation are increasingly non-curial, it is reasonable to seek the services of judges to perform the new duties. Law Reform Commissions, Royal Commissions, Committees of Inquiry, and Tribunals and Commissions of differing kinds are part, and an important part, of the pattern of social regulation. Judicial skills are required to make them work efficiently. Judicial skills should not be denied to

them unless their jurisdiction or procedure require the judge to depart so substantially from the traditional judicial function that the departure carries an unacceptable risk of loss of confidence."[16]

This approach assumes the validity of a premise which I would respectfully question, namely that Royal Commissions and the like (or most of them) do require resort to judicial skills, or at least to legal skills, for the efficient resolution of the questions which they raise. This assumption has, I think, been engendered in large measure by the exceedingly legal atmosphere in which Royal Commissions have been allowed to flourish; and that practice has in turn been nourished by the coercive powers which, sometimes quite unnecessarily, have always been automatically conferred upon them. With this in mind, I return to the question which I posed for myself earlier: is the system by which the coercive powers were conferred on Royal Commissions at the time of Eureka now justified?

I begin an answer to that question by suggesting that the time has long since arrived when it has become legitimate and desirable to observe a difference between two broad functions performed by government inquiries. The difference is between inquiries that advise and inquiries that investigate. The difference is even now perhaps recognized but it is not usually observed by the making of any appreciable distinction between the form of an inquiry of one kind and an inquiry of the other. An important recent study by the Law Reform Commission of Canada has concluded that the Commission of Inquiry as an institution should have the form suggested by its function,[17] and I agree. The institution is capable of great flexibility and it can certainly be adapted to perform an almost infinite range of inquiries. It can be applied to consider questions which are major or minor, simple or complex, local or national, technical or practical, public or confidential, and immediate or long-term, to nominate only some of the available pigeon-holes. And yet we seem to have become wedded to a more or less stereotyped form or framework within which Royal Commissions are expected to operate for all purposes.

Some commissions of inquiry do not require coercive powers and would be better off without them. Others more or less obviously do require them and it is for those that the powers should be reserved.

An inquiry that advises generally addresses itself to broad issues of policy. Its tasks should be to gather information relevant to those issues by diligent search and, after applying a system of deductive reasoning, to express conclusions in the form of advice or opinion addressed to the executive. The conclusions do not, or should not, depend on the result of a competition between adversaries. Examples of

inquiries to advise are the Board of Inquiry into the Victorian Public Service conducted by Sir Henry Bland from 1973 to 1975 and the Board of Inquiry into Workers' Compensation conducted by Judge Harris which concluded last year. Only last week the Victorian government appointed a four-man Board of Inquiry to consider and advise upon Local Government finances, the function of which is pre-eminently advisory, and yet it was established in the conventional form for this State with all the compulsory powers which I have mentioned which *prima facie* it does not need. Because they are true advisory inquiries, there is not much logic in bestowing strong coercive powers upon them. As the Canadian study has put it:[18]

> "In the first place, it is unlikely that such powers would ever be necessary. It would be highly unusual in a democracy to have to force the expression of opinion to government. Reticence of experts to express views on subjects within their competence is rare. In the second place, it would be inappropriate to use coercive machinery of any kind for the purpose of obtaining advice."

That reasoning is very difficult to fault. The investiture of formal coercive powers tends to promote formal hearings in some cases where the emphasis might be on a degree of informality. This formality, and a reliance upon evidence received on oath, leads at least to an expectation on all sides that the findings, opinions and advice ultimately made and given will relate to the evidence formally taken and can in such cases create an impediment to, rather than a facilitation of, the inquiry's proper function.

Inquiries to investigate differ from inquiries to advise in that their function tends to be somewhat narrow and they are usually directed to the elucidation of a specific event or series of events or a trend or the investigation of certain allegations of conduct, often alleged misconduct. The recently-concluded Boards of Inquiry conducted by Mr. Justice Beach (before his appointment to the Bench) into allegations against members of the Victoria Police Force and by Sir Gregory Gowans into certain land purchases by the Housing Commission are examples, and others will come readily to mind. Some inquiries of this kind will be found to involve an element of competition between opposing interests in respect of defined issues. In some of these exercises there is room for, and benefit to be derived from, something approaching an adversarial contest. There is no doubt a case to be made out for some of these investigatory inquiries that they should receive compulsory powers to summon and examine witnesses. Where the case is made out the powers should be granted, but the grant should not be automatic. It is very significant, I think,

