WESTERN AUSTRALIAN FORUM

Royal Commissions, Parliamentary Privilege and Cabinet Confidentiality

★

ENID CAMPBELL†

The Marks Royal Commission, which was set up to inquire into the circumstances surrounding the tabling in State Parliament of a scurrilous petition in November 1992, has proved to be one of the most controversial royal commissions in the history of Western Australia. This article examines some of the legal and constitutional issues which arose from the establishment of the Commission, particularly those relating to parliamentary privilege and the confidentiality of Cabinet discussions.

ROYAL COMMISSIONS of inquiry have, from time to time, been appointed as a result of allegations which have been made in the course of parliamentary proceedings and under cover of parliamentary privilege.[1] Those appointed to inquire and report will have been commissioned by Letters Patent which set out their terms of reference. At common law persons so appointed do not possess power to compel the attendance of witnesses or the production of documents, or to require the giving of evidence under oath or affirmation.[2] In Australia there are,

† Emeritus Professor of Law, Monash University.

1. LA Hallett *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (Sydney: Law Book Co, 1982) 260-264.
2. *McGuiness v A-G (Vic)* (1940) 63 CLR 73.

however, statutes which supply such powers to royal commissioners whensoever they are appointed.[3]

In conducting their inquiries, royal commissions are not bound by curial rules of evidence, though in the absence of valid statutory provisions to the contrary, they are bound to respect the privilege against self-incrimination and legal professional privilege.[4] Judges who have acted as royal commissioners have generally taken the view that the statutory powers accorded to them do not permit them to impeach or question proceedings in Parliament in contravention of Article 9 of the Bill of Rights 1689.[5] In the absence of clear statutory provisions to the contrary, royal commissions which have been armed with powers to compel the giving of evidence cannot use those powers to gain evidence which is protected by what is now generally known as 'the public interest immunity'.[6]

The Houses of the UK Parliament, and the Houses of Parliaments elsewhere in the Commonwealth of Nations which have been endowed with the powers and privileges of the House of Commons, have extensive powers of inquiry. They may delegate their powers to send for persons and papers to committees of their members.[7] Acts in defiance of their commands may attract criminal sanctions, imposed by the Houses themselves. Nowadays there are various inquiries which Houses of Parliament could assign to committees of their members but choose not to do so for political reasons, or because they judge that the task of inquiry is more appropriately assigned to an extra-parliamentary body. That body could be a special statutory commission, a royal commission established by statute or a royal commission established by executive act.[8]

In 1995, the Government of Western Australia secured the appointment of a royal commission to inquire and report on the circumstances and events which had preceded and followed the presentation of a petition to the Legislative Council in 1992, on behalf of Mr Brian Easton. The inquiry would necessarily involve examination of the conduct of a former Premier of the State, Dr Carmen Lawrence, members of her Government and some other persons, including the member of Parliament who had presented the petition. Judicial proceedings were instituted to contest the validity of the Letters Patent constituting the commission. They raised important issues concerning the role of the courts in reviewing executive

---

3. The statute law is surveyed in *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) Title 2.8.
4. See SB McNicol *Law of Privilege* (Sydney: Law Book Co, 1992) 53-55, 65-66, 144-151.
5. The cases are listed in G Griffith *Parliamentary Privilege: Use, Misuse and Proposals for Reform* (NSW Parliamentary Library Research Service, 1997) Briefing Paper No 4, 42-44.
6. McNicol supra n 4, 377-382.
7. See E Campbell *Parliamentary Privilege in Australia* (Melbourne: MUP, 1966) 165-166.
8. See Hallett supra n 1, 26-29.

acts, what extra-parliamentary inquiries may be in breach of parliamentary privilege and the extent to which Cabinet deliberations may be the subject of inquiry by royal commission.

The attempt to have the inquiry by royal commission stopped by judicial order failed. The inquiry proceeded and in the course of it evidence was received of what had transpired in Cabinet. The commissioner's report, tabled in the Parliament in November 1995, was, as no doubt the commissioning government hoped it would be, condemnatory.[9]

This article is concerned primarily with the legal issues mentioned above. The reasons why the courts decided as they did in what may be termed 'the Easton affair' cannot, however, be fully appreciated without an understanding of the events which led to the establishment of the royal commission.[10] These events are described in the next part of the article.

THE EVENTS

On 5 November 1992, the Hon John Halden MLC presented a petition to the Legislative Council on behalf of Brian M Easton. Mr Easton, a former Public Service Commissioner, had recently been party to divorce proceedings in the Family Court of Western Australia. He was, apparently, aggrieved by the outcome.[11] In his petition he alleged that his ex-wife, Mrs Penny Easton, and her sister had given false testimony in the court proceedings. He also alleged that highly confidential documentary material had been given to Penny Easton by the then Leader of the Opposition, the Hon Richard Court MLA.[12] The petition received considerable publicity. On 9 November, Penny Easton committed suicide.

