

The Grand Inquest of the Nation

A notion of the past?

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Since at least the beginning of the seventeenth century, the House of Commons has been referred to as the Great or Grand Inquest of the Nation. Indeed, one of the first such references was by Lord Coke in his 4th Institute.

In the nineteenth century, in the seminal case of *Stockdale v. Hansard*, Patteson J stated that the House of Commons was:

. . . the grand inquest of the nation, and may inquire into all alleged abuses and misconduct in any quarter, of course in the Courts of Law, or any of the members of them; but it cannot, by itself, correct or punish any such abuses or misconduct; it can but accuse or institute proceedings against the supposed delinquents in some Court of Law, or conjointly with the other branches of the Legislature, may remedy the mischief by a new law.¹

Another relevant nineteenth century case is *Howard v. Gossett*.² That case involved the Sergeant-at-Arms of the House of Commons being sued in trespass for executing a Speaker's warrant to bring the plaintiff before the Bar of the House. Lord Coleridge, when discussing the scope of the powers of the House of Commons, stated:

That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded: It is unnecessary to attempt to do so now: I would be content to state that they may inquire into everything which it concerns the public weal for them to know; and they themselves, I think are entrusted with the determination of what falls within that category. Coextensive with the jurisdiction to inquire must be

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¹ (1837) 9 AD & E 1112 at 1185.

² *Gossett v. Howard* (1845) 10 QB 359.

their authority to call for the attendance of witnesses, to enforce it by arrest where disobedience makes that necessary, and, where attendance is required, or refused, in either stage, of summons or arrest, there need be no specific disclosure of the subject matter of inquiry, because that might often defeat the purpose of the examination.³

On appeal in that case, Barton Parke J⁴ stated:

. . . it cannot be disputed that the House of Commons has by law the particular powers to take into custody which in the three first pleas it is expressly averred to have exercised; and we have nothing to do with any other. **First, that House which forms the Great Inquest of the Nation, has a power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience, we need not inquire), bring them in custody to the Bar for the purpose of examination.**⁵ [Emphasis added]

I have been asked to assess this concept of Parliament as the Grand Inquest, and attempt to answer whether the concept has any relevance in Australia today. This article is essentially divided into two parts. In the first part I shall deal with the legal aspect, that is, I shall discuss whether as a matter of law the concept of the Grand Inquest applies to Houses of Australian parliaments. In the second part I shall discuss the ‘reality’ of the concept, not as an abstract legal argument, but in context of the real political landscape within Australia.

Some of you may be asking, ‘why is this relevant’? The reason is that the issue may well be determinative of the scope of investigatory powers of the Houses of the Australian Parliaments, that is, what they are able to investigate and what immunities may be claimed in respect of their investigation.

I shall commence by making a caveat — this is not an issue or question that can be given justice in the time available. Therefore, in order to answer the question the best I can in the time available, I must necessarily make numerous assertions without first necessarily providing detailed reasoning or authority.

Summary of the House of Commons position

Before proceeding to discuss the application of the concept to Australia, it is necessary to summarise the concept of the House of Commons as the Grand Inquest. The following general principles can be ascertained about the investigatory or inquisitorial powers of the House of Commons.

³ *Gossett v. Howard* Note 3 at 379–80.

⁴ *Gossett v. Howard* (1847) 10 QB 411.

⁵ Note 5 at 450–1.

- The House of Commons is regarded as the ‘Grand Inquest of the Nation’ and may inquire into any matter it desires.
- The power of the House of Commons as an inquisitor does not arise by virtue of statute or any other written instrument but by virtue of ancient usage and practice (the *lex consuetudo Parliamenti*).
- The House of Commons is but one arm of the Parliament and acting with the other constituent arms of Parliament it can alter the law of the land. An order of the House of Commons itself cannot alter the law of the land. But the House of Commons as part of its power incidental to the Grand Inquest, may call for persons, papers and things. Questions asked must be answered or things sought must be provided. Disobedience to such an order would be a contempt.
- The Courts in an action between party and party, as an incidental matter, can inquire into the legality of an order of the House of Commons or, put another way, the Courts can determine the limits of parliamentary privilege. However, the House of Commons generally is the judge of its own privileges and has sole power to adjudge whether someone is in contempt of the House. It may treat any interference with its inquiries as a contempt, which it alone has power to determine.
- If the House of Commons makes a decision or takes an action whilst acting pursuant to its inquisitorial function, those proceedings are unimpeachable. However, the House is limited as to what action it can take to punish or remedy any matter uncovered by its inquiry; it can only act according to law.