that in the United Kingdom there is still no statute which confers automatic compulsory powers on Royal Commissions and Departmental Committees to summon and examine witnesses on oath. The conventional form of letters patent issuing a Royal Commission in the United Kingdom does in fact purport to grant such powers but they would probably not be enforced by the courts because they lack the statutory force of law, and in practice Royal Commissioners never even try to enforce them. In the comparatively rare cases in which it is considered necessary in the United Kingdom to confer powers to compel the giving of evidence to a government inquiry this is done under the Tribunals of Inquiry (Evidence) Act 1921, and it is done on a strictly *ad hoc* basis and then only on a resolution of both Houses of Parliament. Hence, while tribunals of inquiry do not become responsible to Parliament, they owe their coercive powers directly to Parliament and do not receive them unless a case for their bestowal is specifically made out. It is interesting to notice that of all the many thousands of Royal Commissions and Departmental Committees (corresponding to our Boards of Inquiry) and other governmental inquiries which have been established in the United Kingdom since the passing of the Tribunals of Inquiry (Evidence) Act 1921, only some sixteen have been given the status of a Tribunal of Inquiry with compulsory powers under the Act. Many of the large number of inquiries established in England in the last fifty years have been set up, as similar inquiries have been set up here, for the purpose (for example) of probing public scandals, disasters, allegedly improper conduct and abuses of one kind or another, and yet they have on the whole managed to get along without the automatic compulsory powers which in Australia are always conferred on bodies of that kind. Even in cases of government inquiries which raise or are thought to raise issues of extraordinary and wide-ranging public importance, the overwhelmingly general rule is that coercive powers to summon and examine witnesses are not granted. An example was the inquiry which arose out of the celebrated Profumo affair. You might recall that in 1963 Mr. J. F. Profumo, the Secretary of State for War, made a personal statement in the House of Commons denying that there was any truth in the story that he had had a liaison with Christine Keeler. He afterwards admitted that this statement was untrue. Widespread rumours followed. It was alleged that there had been a serious security risk in that Mr. Profumo had been sharing Christine Keeler as a mistress with the Russian naval attaché; that the government knew or ought to have known that the personal statement by Mr. Profumo was untrue; that certain members of the government failed in their duty by approving the personal statement

before it had been made, particularly as they had done so without taking any steps to check whether or not it was true. Other rumours abounded. The government decided that to allay the palpable public concern an inquiry should be held and that Lord Denning, the Master of the Rolls, should conduct it. The leader of the Liberal Party, Mr. Jo Grimond, was one who denigrated the idea.

> "Since when", he asked, "have the people of this country had to call in a High Court Judge, however eminent, in order to carry out a roving commission into the lives of various individuals, so that we may be informed whether we are behaving ourselves or not? Can you contemplate Mr. Gladstone requiring advice on this subject? Disraeli would have laughed himself silly . . . [19]

Even so, the inquiry of which Mr. Grimond purported to be so critical had comparatively mild powers, and many less teeth than it would automatically have received had it been appointed here, for Lord Denning had no power to summon witnesses or to administer an oath. He had in effect to act as detective, solicitor, counsel and judge. It is true that he was offered extra powers by the Prime Minister if he found he required them, but he found that he did not. All witnesses whom he asked to provide evidence to him did so and he considered that he was not inhibited in arriving at the truth by the absence of a power to take evidence on oath. That inquiry was admittedly somewhat special because it was held in private, thereby producing a degree of co-operation and frankness from witnesses which probably would not otherwise have been obtained; but I have dwelt on it as a good illustration of the point that not all important inquiries which clearly fall into the investigative class must necessarily be endowed with coercive powers in order to be effective.

It is of special interest that in a White Paper published in 1973 the United Kingdom government expressed the view, as a matter of policy, that the use of Tribunals of Inquiry with the strong coercive powers under the Tribunals of Inquiry (Evidence) Act 1921 —

> " . . . should be limited to matters of vital public importance concerning which there is something of a nation-wide crisis of confidence which renders any other method of investigation inadequate."[20]

That policy stems from an acceptance of the premise that the inquisitorial powers available under the Act should be regarded as exceptional and that they necessarily expose the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of having baseless allegations made against him, causing unjustifiable distress and injury to reputation.

I think we should do well to reconsider our own attitudes to non-voluntary inquisitions in the light of the views which have so recently been expressed about them in Canada and the United Kingdom. When doing so we ought to reflect on their genesis here one hundred and twenty-four years ago, in the circumstances which I have outlined, and consider whether we have done any better by being indiscriminate in conferring those powers than we would have done by being selective in their application.