On 10 November 1992, the Legislative Council established a Select Committee of Privilege to inquire into whether in the preparation, presentation, use and promotion of the petition there had been a breach of the privileges of the House. At this point it is worth noting that there was no doubt that the petition was protected by Article 9 of the Bill of Rights 1689, which is part of the law of Western Australia by virtue of section 1 of the Parliamentary Privileges Act 1891 (WA). Nor was there any doubt about the House's jurisdiction to undertake the inquiry committed to it. The Select Committee's report (dated 14 December 1992, but not

---

9. Royal Commission *Report into the Use of Executive Power* (Perth, 1995) (hereafter referred to as 'the Marks Commission', after its chairman Mr Kenneth H Marks QC).
10. These events are described in *Halden v Marks* (1996) 17 WAR 447. See also H Goodwin, A Stewart & M Thomas 'Imprisonment for Contempt of the Western Australian Parliament' (1995) 25 UWALR 187, 193-200.
11. He claimed he had been forced into bankruptcy.
12. Marks Commission supra n 9, para 3.2.2.

tabled by the President of the Legislative Council until June 1994) found the petition to be misleading in three respects and unfair in two other respects.[13]

On 22 June 1994, the Legislative Council resolved that Mr Easton be ordered to make a written apology by 5 July. The form of the apology which was expected was set out in the resolution. On 9 August 1994, the President of the Legislative Council notified the House that Mr Easton had not complied with the order. Another Select Committee was appointed to inquire and report on this matter. In December it reported that Mr Easton's non-compliance was a serious breach of parliamentary privilege. A majority recommended that Mr Easton be imprisoned for contempt of the House.[14] This recommendation was adopted by the Legislative Council and a warrant for Mr Easton's arrest was issued on 28 December. He was taken into custody in January 1995, but was detained for only seven days.

The Easton affair continued to attract considerable publicity. Conflicting statements were published by the mass media concerning the role which Dr Carmen Lawrence, the former Premier of the State, may have played in the presentation of the petition. In February 1993, she had been succeeded by the former Leader of the Opposition, the Hon Richard Court MLA, and had moved to a seat in the House of Representatives and the federal Ministry. Dr Lawrence stated publicly that she had no knowledge of the petition until shortly before its presentation, and that she was not aware of its contents until it had been presented. In April 1995, two of her former colleagues in State Cabinet made public statements which did not square with her account. In the course of a radio interview in the same month Mr Court claimed that the Easton petition had been presented for the purpose of discrediting him and the Liberal Party before the impending State general election.

On 9 May 1995, Mr Court announced the appointment of a royal commissioner, a retired judge of the Supreme Court of Victoria, Mr KH Marks QC, 'to inquire and report on whether the circumstances and events preceding and following the presentation of [the Easton petition] involved conduct that was an improper or inappropriate use of executive power or public office or was motivated by improper or inappropriate considerations'.[15] The terms of reference stated that, for the purpose of the inquiry, the commissioner should:

---

13. Select Committee of Privilege (LC) *Report Concerning the Petition of Brian Easton* (Perth, 1992). See also *Halden v Marks* supra n 10, 453-454.
14. Select Committee of Privilege (LC) *Report Concerning the Non-compliance by Brian Easton with the Order of the House of 22 June 1994* (Perth, 1994). It is doubtful whether the Legislative Council had power to adopt this recommendation because under the Parliamentary Privileges Act 1891 (WA) the forms of contempt punishable by the State Houses are limited. Mr Easton's refusal to apologise does not appear to come within the description of any of the defined offences: see infra n 67.
15. Marks Commission supra n 9, 1.

(a) Identify all persons who were at the relevant time —
- Ministers of the Crown;
- members of Parliament;
- staff of such Ministers or members acting on or purporting to act on behalf of or on the instructions of such Ministers or members; or
- holders of public office,

and who —
(i) were directly or indirectly involved in those circumstances or events, whether in connection with the preparation of the petition or its presentation or the timing of its presentation or in any other manner; or
(ii) knew of or considered the petition or any of its contents or proposed contents prior to its presentation to the Legislative Council;

(b) Determine the nature and extent of such involvement, knowledge or consideration and the circumstances in which such knowledge was obtained or such consideration took place;

(c) Determine the motivation for the conduct of those persons in the course of such involvement; and

(d) Determine whether and if so when and to what extent such persons communicated information in respect of the petition or of its contents or proposed contents to members of the news media.[16]

In addition, the terms of reference directed that, should the commissioner be unable to obtain information relevant to the inquiry because of the operation of Article 9 of the Bill of Rights 1689, he should make an interim report 'outlining the nature of the information sought to be obtained, the circumstances in which ... [he had] been unable to obtain the information, and the reason why obtaining that information would or might assist [him] in completing the inquiry and report'.[17]

Following the appointment of the royal commission Mr Halden and Dr Lawrence instituted proceedings in the Supreme Court of Western Australia in an attempt to halt the inquiry. The proceedings were unsuccessful and commissioner Marks was able to open the public hearings in mid-August. The commissioner presented his report in November 1995. It contained findings which were adverse to both Dr Lawrence and Mr Halden.[18] On the evidence he had received Mr Marks concluded that there had been at least four occasions before the presentation of the Easton petition on which Dr Lawrence had participated in discussions about Mr Easton's allegations and that she had initiated discussion of them at a Cabinet meeting on 2 November 1992. For reasons which need not detain us here, commissioner Marks also concluded that, having regard to principles of representative government, the conduct of both Dr Lawrence (as Premier) and of

16. Ibid, 1-2.
17. Ibid, 2.
18. Ibid, paras 9.19, 9.20.

Mr Halden (as a member of Parliament), in the circumstances and events prior to and since the presentation of the petition, had been improper.

THE LITIGATION

On 29 June 1995, Mr Halden (who had by this date ceased to be a member of the Legislative Council) and Dr Lawrence commenced proceedings in the Supreme Court of Western Australia. They sought a declaration that the instrument appointing commissioner Marks was 'invalid and void' and an injunction restraining him from proceeding.[19] An interlocutory injunction was also sought but was refused by Steytler J on 10 July.[20] On 13 July, the plaintiffs gave notice of appeal against this decision and on 17 July sought a stay of the hearing before the commissioner pending the hearing of the appeal. They also sought a further injunction. On that day the commissioner had begun hearing evidence from the first witness, a former Press Secretary to Dr Lawrence. The further injunction was sought on the ground that the taking of this evidence was in breach of parliamentary privilege, though the commissioner had ruled that it was not.[21] On 18 July, Heenan J granted an interim injunction to restrain the commissioner's inquiry pending the appeal; he also referred the fresh application for an injunction to the Full Court. The application was heard by Rowland, Murray and Anderson JJ on 27 and 28 July 1995.