Differences between the United Kingdom and Australia

Turning now to the Houses of Australian parliaments and the relevant legal issues for discussion. There are a multitude of differences between the modern Australian constitutional and political landscape and the United Kingdom when considering whether Australian houses of parliament may be considered ‘Grand Inquests’. But the first thing to be considered is the significant differences between the constitutions of the United Kingdom and the Commonwealth and States of Australia. These differences include:

- The very existence of the powers, privileges and rights of Australian houses of parliament are all dependent in some way upon written instruments — the Commonwealth Constitution and what may be loosely called the ‘state constitutions’, being the most important. In most of the Australian jurisdictions, the Houses of Parliament have by statute been granted the powers, privileges and immunities of the House of Commons. In New South Wales the absence of such a grant means its Houses of Parliament must rely upon the doctrine of necessity — that is, the New South Wales Parliament has those powers, rights and privileges necessary for it to discharge its parliamentary functions — and are thus arguably more susceptible to judicial review and limited in powers.

- The United Kingdom has been (at least until recently) a unitary system of government whereas Australia is a federal system with powers and responsibilities shared between state and Commonwealth systems. (However, the process of devolution is changing this situation in the United Kingdom.)
- The fact that the powers, rights and privileges of Australian houses of parliament are sourced from legal documents means that to some degree there is more risk of legal interpretation of those legal documents, especially in placing the relevant provisions within the context of the entire document.
- Whilst not strictly a legal issue, a related issue is the nature of the judiciary in Australia. It must be recognised that there have been far more instances of restrictive interpretation of the powers, rights and privileges of Parliament in Australia than in the United Kingdom. The incidence of these restrictive interpretations has increased in recent years, indicating perhaps that as ties with the United Kingdom widen so too does the willingness of Australian courts or individual judges to interfere with the parliamentary process. At the risk of being unfair to Australian judges, I believe there are far more Australian judges, who have less appreciation of, and respect for, the separation of parliamentary and judicial powers than there are in the United Kingdom. The quasi-judicial nature of the House of Lords may account for this different culture and understanding.

Legal issues

I now wish to raise and attempt to answer, in a short manner, some issues pertaining to the concept of Australian houses of parliament as Grand Inquisitors.

Scope of power

The first issue I wish to discuss is the scope of investigative power of Australian houses of parliament. This involves such questions as:

- Is the inquisitorial power of a house of parliament distinct from, or merely a manifestation of, its legislative character?
- Is an Australian house of parliament limited in its investigations in respect of matters about which its Parliament may legislate?

There have been a number of authors⁶ who have suggested, and some judicial authority indicate,⁷ that an Australian house of parliament does not have the same unrestricted power as the House of Commons to inquire into anything it desires.

⁶ Enid Campbell, (1966) *Parliamentary Privilege in Australia*, Melbourne University Press, 164–5; Greenwood QC and Ellicott QC, *Parliamentary Committees — Powers over and protection afforded to witnesses*, Australian Parl. Paper 168, 1972, 6–7.

⁷ *Attorney-General v. MacFarlane* (1971) 18 FLR 150 (per Forster J).

The learned authors point to the division of legislative authority between state and Commonwealth Parliaments. The authors do not deny the ability to investigate, they simply deny the ability to establish an investigation that has coercive powers in respect of which the subject matter is beyond the legislative power of the relevant parliament.

In support of such arguments, these authors point to two cases involving royal commissions, where the ability to establish royal commissions outside of legislative competence was denied.⁸

In the Northern Territory decision referred to above, the learned Federal Judge held that the House of Commons in 1900 had two functions, legislative and inquisitorial, and the only function given to the Commonwealth Parliament in 1901 was the legislative function.

I submit that the various views of Campbell, Ellicott, Greenwood and Forster J in *MacFarlane's Case* are incorrect and that the Commonwealth Parliament and most, if not all, state parliaments, possess the same function and powers as the House of Commons as the 'Grand Inquest of the Nation'. In other words, it is submitted that the power of each House of the Commonwealth Parliament to establish parliamentary inquiries is not limited to the Commonwealth Parliament's legislative competence.

Further, I submit that the same principle applies to state parliaments. I am not alone in this view and shall refer to others who have made similar observations.

