

WA INC. ROYAL COMMISSION RECOMMENDATIONS: OVERVIEW AND IMPLICATIONS FOR COMMERCIAL DEALINGS OF GOVERNMENT

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Introduction

In Part I of the report of the Royal Commission into the Commercial Activities of Government and other matters, the Commission concluded that:

- The system of government in Western Australia had been placed at risk during the period into which it had inquired;
- Some ministers had elevated personal or party advantage over their constitutional obligation to act in the public interest;
- Personal associations and the manner in which electoral contributions were obtained could only create the public perception that favour could be bought, that favour would be done;
- Members of statutory authorities with very significant funds subject to their control seemed to be unaware of, or else indifferent to, their legal and public duties;
- Persons appointed to statutory authorities had not always been possessed of appropriate experience and qualifications;
- In many instances, the capacity of statutory authorities to act appropriately in the discharge of their obligations was severely constrained by the presence on their boards of public servants who represented government;
- The appointment of ministerial advisers and favoured appointees to the public service had resulted in the public service being denied an effective advisory role;
- Processes of decision making were often shrouded in secrecy. The reasons for decision in many instances were not documented. The proper role and function of Cabinet was either poorly understood or deliberately abused by the Premier and certain senior Ministers;
- Accurate records provide the first defence against concealment and deception. The absence of an effective public record hindered the Commission in its enquiries. On some occasions, a deliberate process of interference with official records appeared to have taken place;
- A marked change in the Government's approach to business relationships was observed by the Commission, especially in relation to the Burke years - it was more entrepreneurial and risk taking. In the case of the provision of a \$150,000,000 indemnity to National Australia Bank to assist the rescue of Rothwells in

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October 1987, Parliament was not consulted. In the case of the Government's decision to involve itself, through WA Government Holdings Ltd, with Bond Corporation in the Kwinana Petrochemical Project, the Government acted completely outside the purview of public scrutiny. The value of that project was enhanced at least ten times its proper value to a figure of \$4,000,000,000 by obligations undertaken by the Government including the giving of a Treasurer's guarantee.

Of these various matters, the Royal Commission very directly observed in Part II of its report, that:

Individually, the matters upon which we have reported reveal serious weaknesses and deficiencies in our system of Government. Together, they disclose fundamental weaknesses in the present capacity of our institutions of Government, including the Parliament, to exact that degree of openness, accountability and integrity necessary to ensure that the Executive fulfils its basic responsibility to serve the public interest. This is not to deny the essential strengths of the concepts of representative democracy and responsible government which Western Australia has inherited. What is now necessary, however, is a systematic reappraisal of our institutions of government. In carrying out this task, individual recommendations for change to our system of government must be formulated with proper regard to the operation of the system as a whole. The inter-relationship between the institutions of government demands a comprehensive approach. Recommendations for change, both specific and directional, must also respect the principles which underlie our system of government.

The Commission in Part II of its report then proceeded to lay out these fundamental principles. First, it stated what it called 'the democratic principle', namely, that it is for the people of the State to determine by whom they are to be represented in government. Secondly, it made reference to the 'trust principle', namely, that the institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public. The Commission observed that both principles, and the commitment which they assume to the rule of law and to respect for the rights and freedoms of individuals, need to be translated into practical goals if they are to provide the basis for government in Western Australia. The Commission then identified three goals as necessary to safeguard the credibility of democracy and to provide an acceptable foundation for public trust and confidence in our system of government:

- (a) government must be conducted openly;
- (b) public officials and agencies must be made accountable for their actions; and
- (c) there must be integrity both in the processes of government and in the conduct to be expected of public officials.

Central Recommendations

Having regard to these principles, the Commission made some forty recommendations and a number of ancillary observations. Each recommendation was designed to facilitate open and accountable government and integrity in government.

Central to the direction adopted by the Commission was the role and function of the Parliament. Once this is understood, the approach taken in Part II of the report to the commercial undertakings of

government, as other matters, can be better appreciated.

The Commission unequivocally affirmed 'the constitutional idea of responsible government, namely, that those who participate in the government of this State are responsible and accountable through the Parliament to the public they serve.'

Thus, particular attention was given by the Commission to the responsibility Parliament has for the scrutiny and review of governments. In turn, this resulted in the Commission recommending that the Legislative Council be acknowledged as the House of Review, with particular responsibility for scrutiny of the public sector as a whole. This led to consequential recommendations concerning the electoral system of both the Legislative Council and the Legislative Assembly.

The Commission recognised, however, that a reformed Parliament left to the traditional - or current - devices of Parliament, would be unlikely effectually to discharge the primary responsibilities assigned to it: secret and unaccountable government might be replicated unless the Parliament were better informed than it now is, concerning matters affecting the public sector.

To this end, the Commission recommended the designation of certain agencies, and two proposed agencies, as Independent Parliamentary Agencies. The existing agencies are the offices of the Auditor General, the Ombudsman and the Electoral Commissioner. The two new agencies proposed are the Commissioner for Public Sector Standards and the Commissioner for the Investigation of Corrupt and Improper Conduct.