The action commenced in the Supreme Court by Mr Halden and Dr Lawrence was not the only judicial proceeding in respect of the royal commission. Mr Easton had been named as one of the defendants to that action, but on 3 July 1995 he had instituted proceedings in the High Court of Australia for declaratory and injunctive relief. The defendants to his action were the President of the Legislative Council, Dr Lawrence, Mr Halden, the member of the Legislative Council who had chaired the two Select Committees of the Council, Premier Court and commissioner Marks. Mr Easton's application for an interlocutory injunction seems not to have been made for the purpose of bringing the inquiry before commissioner Marks to an end. Toohey J, who heard the application on 18 July and gave judgment on 20 July,[22] perceived Mr Easton's object to be rather to secure a ruling by the High Court on the meaning and effect of the terms of reference given to commissioner Marks. Mr Easton's purpose, it appeared to Toohey J, was to obtain a ruling that the proceedings before commissioner Marks would enable him to vindicate his reputation. Certainly Mr Easton did not challenge the validity of the commission.

---

19. The defendants were Messrs Marks, Court and Easton.
20. *Halden v Marks* supra n 10, 452.
21. Ibid, 457.
22. *Easton v Griffiths* (1995) 130 ALR 306.

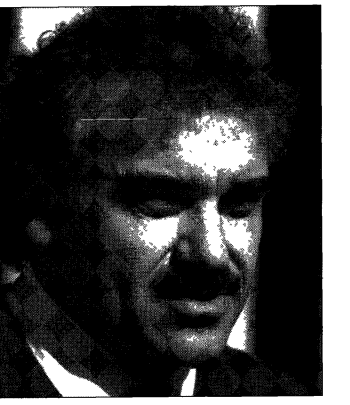
The statement of claim which Mr Easton had filed in the High Court was, one gathers from comments made upon it by Toohey J, long and repetitive, and the basis upon which it could attract the original jurisdiction of the High Court was somewhat tenuous.[23] Mr Easton claimed, inter alia, that the proceedings of the two Select Committees which had inquired into his case, and the related proceedings of the Legislative Council, were void on constitutional grounds. Those grounds appear to have been that the proceedings violated the freedom of political communication implied in the federal Constitution. Only one of the defendants named by Mr Easton played an active part in the hearing before Toohey J. He was Premier Richard Court. Toohey J adjudged that Mr Easton should not be granted the injunction sought by him. His reasons for judgment indicated that he was aware of the litigation before the State Supreme Court. His assessment was that it was not appropriate for the High Court to intervene.

The appeal to the Full Court of the Supreme Court was heard in late July 1995 and judgment was delivered on 2 August. The Full Court dismissed the appeal. The High Court subsequently refused special leave to appeal. The application for special leave to appeal was heard by Dawson, McHugh and Gummow JJ on 3 August. Leave was refused on 14 August, principally on the ground that the High Court does not usually grant special leave to appeal from interlocutory orders.[24]

The grounds on which Mr Halden and Dr Lawrence challenged the validity of the commission issued to Mr Marks were

Kenneth H Marks QC

Carmen Lawrence



John Halden

23. The only basis would have been that it was a matter arising under s 106 of the federal Constitution, which attracted the jurisdiction given to the High Court under the Judiciary Act 1903 (Cth): see *McGinty v WA* (1996) 186 CLR 140.

24. (1995) 13 The Legal Reporter (Special Leave) 1.

essentially three: (i) it purported to authorise the commissioner to infringe parliamentary privilege; (ii) it purported to inquire into proceedings of a Cabinet meeting of a previous government; and (iii) it had been issued for an improper purpose. While technically the Full Court had to decide only whether an interlocutory injunction should be granted, effectively its decision was the final judgment in the case. In the opinion of the Full Court, grounds for judicial intervention had not been made out.

The obvious starting point for analysis of the Full Court's disposition of the case is the law which the courts have developed over time regarding their role in reviewing decisions to create royal commissions of inquiry and actions taken by royal commissioners in purported discharge of their functions.

ROYAL COMMISSIONS AND JUDICIAL REVIEW

The power to establish royal commissions of inquiry has commonly been regarded as one of the royal prerogatives, albeit one which may be overridden or modified by statute. The courts have long assumed jurisdiction to determine questions about the existence and ambit of royal prerogatives and have held that, at common law, the prerogative to appoint commissioners of inquiry does not include the power to endow those so appointed with power to coerce the giving of evidence or to impose legal sanctions.[25] This might suggest that, at common law, royal commissioners possess no greater power to investigate than do citizens and representatives of the mass media. It has, however, been pointed out that an inquiry by royal commission is distinctive in that, for the purposes of the law of defamation, proceedings in the course of the inquiry will be afforded greater protection than proceedings in the course of an inquiry initiated by a non-governmental agent.[26]

As has already been mentioned, Australian Parliaments have enacted legislation which provides royal commissions, whensoever they are appointed, with the authority to compel the giving of evidence relevant to the terms of reference of the particular commission. Having regard to the existence of such statutory provisions it is not surprising that Australian courts have claimed jurisdiction to rule on the validity of the instruments by which royal commissioners have been appointed[27] and also to decide whether a matter falls within a commission's terms of reference so as to attract the commission's coercive powers.[28] Courts have also decided