The Commonwealth

In respect of the Commonwealth Parliament, the following arguments are advanced in support of this proposition. Firstly, the learned authors in reaching their conclusions refer to two cases which concern the power of the Commonwealth to establish commissions of inquiry. But the issue in these cases turned upon the legislative power of the Commonwealth Parliament, specifically the incidental power of the Commonwealth under section 51(xxxix) of the Constitution. Neither case discussed the specific power of the Commonwealth Parliament under section 49 of the Constitution, which is quite distinct from the Commonwealth's legislative or incidental power.⁹

The only possible relevance of these cases is where a parliamentary investigation is established by specific legislation, and the powers of that investigation are detailed by the legislation, in which case there is an exercise of legislative power. It is also

⁸ *Attorney-General (Commonwealth) v. Colonial Sugar Refining Company Ltd* (1914) A.C. 237; (1913) 15 CLR 182; *Lockwood v. The Commonwealth and Other* (1953) 90 CLR 177.

⁹ See Pearce D.C., 'Inquiries by Senate Committees', *Australian Law Journal* 45, 652, who also makes similar observations.

noted that the two cases were concerned with the exercise of an executive power — the power to establish royal commissions. The courts have always been eager to constrain the exercise of executive power but have been much more circumspect in respect of parliamentary power.

Secondly, when considering the power of the Commonwealth under section 49 of the Constitution, its clear words must be paramount. The wording is unambiguous and its intention clear — until legislation otherwise defines, the Commonwealth Parliament has all the powers, immunities and privileges of the House of Commons at the date of federation. Section 49 does not say, or in any way imply, that the power it is granting is subject to the legislative power granted the Commonwealth. The leading authority on section 49 is the High Court decision of *The Queen v. Richards; Ex Parte Fitzpatrick and Browne*.¹⁰ During the course of the unanimous decision the following observations were made about section 49:

The answer in our opinion lies in the very plain words of s.49 itself. The words are incapable of a restricted meaning, unless that restricted meaning be imperatively demanded as something to be placed artificially upon them by the more general considerations which the Constitution supplies. Added to that simple reason are the facts of the history of this particular branch of the law. Students of English constitutional history are well aware of the controversy which attended the establishment of the powers, immunities and privileges of the House of Commons. Students of English constitutional law are made aware at a very early stage of their tuition of the judicial declarations terminating that controversy, and it may be said that there is no more conspicuous chapter in the constitutional law of Great Britain than the particular matters with which we are now dealing. It is quite incredible that the framers of s.49 were not completely aware of the state of the law in Great Britain and, when they adopted the language of s.49 were not quite conscious of the consequences which followed from it. We are therefore of opinion that the general structure of this Constitution, meaning by that the fact that it is an instrument creating a constitution of a kind commonly described as rigid in which an excess of power means invalidity does not provide a sufficient ground for placing upon the express words of s.49 an artificial limitation.¹¹

It is conceded that the *Fitzpatrick and Browne* case was dealing with the question of whether the House of Representatives had the same powers to punish for contempt as the House of Commons. In particular, it questioned whether the doctrine of the separation of powers, implicit within the Constitution, prevent the House of Representatives adjudging and punishing a contempt in an apparently quasi-judicial manner. But even if the conclusion in *Fitzpatrick and Browne* is doubtful, in light of recent decisions by the High Court concerning the doctrine of the separation of

¹⁰ (1955) 92 CLR 165.

¹¹ Note 11 at 172.

powers¹² (a point which I do not accept), it seems plain that the above decision applies *a fortiori* when considering whether section 49 is limited by reference to the legislative powers of the Commonwealth Parliament.

Thirdly, and as also recognised by the High Court in the *Fitzpatrick and Browne* case, the framers of the Constitution were well aware that they were providing the Commonwealth Parliament with powers, privileges and immunities equal to the House of Commons — if not leaving open the possibility that the Commonwealth Parliament could extend its powers. During the eighteenth and nineteenth centuries the Privy Council made it clear that colonial legislatures did not possess the same powers, privileges and immunities as the House of Commons — but that they did possess such powers etc as necessary to conduct and protect their legislative function. If the power of the Commonwealth Parliament were to be limited to powers necessary to assist it in its legislative function, why was section 49 thought necessary?¹³