Take as a test case the Royal Commission into the failure of the West Gate Bridge which took place in 1970 and 1971. This inquiry, which arose out of a tragic industrial accident in which thirty-five men perished, was treated very much as an adversary proceeding and it occurred in a pre-eminently curial atmosphere. At one time there were no less than twenty-four counsel appearing for those who sought and obtained legal representation. I believe that a need for representation of the kind which was obtained was largely created in those who sought it by the knowledge that they or their employees were compellable witnesses before the Royal Commission. The inquiry occupied the best part of six months in its hearing and about 5,000 pages of evidence and submissions were presented, all in public. The proceedings were widely reported in the press with varying degrees of inaccuracy. The Commission produced a very detailed and useful report but the cost in time and money must have been staggering. I have more than once wondered how much of that enormous and non-recoverable cost might have been saved, without significantly altering the end result, if the evidence had been received voluntarily, and not on oath, and had not been the subject of very protracted cross-examination on an adversary basis. I do not for a moment suppose that most witnesses whose evidence mattered would not have been forthcoming even if they had known that they were not compellable. Indeed, several important witnesses did come from overseas whence it would probably have been impossible in any event to compel their attendance by subpoena.

That inquiry was of a hybrid investigatory and advisory type. The exercise was not only to ascertain the causes of the disaster but to provide advice with a view to avoiding a repetition. I am not sure that much of the work of the inquiry, to the extent that it was advisory, might not have been better undertaken exclusively outside the adversary atmosphere. In this connexion it is worth noting that only about four months before the West Gate Bridge failure a not dissimilar kind of accident befell the Milford Haven Bridge which was under construction in Wales, also causing loss of life. The government inquiry which was established to investigate that occurrence did not enjoy the

doubtful entitlement to compel testimony. It had its investigation completed and its report published within two months of the accident without evident detriment to its quality or its utility. I want to say specifically that in dwelling on the West Gate Bridge Royal Commission I neither make nor imply any criticism of the commissioners. Rather, my criticism is of the system which the commissioners inherited in spite of themselves and within which they were obliged to work having regard to the way in which the institution of Royal Commissions has developed here.

What I have said has been designed to expose the dilemma which I foreshadowed, but did not identify, at the commencement of this paper. Royal Commissions and Boards of Inquiry are undoubtedly useful institutions of government but their optimum exploitation presents a challenge: they serve as a valuable means of gathering information but in doing so they should be careful not to endanger the species which provides it. The species is, of course, the individual. The choice is between preserving the best which the institution has to offer and limiting its use so that it interferes as little as possible with the individual's rights.

In exchange for the power conceded to the courts to compel testimony from him the individual receives a corresponding benefit in that his rights are determined and protected by the courts according to law. By comparison, the individual's concession to a Royal Commission of a similar power produces no corresponding benefit to him, for the Royal Commission can determine nothing in his favour. But while the Royal Commission can do nothing positive for him it can negatively damage his reputation and expose him to the risk of awful injury. In any event, as the system now operates, individuals and organizations who became entangled in a Royal Commission are inherently likely to incur really severe legal costs which they will be expected to bear without any prospect of recoupment. The power to compel individuals to give evidence under oath to a body appointed by the executive, but responsible to no one in particular, is not to be given lightly. In a free society such a power should be confined to the courts to the maximum extent possible.

How should the task of reform be best undertaken? Dare I suggest that there might be a Royal Commission appointed to look at the question? The suggestion is really not so incestuous as it sounds and it is certainly not novel. In 1909 Mr. Winston Churchill as Home Secretary in England established the Balfour Committee of Inquiry into the procedures and practices of Royal Commissions and a useful report[21] was produced in the following year. In 1966 Lord Justice Salmon (now a lord of appeal) was chairman of a Royal Commission

of six persons who inquired into the Tribunals of Inquiry (Evidence) Act 1921. The report[22] subsequently produced was of major importance in this field and provided the basis of the White Paper to which I have referred. Canada, too, has undertaken the research which I have already mentioned. In 1976 there was published in this country a report of a Royal Commission on Australian Government Administration which included some searching work on the Royal Commission as an institution in the federal sphere. So far as I am aware nothing has yet become of it. It is high time that some work was done on the subject in Victoria and changes made.

Sir Hugh Cairns, an Attorney-General who was to become an accurate and careful expositor of the law as Lord Chancellor of England, once employed a most refined sort of mixed metaphor to advise the House of Commons that: "It is always dangerous to pin yourself to one horn of a dilemma until you have heard the other".[23] I have endeavoured to expose one horn and if what I have said provokes any discussion you will, I hope, hear the other.

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