---

25. See supra p 239.
26. *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25, Stephen J 155-156.
27. *A-G (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644; *Lockwood v Cth* (1954) 90 CLR 177; *Bercove v Hermes (No 3)* (1983) 51 ALR 109, 112-113; *Boath v Wyvill* (1989) 85 ALR 621.
28. *Lloyd v Costigan (No 2)* (1983) 48 ALR 241; *Eatts v Dawson* (1990) 93 ALR 497; *A-G (Cth) v Queensland* (1990) 94 ALR 515.

whether pursuit of an inquiry by royal commission would be in contempt of court by reason of the likelihood that it would prejudice adjudication of pending judicial proceedings.[29] And there is now authority for the view that the ultimate findings of a royal commission are subject to judicial review, for example on the ground that they are not supported by any logically probative evidence or on the ground that someone was denied a right to procedural fairness.[30]

Judicial proceedings to contest the validity of the instrument by which a royal commission has been appointed, with the object of obtaining a court order prohibiting inquiry, are likely to be rare. In Australia such proceedings are most likely to be instituted in relation to royal commissions established by the Commonwealth executive. In such cases the challenge could be made on constitutional grounds. The party instituting the challenge might claim that the matter into which the commission has been directed to inquire is not one within federal legislative competence.[31] Were a person appointed as a federal royal commissioner to be a judge of a federal court, the challenge might be made on the basis that Chapter III of the federal Constitution impliedly prohibits the appointment of federal judges to offices the duties of which are incompatible with the performance of their judicial functions.[32] It is, however, by no means clear that Chapter III would be construed as placing like inhibitions on the appointment of judges of State courts to non-judicial offices, whether they be State or federal.[33]

The plaintiffs in *Halden v Marks*[34] challenged the establishment of the Marks royal commission partly on the ground that those responsible for its establishment, whether it be under the royal prerogative or its statutory embodiment in section 5 of the Royal Commissions Act 1968 (WA), had been guilty of an abuse of power. At one time there would have been little prospect of persuading a court that a decision to appoint a royal commission, in exercise of prerogative power, was judicially reviewable. The courts have, however, in recent years, indicated that the manner in which at least some prerogative powers have been exercised is judicially reviewable on grounds such as use of power for an improper purpose.[35] The plaintiffs in *Halden v Marks* did not persuade a Full Court of the Supreme Court that those

---

29. *Johns & Waygood Ltd v Utah Australia Ltd* [1963] VR 70; *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* supra n 26; *Sharpe v Goodhew* (1989) 90 ALR 221.
30. *Mahon v Air New Zealand* [1984] AC 808; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
31. See cases cited supra n 27.
32. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
33. This question was not resolved in *Kable v DPP (NSW)* (1996) 189 CLR 51.
34. Supra n 10.
35. See MI Aronson & BD Dyer *Judicial Review of Administrative Action* (Sydney: Law Book Co, 1996) 156-161.

responsible for establishment of the Marks royal commission had, on the evidence put before it, been guilty of misuse of executive power.

The Full Court chose to treat this aspect of the case as one involving the exercise of the statutory power to appoint royal commissions which is expressly conferred by section 5 of the Royal Commissions Act 1968 (WA). The Court seems to have accepted that this power is exercisable subject to constitutional limitations on the legislative powers of the State Parliament. It stated that, for present purposes, it was sufficient to conclude that a proper purpose for the appointment of a commission under section 5 of the Royal Commissions Act 1968 (WA) —

> will be to secure an inquiry into and report upon ... a matter which is of a public character, having a connection with the peace, order and good government of this State, and concerned with the activities, motivations and the quality or nature of persons concerned in the functions of government, Parliament, and public office. The relevant considerations in respect of the exercise of the prerogative or Executive power of appointment will therefore be those which bear upon the need to make such an inquiry and report, with or without recommendations.[36]

The Full Court's opinion was that the matters specified in the terms of reference given to commissioner Marks were of the requisite character. Those matters clearly concerned a matter of 'public controversy'. The fact that Premier Court, and, were it the case, 'other members of the Executive Council involved in making the recommendation' for issue of the commission to commissioner Marks, 'may have appreciated that the outcome of the Commission [might] cause damage to the reputations of some of those into whose conduct the inquiry was to be conducted' did not, the Court said, invalidate the decision to establish the commission.[37]

Occasions have arisen on which, during the course of inquiry by a royal commission, an injunction has been sought either to halt the inquiry until the conclusion of pending judicial proceedings or to prevent the commission from continuing to hold public hearings and to prevent publication of the evidence it receives and publication of any report.[38] In one case an inquiry by royal commission was effectively brought to an end when the Supreme Court of Queensland ruled that one of the two persons appointed as commissioners had, by his conduct, become disqualified because his conduct had created a reasonable apprehension of bias.[39] Injunctions have also been sought to prevent use by royal commissions of coercive powers to pursue certain lines of inquiry.[40]

---

36. *Halden v Marks* supra n 10, 460.
37. Ibid.
38. See cases cited supra n 29.
39. *Carruthers v Connolly* [1998] 1 Qd R 339.
40. See cases cited supra n 28.

In New South Wales[41] and South Australia, but not in Western Australia, judicial review of the actions of royal commissions may be constrained by a statutory privative clause. Section 9 of the Royal Commissions Act 1917 (SA), for example, provides that:

> No decision, determination, certificate or other act or proceeding of the commission, or anything done or the omission of anything, or anything proposed to be done or omitted to be done by the commission, shall, in any manner whatsoever, be questioned or reviewed, or be restrained or removed by prohibition, injunction, certiorari, or otherwise howsoever.