Fourthly, it is submitted that the view taken by Forster J, and Greenwood and Ellicott, is incorrect because it also erroneously necessitates the conclusion that the only function of the Commonwealth Parliament is a legislative function and that inquisitorial powers are totally reliant upon legislative power. But the Commonwealth Parliament has functions over and above its legislative function, including the scrutiny of the actions of the executive. (This point has been made by Geoffrey Lindell¹⁴ in a 1995 article.) It cannot be understated that the functions of a Parliament in a Westminster system are not limited to the consideration of legislation. The High Court has itself stated ‘to secure accountability of government activity is the very essence of responsible government’.¹⁵ It is submitted that the power of the Commonwealth Parliament under section 49 is not simply a power incidental to the Commonwealth’s legislative function; rather it is a fundamental mechanism to assist the Parliament to discharge its broader functions as an integral part of a system of responsible government upon which the Constitution is founded.¹⁶ I agree with Geoffrey Lindell when he states:

It seems difficult to deny that there should be a general power to inquire into any matter that affects the public interest, read in its broadest sense. Strong and compelling notions of executive accountability to the Parliament can only reinforce that view, whether or not the kind of accountability adopted takes the form of Responsible Government.¹⁷

¹² A Twomey, ‘Reconciling Parliament’s Contempt Power with the Constitutional Separation of Powers’, *Public Law Review* 8, June 1997, 88.

¹³ This point is also alluded to in the article by Twomey (Note 13) wherein an examination of the debates of the Constitutional Conventions reveals that there was some discussion and concern about the breadth of s.49 by delegates and the colonial office.

¹⁴ G. Lindell, ‘Parliamentary Inquiries and Government Witnesses’ (1995) 20 MULR 383 at 386.

¹⁵ *Egan v. Willis* (1998) 195 CLR 424 at 451–2.

¹⁶ Note 15 at 96–7.

¹⁷ Note 15 at 385.

Fifthly, to admit that there are limits to the inquisitorial powers of the Commonwealth Parliament would necessarily be to admit that the High Court has the power to, in effect, dictate what matters the Commonwealth Parliament can consider and debate. Whilst it is accepted that the High Court has a paramount function to interpret the Constitution and strike down both state and Commonwealth legislation repugnant to the Constitution, it is another matter entirely for the High Court to have the power to stifle the freedom of Parliament to consider matters. Indeed, as Geoffrey Lindell¹⁸ points out, such a power, being admitted to the High Court, would in itself be apparently inconsistent with the notion of freedom of communication in relation to political discussion enforced in recent years by the High Court.¹⁹ I submit that it would also be inconsistent with the notion of the separation of powers to permit one arm of government, the High Court, to limit directly the agenda for the other arm of government, the Houses of the Commonwealth Parliament.

What is largely ignored is the fact that the concept of separation of powers swings both ways: it protects the courts from the Parliament and the Parliament from the courts. Thus, whilst it may be unconstitutional for the Commonwealth Parliament to enact legislation declaring that all blue-eyed babies are to be killed because it infringes some deep-rooted or constitutional right, there appears to be no reason why a house of the Commonwealth Parliament could not investigate whether such a law was necessary or constitutional.

Sixthly, to admit ability by the High Court to determine the ambit of the Commonwealth Parliament to conduct an investigation is fraught with practical difficulties that are not inherent in considering and striking down legislation. Who is to say what and when investigations are irrelevant to the operation of the Commonwealth Parliament? It may well be that apparently tenuous investigations actually uncover matters that require Commonwealth legislation, or even require an amendment to the Constitution. As explained above, the English courts have always taken the view that the House of Commons has an unlimited power of inquiry but can only take remedial action with the consent of the other arms of the government. Similarly, should not the Houses of the Commonwealth Parliament be permitted to undertake a *prima facie* unlimited inquiry and take remedial action in accordance with the legislative power set out by the Constitution and interpreted by the High Court?

To limit investigation itself appears to be premature. Isaac and Higgins JJ in *Attorney-General (Commonwealth) v. Colonial Sugar Refining Company Ltd*²⁰ took the view that the Commonwealth Parliament possessed the right to legislate for the purpose of obtaining information on existing matters which might form the basis of constitutional amendment and that it was impossible to pronounce, in advance, that

¹⁸ Note 15 at 388.

¹⁹ Lindell, Note 15, specifically refers to the judgement of Mason CJ in *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106.