These independent parliamentary agencies would serve the public at large. The public, through the Parliament, would oversee their operations. And,

most importantly, the public, through the parliament and its committees, would maintain a monitoring and investigatory eye on government and executive behaviour.

Other recommendations of the Commission complete or complement these essential recommendations.

Open Government

The Commission recommended:

- FOI legislation largely in accordance with a Bill currently before the Parliament;
- An Administrative Decisions (Reasons) Act in accordance with a 1986 WA Law Reform Commission proposal;
- A review of secrecy laws;
- The limitation of confidentiality agreements in commercial dealings;
- Greater control over the giving by government of guarantees and indemnities;
- The investigation of the role of press secretaries and The Government Media Office.

Accountability

The Commissioner further proposed:

- The establishment of an Administrative Appeals Tribunal;
- Increased powers for the Auditor General;
- That all companies owned or acquired by the government or a statutory authority be subject to a State-owned Companies Act.
- That a public servant should not be appointed to the board of a statutory

authority or a State-owned company while retaining a position in the public service in a department within any portfolio of the minister responsible for that body.

- That members of boards of authorities and State-owned Companies conform to the same standards of probity and integrity as is expected of persons occupying positions of trust; and where the authority or company is responsible for a business activity, a member should exercise reasonable care and diligence in the exercise of powers.

Integrity

Here the Commission proposed:

- The establishment of an independent Archives Authority;
- The formulation of standards of conduct in codes of conduct;
- The establishment of whistleblowing procedures;
- Registration of pecuniary in other interests of members of Parliament and senior public sector employees;
- The enactment of a comprehensive law governing political donations and political expenditure; and an inquiry into other aspects of political finance.

Other recommendations made in Part II of the report deal with the Parliament and the establishment of the two independent parliamentary agencies earlier referred to. The Commission proposed the separate appropriation of funds to ensure the independence of Parliament.

Commission on Government

Where it was felt appropriate, the Commission made explicit recommendations for immediate implementation. In a number of areas,

however, the Commission expressly acknowledged the need for further community debate on issues of immense public importance. To this end, the Commission proposed the establishment of a Commission on Government (COG) to facilitate extensive public consultation on these issues. The Commission stated in its report that it was the public's 'right' to be consulted in relation to these matters; consultation should not occur as a matter of mere courtesy.

Commercial Dealings of Government

It will already have become apparent that a number of the recommendations touch on the question of the commercial dealings of government.

The Commission at the outset expressed the view that 'it is impossible to contend that Government should be prohibited from engaging in any commercial activity', because whatever the political philosophy of the Government, government involvement to some degree in commercial activities is inevitable.

In a State such as Western Australia, the government has found it appropriate, with public support, to create conditions conducive to economic development over many years. On some occasions it has engaged directly in business enterprises. This is not a phenomenon unique to Western Australia, or Australia; it is common indeed in many western democracies and developing countries. The Commission suggested that to prohibit some forms of commercial activity would, in fact, offend the democratic principle identified at the outset of the report.

The vital issue, therefore, became not whether government should engage in commercial activities, but the conditions under which government may engage in these activities. The public, the Commission said, is entitled to insist that government be conducted openly, and that it be and be seen to be, accountable

for its actions. This is especially so where the actions of government would put public funds and resources at risk.

This Commission made a number of recommendations consistent with these objectives which touch upon commercial dealings.

Commercial Secrecy

The Commission maintained that claims to commercial secrecy by government in its commercial dealings should be minimised. We are not here speaking of rights to confidentiality of third parties who have supplied information to government in confidence, or of the proprietary information belonging to the government itself, but claims to commercial secrecy in respect of government activities where the claim is made to prevent the public from being informed of the details of those activities. The Commission ultimately observed that commercial information should be protected from public disclosure only where such public disclosure would reveal information that has a commercial value, and disclosure could reasonably be expected to diminish or destroy that commercial value. That is the same test that is used under the proposed WA FOI legislation. However, certain pre-conditions to this rule were stated by the Commission, namely:

- Parliamentary review of these activities should still be possible;
- The Auditor General should retain the power to investigate those activities;
- Commercial activities should be set by law or known policy of government;
- A State-owned Company or Statutory Authority should be obliged to file a statement of corporate intent with Parliament in respect of its proposed activities;

- The responsible Minister should have a right of access to all commercial information, including that for which secrecy is claimed;
- An annual report should be filed with Parliament by the entity carrying on this activity;
- There should be no complete FOI exemptions for entities carrying on such activities, except for compelling reasons.

In other words, if government wishes to engage in commercial dealings, it must be as open with the public, especially through the Parliament, as is possible. If confidential arrangements exist, they should be known to exist. After all, it is the public's funds which are being put at risk.

To this end, Section 58C of the Financial Administration and Audit Act (FAAA) should, said the Commission, be amended to ensure that no confidentiality arrangements are entered into which would prevent Parliament being informed about the matter, and requiring the Minister to advise Parliament and the Auditor General of what is being done, and why.

The Royal Commission in the light of these matters recommended that the State Trading Concerns Act, which currently prevents government entering into certain commercial undertakings without parliamentary approval, be repealed.