This section does not preclude a challenge to the validity of the instrument of commission. Nor will it preclude judicial review of actions of a royal commission on the ground that they are patently beyond its jurisdiction.[42]

In *Halden v Marks* the plaintiffs challenged the validity of the instrument by which the royal commissioner had been appointed and which had defined his terms of reference. Their primary object was to have the commissioner restrained by judicial order from proceeding with the inquiry committed to him with the aid of the powers conferred on royal commissions by the Royal Commissions Act 1968 (WA). To achieve that object they needed to satisfy the Supreme Court that their application for an interlocutory injunction to stay proceedings before the royal commission, pending judicial determination of the substantive issues, should be granted.

The Full Court had regard to special principles which have been enunciated by the High Court in relation to cases in which interlocutory injunctions are sought to restrain the exercise of governmental powers.[43] It concluded that, in the present case, the plaintiffs had not satisfied one of the essential conditions for interlocutory relief, namely:

> That there is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be entitled to relief.[44]

The Court concluded that the evidence to date had fallen 'far short of establishing that the members of Cabinet who apparently concurred in the appointment of the Commission were activated by improper purposes or irrelevant considerations'.[45] The application for interlocutory relief based on a claim that

---

41. Royal Commissions Act 1923 (NSW) s 14A; Special Commissions of Inquiry Act 1983 (NSW) s 36(2).
42. The effect of the section was considered in *ABC v Jacobs* (1991) 56 SASR 274 and *Aboriginal Legal Rights Movement Inc v South Australia [No 3]* (1995) 64 SASR 566.
43. *Halden v Marks* supra n 10, 466.
44. *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153.
45. *Halden v Marks* supra n 10, 465.

Cabinet confidentiality would be breached was premature. There was no evidence that the commissioner would take action in contravention of relevant principles.[46]

The plaintiffs' claim for interlocutory relief, based on parliamentary privilege, was dismissed more categorically and in terms which suggested that, even at trial, their claim would have to be dismissed. 'There is not', the Full Court concluded, 'a serious question to be tried that, as regards parliamentary privilege, the court can give the relief sought, or any relief'.[47]

The next part of the article explores the question of whether the Full Court was right in dismissing the plaintiffs' claim on this last mentioned ground in so peremptory a fashion. It was a question which concerned, in a direct way, the relationship between the courts and Houses of Parliament regarding the administration and enforcement of laws to do with parliamentary privilege.

PARLIAMENTARY PRIVILEGE

Section 1 of the Parliamentary Privileges Act 1891 (WA) gives to the Houses of the Western Australian Parliament, their members and committees, the powers, privileges and immunities of the House of Commons of the UK Parliament, its members and committees, for the time being. (This section is subject to more specific provisions in the Act.) Article 9 of the Bill of Rights 1689 applies to the Houses of the State Parliament by force of this section. Rendered into modern English, Article 9 provides:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Those who drafted the terms of reference of commissioner Marks obviously recognised that to have authorised inquiry into the Easton petition itself would have been contrary to Article 9.[48] The inquiry was thus limited to the circumstances and events which had preceded and followed the presentation of the petition. But in their action in the Supreme Court, Mr Halden and Dr Lawrence contended that 'inquiry outside Parliament into the activities of parliamentary officers, members of Parliament or their staff, both before and after the presentation of the petition in the Chamber would be to question or impeach proceedings in the Parliament'.[49] Their contention clearly raised a question as to the extent of the protection conferred by Article 9.

---

46. Ibid, 465-466.
47. Ibid, 465.
48. On Art 9 and petitions: see *Lake v King* (1667) Wms Saund 120, 131-133; 85 ER 128, 137, 139, 141.
49. *Halden v Marks* supra n 10, 461.

It is now well established that in polities in which the Houses of Parliament enjoy the privileges of the House of Commons, the existence and extent of parliamentary privileges are determinable by the courts. In the leading Australian case of *R v Richards; ex parte Fitzpatrick and Browne,*[50] the High Court stated the governing principle thus:

> It is for the courts to judge of the existence in either House of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.[51]

There have been many occasions on which courts have had to consider the nature and extent of the protection afforded by Article 9 of the Bill of Rights, but, as the Full Court recognised, this question has arisen mainly in the context of judicial proceedings already before a court in which the court has found it necessary to decide what Article 9 requires in relation to the conduct of those proceedings. The Full Court knew 'of no case in which a court has made such a ruling in a case in which the court was asked to enjoin a person or body from engaging in otherwise lawful conduct on the ground that it was conduct in contempt of Parliament or a breach of a privilege of Parliament'.[52] The Court concluded that it would be intruding into an exclusively parliamentary domain were it to determine whether the inquiry assigned to commissioner Marks required him to infringe parliamentary privileges and immunities.

The Court seems to have been exercised by the possibility of conflict between courts and Houses of Parliament as to what is in breach of privilege, and by the need to avoid such conflict. It acknowledged that the issue raised by Mr Halden and Dr Lawrence could be presented in the Parliament. But it thought it —

> beside the point (if it is the fact) that, as things presently stand in Parliament, there will not be any challenge by Parliament to the conduct of the Commission, even if that conduct does breach its privileges.[53]

Was the Full Court right or justified in adopting the position it did on the issue of parliamentary privilege? It was undoubtedly right in drawing attention to the fact that Houses of Parliament invested with a jurisdiction to impose penalties for breach of their privileges must necessarily have to adjudicate the extent of those privileges.[54] Should penalties be imposed, they may be imposed in such a way that the House's action may not be vulnerable to challenge in a court of law.[55]

---

50. (1955) 92 CLR 157.
51. Ibid, 162.
52. *Halden v Marks* supra n 10, 462.
53. Ibid, 463.
54. Ibid, 462.
55. See *R v Richards; ex parte Fitzpatrick and Browne* supra n 50.