²⁰ (1913) 15 CLR 182.

the matters sought to be investigated might not prove to be relevant to matters the proper subject of inquiry.²¹

The Privy Council agreed with Isaac and Higgins JJ on this issue. Viscount Haldane LC delivering the judgment of the Council stated:

Their Lordships think that this last conclusion is entitled to some weight. For even assuming that what can only be made relevant by an amendment of the Constitution is excluded from the class of subjects as to which the Commonwealth Government is entitled to insist on being furnished with information, it is hardly possible for a Court to pronounce in advance as to what may and what may not turn out to be relevant to other subjects of inquiry on which the Commonwealth Parliament is undoubtedly entitled to make laws.²²

Finally, if the *Fitzpatrick and Browne* case is correct — and it has not been seriously questioned by the High Court — and the Commonwealth Parliament can commit for contempt and be virtually impervious to review, then the Houses of the Parliament have the effective means to ensure compliance with any inquiry.²³

The states

Does the notion of the Grand Inquest also apply to the houses of the state parliaments?²⁴

In those states where the houses of parliament are declared to have the same power, privileges and immunities as the House of Commons, there appears to be no reason for holding that the investigatory powers of those houses are limited to the legislative competence of a state parliament. Most of the arguments advanced above in respect of the power of the Commonwealth Parliament appear to be equally applicable to the powers of inquiry of state parliaments. It must be remembered that the constitutions of at least three of those states conferred the powers, privileges and immunities of the House of Commons on their parliaments *prior to federation*. Nothing in the Commonwealth Constitution directly removes those powers, privileges and immunities. Rather, what is removed is the power to legislate in

²¹ Note 20 at 197.

²² [1914] AC 237 at 251–52.

²³ Campbell, Note 7, also concedes this point

²⁴ Campbell, after considering the position of the Commonwealth under s.49, also made similar comments about the powers of state parliaments to conduct inquiries into Commonwealth areas: This restriction on parliamentary authority, it should be noted, must apply not only to the federal Houses of Parliament but to the Houses of the state parliaments. Under the federal Constitution, there are some legislative powers belonging exclusively to the Commonwealth, others belonging exclusively to the states. If, therefore, a state House of Parliament should appoint a parliamentary committee to investigate some matter falling exclusively within Commonwealth power, punishment of persons who fail to appear to answer questions before the committee may well be held to be outside the House's competence. However, I do not share this view.

respect of certain enumerated matters. Indeed, section 106 of the Constitution guarantees that the constitution of each state shall, subject to the Constitution, continue as at the establishment of the state until altered in accordance with the constitution of the state.

Further, section 107 of the Constitution provides that every power of the parliament of a state shall continue unless it is vested exclusively by the Constitution in the Commonwealth Parliament. The only powers of the state parliaments affected by the Constitution were the powers to legislate in respect of matters vested exclusively in the Commonwealth by the Constitution or which were vested concurrently with the Commonwealth and in respect of which the Commonwealth has introduced legislation 'covering the field'. The power to inquire into matters remained unaffected.

There also appears to be a sound public interest basis for allowing state parliaments to investigate matters in respect of which the power to legislate is exclusively vested in the Commonwealth. For example, even though the Commonwealth may introduce legislation covering the field in respect of defence, why should a state parliament be *prima facie* restricted from inquiring as to whether there is adequate resources being expended on the defences of a particular state? Certainly the state is restricted in legislating in respect of matters identified, but that does not prevent a state parliament communicating its concerns to the Commonwealth Parliament in an informal or formal manner.²⁵

In those states which have not adopted the powers, privileges and immunities of the House of Commons the situation is more difficult to ascertain. The decisions cited earlier make it clear that those parliaments only have those powers, privileges and immunities necessary for the existence of the body and the proper exercise of its functions. But it also appears that in those jurisdictions where the power of the House of Commons has not been adopted, a wider view of their powers arising as a result of 'necessity' will be taken today than over 150 years ago when they were but mere colonies.²⁶

²⁵ It is not uncommon for a parliament to agree to a formal resolution communicating a concern to another entity such as the Commonwealth Parliament.

²⁶ See *Armstrong v. Budd*, a case concerning whether the Legislative Council of NSW had the power to expel a member from the Council and declare his seat vacant, Wallace P stated: . . .