Guarantees and Indemnities

Some of these may be given under statutory authority. In the case of the rescue of Rothwells, Swan Building Society and the Teacher's Credit Society, matters inquired into by the Commission, guarantees and indemnities were given by the Government without statutory authority. There are currently no clear procedures governing the giving of such

commitments. Yet, government can effectively bind the Parliament to appropriate the funds necessary to meet these contingent liabilities should they fall due because, as the Under Treasurer of the State put it in evidence to the Commission, politically speaking no parliament is our system of government is likely to renege on an undertaking given by government. To do so would jeopardise the State's credit rating.

The Commission considered that the Treasurer and the Department of Treasury must be centrally involved in the giving of guarantees and indemnities, and that in the case of significant matters, Cabinet approval should be required to the commitment. Further, consistently with other recommendations concerning confidential dealings, Parliament and the Auditor General should be notified as soon as practicable of the nature, full extent and purpose of any guarantee or indemnity given.

The Commission refrained from recommending that government should not be able to issue guarantees and indemnities unless with parliamentary approval, principally because it considered that to do so might unreasonably constrain upfront action in the public interest. However, the Commission emphasised that early notification to Parliament and the Auditor General of its dealings was essential.

It should be noted here what by now will have become obvious, that the role of the Auditor General in relation to these various matters is of considerable significance.

Regulation of Statutory Authorities in State-owned Companies

Again, the Commission did not seek to prevent commercial activity by government through such entities. Government must, however, operate in the full light of day if it wishes to utilise such entities for commercial purposes.

Where a company is created or acquired by government or a statutory authority, the responsible Minister, said the Commission, should notify Parliament of the full details. A central register of all such companies must be kept by the Auditor General and the proposed State-owned Companies Act should apply to the entity.

Under the State-owned Companies Act, all such bodies would be similarly regulated to ensure consistency of memorandum and articles of association, to prevent the entity from exceeding the power of the statutory authority which may have acquired it to require a statement of cooperate intent, to define the control of the Minister over the body, to affirm the responsibilities of directors and officers to, ensure that the FAAA applies to the body, to lay down the reporting obligations to Parliament and to ensure the jurisdiction of the FOI legislation, the Ombudsman and the proposed Commissioner for the Investigation of Corrupt and Improper Conduct in respect of the body.

Members of Statutory Authorities and State-owned Companies

Attention was drawn earlier to the recommendation of the Commission designed to prevent public servants sitting on boards of bodies to which their Minister is the responsible Minister.

Level of Competence and Liabilities of Members of Statutory Authorities and State-owned Companies

The responsibilities of members of such boards was highlighted earlier in that they should be under the same probity obligations as a person holding a position of trust and must exercise reasonable care and diligence in relation to the conduct of business activities.

Independence from Ministerial Control

The Commission also recommended that if some level of independence of ministerial control is to be conferred on a board, it must be done so explicitly. Otherwise, it is to be assumed that such control exists.

Auditor General

Earlier the significance of the office of the Auditor General was foreshadowed. It already has wide powers under the FAAA. The Commission recommended a strengthening of those powers.

The Auditor General has the function not only to conduct financial audits under current law but also to investigate more generally the performance of the public sector. The Commission emphasised the importance of this office. Whilst the Auditor General's office does not carry with it the function to question government policy, it does have the power to examine, and report to Parliament on, the effectiveness with which policy is implemented. The Commission recommended that all public sector bodies, programs and activities involving any use of public resources be the subject of audit by the Auditor General.

Conclusion

It will be appreciated in the light of these detailed recommendations, how important the central recommendations of the Commission are. The detailed recommendations are likely to count for nought if there does not exist a reformed Upper House in Western Australia which has as its primary responsibility the review and scrutiny of the management and operations of the public sector.

The functions of the proposed Commissioner for the Investigation of Corrupt and Improper Conduct and Public Sectors Standards Commission, together with the Auditor General and

Ombudsman, are crucial to ensuring that the public of this State, through its elected representatives, know exactly what government is doing in its name.

I should also take this opportunity to make brief observations on the assessment made by certain academic commentators which have appeared in *'The West Australian'* newspaper in recent days, including, for example, the comment that Part II of the report is 'fatally flawed', and that 'the Bill on COG not only has to be opposed by all right-thinking people, but replaced by a Bill instituting a Constitutional Convention of the People charged with bringing WA into the 21st century with a codified Constitution which sets out the responsibilities of people in government that ... gives Western Australia a new system of limited government by, as well as for, the people'.

Clearly, the principles expressed in Part II of the report of the Royal Commission do not satisfy adherents of radical, US-style constitutional change. I believe, however, the views of such persons represent an unwise and an unwarranted solution to the governmental problems identified by the Royal Commission. This is a case where truly discretion is the better part of valour.

There should be a natural reluctance to throw out the bath water of our existing constitutional arrangements in dealing with these most serious of issues. The proposals in Part II of the report set forth a serious and important reform agenda for constitutional change, without recommending a break with our traditions and experience which may have unpredictable, deleterious consequences. I earnestly trust wise heads prevail in urging the early establishment of COG so that the reform process may begin.