But the fact remains that courts have for a long time asserted jurisdiction to determine the existence and ambit of parliamentary privileges, even though their determinations have not always been in conformity with the views of the Houses.[56]

Courts have sometimes allowed the presiding officer of a House to appear before them as amicus curiae in order to make submissions on what Article 9 of the Bill of Rights 1689 means and requires.[57] In *Halden v Marks*[58] the Full Court gave leave to the President of the Legislative Council to appear in that capacity. But in such cases the courts have insisted that it is ultimately for them to decide what Article 9 means and requires, and that they are not bound to defer to the parliamentary view.

A second point to be made about the position adopted by the Full Court is that the absence of precedent for the grant of judicial remedy to restrain action alleged to be in breach of Article 9 could not have been regarded as an absolute bar to the grant of the remedy sought by the plaintiffs. They were, after all, seeking a judicial ruling on the ambit of the protection conferred by Article 9. Admittedly their claim was based only on the terms of reference of the royal commissioner and was made in advance of any action on his part which was clearly in breach of Article 9. The Court might have rejected the plaintiff's claim to injunctive relief simply on the ground that the commissioner's terms of reference did not, on their face, require him to infringe parliamentary privilege and that therefore their application for remedy was premature. In this connexion it is worth noting that, when the High Court refused the application for special leave to appeal, it stated that it did not 'necessarily agree with the Full Court that there was no serious question to be tried regarding parliamentary privilege'. It did not, however, think that the Full Court had been 'in error in concluding that this was not a proper case for interlocutory relief at this stage'.[59]

Precedent for judicial proceedings to restrain an extra-parliamentary inquiry into what were indisputably proceedings in Parliament was later to be provided in the case of *Arena v Nader*.[60] This was a special case inasmuch as the inquiry had been commissioned by the executive branch of the government of New South Wales, pursuant to a special Act of the State Parliament, and that the matter raised for judicial determination was the constitutionality of the special Act. In this case there was no contest over the justiciability of the issue raised for judicial decision. The issue was one which necessarily involved interpretation of the special Act and

---

56. As in the case of *R v Murphy* (1986) 5 NSWLR 18. S 16 of the Parliamentary Privileges Act 1987 (Cth) was enacted to negate the court's interpretation: *Hansard* (Sen) 7 Oct 1986, 892; *Hansard* (HR) 19 Apr 1987, 1154-1156.
57. Eg in *R v Murphy* ibid.
58. Supra n 10, 450.
59. The Legal Reporter surpa n 24.
60. (1997) 42 NSWLR 427.

determination of its legal effects. The special Act had been enacted in light of the inhibitions imposed by Article 9 of the Bill of Rights 1689 on extra-parliamentary inquiries to ascertain the truth of statements made under parliamentary privilege. The Act had been carefully crafted so as to exempt the member of Parliament whose allegations were to be the subject of inquiry from any legal obligation to appear before the special commission to render account for what she had said under parliamentary privilege. The New South Wales Court of Appeal rejected her challenge to the constitutionality of the special Act and the High Court refused her application for special leave to appeal.[61]

The Full Court's ruling in *Halden v Marks* on the issue of parliamentary privilege did not relieve commissioner Marks from the responsibility of ruling on objections based on parliamentary privilege which were made during the course of the inquiry. Some issues of privilege were in fact raised and the commissioner's ultimate report includes a chapter on this subject. The report records that the commissioner 'took every care not to trespass on the jurisdiction of Parliament'.[62]

On the important question of whether privilege would be breached by inquiry into the circumstances which preceded the presentation of the Easton petition, commissioner Marks was guided by a ruling which the President of the Legislative Council had made on 16 May 1992. This ruling was that the preparation of a petition, and its circulation prior to presentation, was not protected by Article 9 of the Bill of Rights 1689. It was on the basis of this ruling that the commissioner concluded that it was open to him to inquire into Mr Halden's conduct before and after the presentation of the petition by him.[63] The commissioner did, however, say that: 'If without more, Halden had been asked by Easton to present a petition which he had signed, this report would be silent about the conduct of Halden and Dr Lawrence. That conduct would be a matter only for Parliament'.[64]

But inquiry had revealed that Mr Easton had not come to Mr Halden with a signed petition. Rather it was Mr Halden who had suggested to Mr Easton that he should ventilate his grievances by way of a petition. In the opinion of commissioner Marks, 'in using Easton's grievances and allegations for his own personal interests at the expense of the interests of the parties to the Easton matrimonial dispute and members of their families'[65] Mr Halden had engaged in improper conduct. Some might think that this was tantamount to questioning his motives for presenting the

61. Ibid. See also E Campbell 'Investigating the Truth of Statements made in Parliament: The Australian Experience' (1998) 9 PLR 125; G Griffith 'The Powers and Privileges of the NSW Legislative Assembly: *Arena v Nader*' (1998) 9 PLR 227.
62. Marks Commission supra n 9, para 2.4.4.
63. Ibid, para 2.7. Committee of Privileges for the Senate *11th Report: Circulation of Petitions* (Cth Parl Paper 46, 1988).
64. Ibid, para 6.2.21.
65. Ibid, para 9.20(a).

petition, contrary to the requirements of Article 9. But the Legislative Council apparently took no exception to the commissioner's inquiry in this regard, even though the Supreme Court had previously acknowledged the possibility that the conduct of the commission might be challenged by the Council.[66] Precisely how that challenge might be made the Court did not indicate. Might it have been by a suit for a declaration in relation to a ruling by the commissioner? Certainly the limited penal jurisdiction of the Houses would have been of no avail.[67]

Those summoned to appear before the royal commission who refused to answer questions would have risked prosecution under the Royal Commissions Act 1968 (WA).[68] Had commissioner Marks rejected an objection by a witness based on parliamentary privilege, the witness might conceivably have sought judicial review of the commissioner's ruling.