The constitutional scheme under which Australia has been organized and governed since 1901 is that the States have plenary powers subject to the stated powers of the Federal Government and subject also to certain residual qualifications such as those which derive from the Colonial Laws Validity Act, the Third Charter of Justice and the Ordinances dealing with appeals from state courts direct to the Privy Council. But to speak of the New South Wales Parliament — the oldest in the Commonwealth — as a colonial legislature would today be an anachronism, even though it is not within the Statute of Westminster. Nevertheless it cannot be overlooked that any power of our Legislative Council to expel a member on the stated ground can only derive from the fact that we were established by, and gained our common law from, England. When, therefore, Lord Selbourne said that whatever in a reasonable sense is necessary to the existence and proper exercise of the functions of a self-governing colonial legislature has been impliedly granted, *the critical question is to decide what is 'reasonable' under present-day conditions and modern habits of thought to preserve the existence and proper exercise of the functions of the Legislative Council as it now exists. It would be unthinkable to 'peg' Lord Selbourne's remarks to the*

It appears that in New South Wales and Tasmania, where there is no provision affording the powers, privileges and immunities of the House of Commons, the power to establish parliamentary inquiries would be almost the same, if not the same, as states that have adopted the powers and privileges of the House of Commons. There is no doubt that these states could still, by legislation, confer on themselves the powers, privileges and immunities of the House of Commons. What the houses of those states' parliaments may not be able to do is, by resolution, establish an inquiry that was not necessary for the discharge of a function of the house. But as explained above, the functions of a house of parliament go beyond its legislative functions. Therefore, there is little doubt that a house of one of these parliaments could establish an inquiry which related to a non-legislative function, such as the scrutiny of the executive. For example, a house of the New South Wales Parliament could establish an inquiry into the dealings of a state minister with the Commonwealth on a Commonwealth issue if it somehow related to the accountability of that minister to the house — such as whether that minister misled the house over the matter. It may, however, be difficult for a house of the New South Wales Parliament to establish by resolution an inquiry into a matter which is vested exclusively in the Commonwealth because that state does not, without legislative enactment, possess the powers of the Grand Inquest. But to complicate matters further, in order to challenge such an inquiry, the actual proceedings of the Parliament (the resolution establishing the inquiry) would have to be impeached or questioned and this is not permissible. This point needs to be explained further.

Restrictions on investigations established by statute

The power of an inquiry established by resolution of a house of parliament is sourced from its resolution of appointment. Therefore, the scope of the investigation's power must be relevant to the terms of reference as set out in the resolution.²⁷ But a resolution of a house of parliament cannot be impeached or questioned by a court. Because it would be impossible to determine whether an investigation was acting outside of its terms of reference without in some way actually subjecting the terms of reference to critical examination, it follows that a court cannot be called upon to decide whether an investigation established by resolution has exceeded its jurisdiction.

But what about a parliamentary investigation established by legislation or operating in accordance with terms of reference set down by legislation? For example, what if it is alleged that a statutory committee established by the *Parliamentary Committees Act 1995* (Qld) is acting outside its 'area of responsibility' defined by the Act?

conditions in New South Wales when it had just emerged from convict days. Indeed when Kielley v Carson was decided convicts were still being sent to western portions of Australia and had only ceased to be sent out to New South Wales one year earlier. This is not to say that the implied power as enunciated by the Privy Council can be enlarged by the passage of time, but the word 'reasonable' in this context must have an ambulatory meaning to enable it to have sense and sensibility when applied to the conditions obtaining in 1969. [Emphasis added]

²⁷ Note 11 at 659.

In such a case it is theoretically arguable that a court could *prima facie* inquire into whether the committee was acting outside its jurisdiction. However, the question would ultimately turn on whether, in doing so, the court would be in effect questioning or impeaching a parliamentary proceeding. A court has been requested judicially to review a statutory committee's decision not to refer a matter to a Parliamentary Commissioner and has declined, because to do so would be to impeach or question the committee's proceedings.²⁸ I would argue that to question whether a committee was exceeding its statutory terms of reference would still be questioning the proceedings of parliament. Questions such as this are a matter for parliament. However, it is much more likely that the actual exercise of a coercive power, such as a summons to appear, would be the subject of the challenge. It is established law that a court can inquire into the terms of a warrant committing someone for contempt if the warrant specifies the grounds of the contempt.²⁹ Therefore, there seems no reason why a court could not inquire into the power of a statutory committee to issue a summons to a witness to appear or produce material if the reasons for the appearance are clear on the face of the summons.

Constitutional restrictions

Even though s.49 of the Commonwealth Constitution and the equivalent provisions in some state constitutions confer the powers of the Grand Inquest, this does not mean that there are no constitutional restrictions upon the power of inquiry or the conduct of such inquiries.

Leaving aside specific restrictions contained in some state constitutions or statutes, there are at least three potential restrictions on parliamentary investigations as a result of the Commonwealth Constitution.

Inter-governmental immunities

In earlier times, the High Court developed a doctrine of immunity of instrumentalities. Basically this doctrine — which was based on the implicitly federal nature of the Constitution — provided that because it was essential to the sovereignty of any government that it not be interfered with by any external power, the elements of the Australian federation had the right to disregard and treat as inoperative any attempt by the other elements to control the exercise of its powers.³⁰ Griffith CJ³¹ described it as 'mutual non-interference' which arose from 'necessity'. But in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd*³² the High

²⁸ *Corrigan v. PCJC* (unreported) 2000 QSC, 27/4/2000.

²⁹ *Bradlaugh v. Gossett*, *Supra*, Note 2 and Fitzpatrick & Browne, Note 11.

³⁰ See *D'Emden v. Pedder* (1904) 4 CLR 1078; *Federated Amalgamated Government Railway & Tramway Service Association v. NSW Railway Traffic Employees Association* (1906) 4 CLR 488; *Baxter v. Commissioner for Taxation (NSW)* (1907) 4 CLR 1078.

³¹ *Attorney-General (Qld) v. Attorney-General (Cth)* at 163.

³² (1920) 28 CLR 129.

Court rejected the doctrine and the related reserved powers doctrine which favoured an interpretation of the Constitution favourable to the states. In the *Engineers Case* the High Court advocated a literal reading of the Constitution. The High Court also held that Commonwealth legislation, which was supported by a head of power in the Constitution, was binding on state governments and their instrumentalities.

However, some vestiges of the doctrine of implied immunities still remain. Hanks,³³ referring to cases such as *Melbourne Corporation v. Commonwealth*,³⁴ *Queensland Electricity Commission v. Commonwealth*,³⁵ and *Re Australian Education Union; Ex parte Victoria*,³⁶ summarises the two remaining exceptions as follows:

first, that the Commonwealth cannot legislate so as to place special burdens or disabilities on state governments;

second, that the states are immune from Commonwealth legislation, even if non-discriminatory, that would operate to destroy or curtail the continued existence of the states or their capacity to function as governments.³⁷

Geoffrey Lindell³⁸ suggests that these limitations on the power to make laws ‘can also be used to limit other provisions contained in the Constitution which are not concerned with the power of the Federal Parliament to enact legislation’. Lindell refers to the reasoning of Brennan J in the case of *Street v. Queensland Bar Association*³⁹, which involved the use of s.117 of the Constitution and states that ‘No doubt similar reasoning can and should be used to restrict the scope of section 49’.⁴⁰

If Geoffrey Lindell is correct then, because there has been some judicial support for the reciprocal proposition — that the states cannot unduly interfere with the organs of the Commonwealth government⁴¹ — there would appear to be scope for believing that the High Court would in certain cases restrict the conduct of state parliamentary investigations that unduly interfered with the Commonwealth. Harry Evans suggests that the principle may extend to prevent office-holders of other jurisdictions from being compelled to give evidence, but concedes there is no judicial authority on the issue.⁴²

³³ Hanks 1994 *Australian Constitutional Law Materials and Commentary*, 5th edn, Butterworths, Brisbane at 236–7.

³⁴ (1947) 74 CLR 31.

³⁵ (1985) 159 CLR 192.

³⁶ (1995) 128 ALR 609.

³⁷ Note 33 at 236–237.

³⁸ Note 15 at 389.

³⁹ (1989) 168 CLR 461 at 513.

⁴⁰ Note 15 at 389.

⁴¹ *Pirrie v. McFarlane* (1925) 36 CLR 170; *Uther v. Federal Commissioner of Taxation* (1947) 74 CLR 509; *Commonwealth v. Cigamic Pty Ltd* (1962) 108 CLR 372.

⁴² H Evans, ‘Restrictions on Inquiry in Federal Systems’, *The Table*, Vol. 65, 1997 at 34–5.

But Geoffrey Lindell also concedes that it would 'not be easy to show that the mere holding of an inquiry into the affairs of a State government or its agents and officials will by itself violate the limitation mentioned above'.⁴³ I suggest that what is more likely is that the court would interfere to prevent the exercise of powers by an inquiry which could jeopardise the proper functioning of the Commonwealth's agencies. ▲

⁴³ Note 15 at 389.