The report of commissioner Marks made reference to the evidence of the Clerk of the Legislative Council relating to his role in the processing of petitions and in handling the Easton petition. The Clerk had been granted permission to appear before the commission, by resolution of the Council.[69] The Council had, however, resolved not to accede to the request of senior counsel assisting the commission for access to the transcript of evidence before the Select Committee which had investigated the Easton petition.[70] The reason given was that the Council had not ordered that the transcript be printed. The transcript was clearly a proceeding in Parliament and any attempt by the commission to compel its production could have been resisted.

In August 1995, Mr Halden was summoned to give evidence to the Marks commission and to produce certain documents. He agreed to allow staff assisting the commission to search premises in which he stored documents. During the search certain documents were seized, but when Mr Halden realised that some of these documents might be protected by parliamentary privilege, he contacted the commission. The documents were then handed to the solicitor acting for the President of the Legislative Council. In September, the Council appointed a Select Committee to consider the matter and in an interim report, tabled on 19 September, the Committee reported that those of the documents which Mr Halden had been summoned to produce to the commission were protected by parliamentary privilege. The Committee recommended that they not be returned to the commission.[71] In its

66. *Halden v Marks* supra n 10, 463.
67. Parliamentary Privileges Act 1891 (WA) ss 8, 9 and 11 limit the offences punishable by the Houses.
68. Ibid, ss 13, 14.
69. Marks Commission supra n 9, para 2.5.
70. Ibid, para 2.3.
71. Select Committee of Privilege *Report on Documents Obtained and Retained by the Royal Commission into Use of Executive Power* (WA Parl Paper 615B, 19 Sep 1995).

final report, tabled in December 1995, the Committee considered whether the commission had been guilty of contempt in not returning the privileged documents immediately to Mr Halden. It concluded that it had not, but nevertheless recommended return of the documents to Mr Halden.[72]

CABINET CONFIDENTIALITY

Prior to the establishment of the royal commission there had been suggestions in media statements that the subject of the Easton petition had been discussed in Cabinet before the petition had been presented in the Legislative Council. The terms of reference of the commission did not make specific reference to these suggestions, though in support of their case for a judicial order which would prevent the royal commissioner from proceeding with his inquiry, Mr Halden and Dr Lawrence claimed that there was a risk that the commissioner would admit evidence of Cabinet proceedings.[73] They would, presumably, have been advised that, normally, evidence of such proceedings is not admissible in a court of law, but they could not have been assured that commissioner Marks would regard that principle as applicable in the proceedings before him.

Both at first instance and on appeal the Supreme Court seems to have accepted that the public interest immunity which protects Cabinet proceedings from disclosure in a court would control the commissioner's powers of investigation.[74] But the commissioner had not yet taken any action which suggested that he would not respect that immunity. An application for an injunction on the ground of what the commissioner might do was premature and, in any event, was not a ground on which the validity of the Letters Patent could be contested.

In the event commissioner Marks did rule on the question of the admissibility of evidence of proceedings in Cabinet.[75] He recognised that he was bound by principles enunciated by the High Court in relation to judicial proceedings, but he noted that, although the High Court had said that Cabinet deliberations prima facie attract the public interest immunity, it had also said that the protection so afforded is not absolute.[76] Commissioner Marks perceived his task to be that which a court of law must perform when deciding whether the prima facie rule is overridden by a public interest superior to that which is served by that prima facie rule. In his opinion the public interest was furthered rather than harmed by disclosure

72. Select Committee of Privilege *Report into Documents Obtained and Retained by the Royal Commission into Use of Executive Power* (WA Parl Paper 986, 6 Dec 1995). See also 'Privileged Documents Acquired by Royal Commission' (1996) 64 The Table 61.
73. *Halden v Marks* supra n 10, 464.
74. Ibid, 464-465.
75. 16 Aug 1995.
76. Note 'Executive Power' (1995) 6 PLR 326.

of what had occurred in Cabinet or in informal meetings of its members. Mr Marks would, no doubt, have taken note of the example given by the High Court in *Commonwealth v Northern Land Council*[77] of a case in which the class immunity normally accorded to Cabinet deliberations might be outweighed by a superior claim to disclosure. It was a case in which a person was on trial on a criminal charge involving an allegation of serious misconduct on the part of that person in the capacity of a Minister of the Crown.[78]

In a sense, a former Premier of Western Australia stood trial before commissioner Marks. Though the commissioner was not judging whether Dr Lawrence or anyone else had been guilty of any criminal offence, his ultimate conclusions were ones which found serious misconduct on the part of persons in public office.

CONCLUDING OBSERVATIONS

The inquiry undertaken by commissioner Marks was not for the purpose of determining the truth of the allegations made in the Easton petition. That inquiry had already been undertaken by a Select Committee of a House of Parliament. The purpose of the inquiry by royal commission was rather to discover the circumstances which had led to the presentation of the petition, and to determine whether the events preceding and following the petition involved improper conduct on the part of parliamentarians and other officers of government. The commissioner concluded that there had indeed been improper conduct and that this included the conduct of Mr Halden in inducing Mr Easton to exercise his right of petition.

It was a case in which the right of petition had clearly been abused. Once presented to a House of Parliament, the petition became a proceeding in Parliament and, under the laws of defamation, the media could publish fair and accurate reports of its contents with impunity. The parliamentary inquiry which followed presentation of the petition revealed shortcomings in the parliamentary procedures for the processing of petitions. Subsequently the Standing Orders of the Legislative Council were amended in an attempt to rectify these shortcomings.[79]

The Easton affair should, however, prompt consideration of whether the right to petition a Parliament is worth preserving and, if so, whether the manner of its exercise should be subject to more stringent controls.[80] Nowadays most petitions to Parliaments are not ones by which individuals seek redress of personal grievances. They are rather ones by which signatories express concerns about public affairs.

---

77. (1993) 176 CLR 604.
78. Ibid.
79. Goodwin et al supra n 10, 198 (amendment to SO 133).
80. At federal level, controls are imposed by the Senate's Standing Orders (Aug 1977) Ch 10 and by the House of Representative's Standing and Sessional Orders (Jan 1998) Pt IX.

The right to petition parliament was affirmed by resolutions of the House of Commons in 1669,[81] but the incidents of the right have received little attention.

Westminster parliamentary practice ordains that petitions to Parliament be formally presented to a House of Parliament by a member of Parliament. But in 1893 an English court held that a member of Parliament is not under any legally enforceable duty to present a petition put into the member's hands and does not therefore incur any legal liability for failure or refusal to present a petition.[82] It may be that the freedom of political communication which has recently been found to be implied in Australia's federal constitution[83] secures a right to petition Parliaments, at least to the extent of imposing constraints on the capacity of Parliaments to make laws which abridge that right, and also on the capacity of Houses of Parliament to adopt Standing Rules and Orders which inhibit exercise of the right. Within a representative, democratic parliamentary system, freedom to communicate with elected members of a Parliament and, through them, the Parliament itself is all important.

Persons may seek to bring matters to the attention of a House of Parliament otherwise than by formal petition. They may do so in a variety of ways. One is by writing to the presiding officer of the House or the House's clerk. Another is by responding to an invitation to make submissions to a parliamentary committee. Yet another is by sending documentary material to a member of Parliament which the member may then use as a basis for questions in the House. Occasionally a member may have such material tabled and thereby brought within the protection of Article 9 of the Bill or Rights 1689. The question of when material supplied to a member of Parliament becomes a proceeding of Parliament for the purposes of Article 9 is a question of some difficulty which has yet to be resolved by the High Court.[84] If a House considers that such material has become a proceeding in Parliament, it may take the view that extra-parliamentary inquiry into the circumstances in which it came to be supplied is in breach of its privileges.[85]

Commissioner Marks appears not to have been seriously impeded in his inquiries by Article 9 of the Bill of Rights 1689. The experience of an earlier Western Australian royal commission — the Royal Commission into Commercial Activities of Government and Other Matters ('WA Inc') — had, however, been

81. CJ Boulton (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 21st edn (London: Butterworths, 1989) 745; reproduced in AR Browning (ed) *House of Representatives Practice* 2nd edn (Canberra: AGPS, 1989) 745.

82. *Chaffers v Goldsmith* (1894) 1 QB 186.

83. Initially in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television v Cth* (1992) 177 CLR 106. See also *Lange v ABC* (1997) 189 CLR 520.

84. Parliamentary Privileges Act 1987 (Cth) s 16(2) attempts a definition of proceedings in Parliament. Its effect was considered by the Queensland Court of Appeal in *O'Chee v Rowley* (1997) 150 ALR 199.

85. See Committee of Privileges for the Senate *72nd Report* (June 1998).

rather different and it queried whether the protection afforded by Article 9 should be so wide as to preclude all extra-parliamentary inquiries into the truth of allegations made under cover of parliamentary privilege.[86] The three commissioners[87] believed it was open to the Houses to waive the protection of Article 9 and wrote to the presiding officers to request that this course of action be adopted in respect of their inquiry. The parliamentary view was, however, that Article 9 cannot be waived. That seems to be the correct view.[88] The Western Australian Commission on Government devoted a chapter of its 1995 report to parliamentary privilege and recommended that there should be no power of waiver.[89]

A government which desires that the truth of allegations made under parliamentary privilege should be investigated by royal commission must therefore be prepared to secure the enactment of legislation to overcome the limitations of Article 9. The special legislation enacted by the New South Wales Parliament to allow for extra-parliamentary inquiry to be made into serious accusations made in the Legislative Council[90] provides a model.

[The report of the Marks Royal Commission was tabled in State Parliament in November 1995. Subsequently both Mr Halden and Dr Lawrence were charged with offences of giving false evidence to the Commission. They were tried separately in the District Court in Perth, Mr Halden's trial taking place in December 1998 and Dr Lawrence's in July 1999. Both Mr Halden and Dr Lawrence were acquitted. — Ed.]

---

86. See RKF Davis, 'Parliamentary Privilege: Parliament and the Western Australian Royal Commission' (1993) 67 ALJ 671. Davis had been counsel assisting the commission.
87. One serving judge of the WA Supreme Court, a retired judge of that Court, and Sir Ronald Wilson, a retired judge of the High Court.
88. *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 336; Griffith supra n 5, 35-37.
89. WA Parliament *Report No 1* (Perth, Aug 1995) para 10.6.5. The Premier had, however, refused the commission's request that the Royal Commissions Act 1968 (WA) be amended: see para 10.4.2.
90. See supra n 41.