IN-CONFIDENCE

COMMISSION OF INQUIRY INTO OMPENSATION ARISING FROM SOCIAL ECURITY CONSPIRACY PROSECUTIONS

C9 FILE No. /

ARCHIVAL ACTION

FORMER PAPERS	LATER PAPERS

'LE HIGH COURT PROCEEDINGS

(contains 'B' Class Documents)

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3 Referred to	4 Date	5 Cleared	Resubmit	1 Folio No.	2 Referred to	3 Date	4 Cleared	5 Resubmit

Commission notified by High Court Registry and confirmed by S. Masselos that the Judge had withdrawn the High Court proceedings due to be heard in Canberra on 6 & 7 August 1986.

D N Lloyd.

28 July 1986

ATTORNEY-GENERAL'S DEPARTMENT

SECRETARY'S OFFICE

TEL: 71 9000

ROBERT GARRAN OFFICES
NATIONAL CIRCUIT
BARTON A.C.T. 2600

LT86/8947
EX86/9066

22 July 1986

Sir George Lush
Presiding Member
Parliamentary Commission of Inquiry
GPO Box 5218
SYDNEY NSW 2001

Dear Sir George

Proposal to brief counsel to appear as amicus curiae in Mr Justice Murphy v. Sir George Lush and Others

I refer to your letter dated 18 July 1986 asking that the Australian Government Solicitor brief counsel to appear as amicus curiae before the High Court in the above-mentioned proceedings on 6 August 1986.

You say in your letter that you see benefit in having the view outlined in your letter of one possible meaning of "proved misbehaviour" in s. 72(ii) of the Constitution put before the High Court for the purpose of assisting it. You go on to indicate that if this view is not put before the High Court, the Court will not have placed before it the full range of possible interpretations.

The instruction received from the Commonwealth Attorney-General, as fourth defendant in the proceedings, is for his counsel to put before the High Court all possible interpretations of s. 72(ii) of the Constitution with a view to assisting the Court as to the proper meaning to be given to the section. It is therefore intended to put all tenable

Note
- faxed copy earlier seen by presiding member

→ file

Voradex / received 23-7-86 of same

arguments in relation to every issue under s.72(ii) of the Constitution which is raised for the Court's consideration by the final form of the plaintiff's claim. It is contemplated that this would include the view outlined in your letter, and it seems to me that this should satisfy the Commission's concerns.

Also, I have difficulty in the role you propose for the amicus counsel, if it involves briefing counsel to concentrate on arguing for an extended meaning of "proved misbehaviour". Such a proposal would not in my view accommodate your wish, as I understand it, to avoid taking, or appearing to take, the role of a protagonist in the High Court proceedings (The Queen v. Australian Broadcasting Tribunal; Ex Parte Hardiman (1980) 144 CLR 13 at pp.35-36) since counsel would be briefed to focus on an extended meaning of "proved misbehaviour", and this would be being done at the request of the Commission.

In the circumstances, I suggest that, if you wish to pursue the matter, you look at it again later this week. By then, as I understand it, the Commission will have heard the views of Mr Justice Murphy's counsel at the hearings scheduled for today and tomorrow, and by then the future course of developments in relation to the High Court proceedings may perhaps be a little clearer.

I have mentioned to your Senior Counsel assisting that I shall be in Sydney on Thursday morning next and that I have reserved the latter part of the morning for discussions with him on the matter, if that is your wish.

Yours sincerely,

P. BRAZIL

Mr P Brazil
Secretary
Attorney-General's Department
Robert Garran Offices
BARTON ACT 2600

Dear Mr Brazil,

I am told by Mr Charles, Senior Counsel assisting the Commission, that he has discussed with the Solicitor-General the further conduct of the proceedings being taken in the High Court by the Honourable L.K. Murphy. As you will know, those proceedings have been set down for further hearing by the High Court on 6 August, 1986.

My brother Commissioners and I are of the firm opinion that the submissions to be put to the High Court should include a submission that "proved misbehaviour" extends to conduct which does not involve criminal misconduct and that misbehaviour may be constituted by conduct which is contrary to accepted standards of judicial behaviour. Forming part of that submission would be the argument that whether particular conduct is capable of amounting to misbehaviour in a particular instance is determinable by the Court.

We would see a benefit in having this view put before the High Court for the purpose of assisting it, and ultimately the Commission, in consideration of the question. If it is not put before the High Court, that Court will not have placed before it the full range of possible interpretations.

We would not however see it appropriate that this argument be put on behalf of the Commission. Instead we would ask that the Australian Government Solicitor brief counsel to appear as amicus curiae before the High Court.

I should say that there is a possibility that the Commission will have heard argument upon the meaning of section 72 and delivered its reasons before the hearing in the High Court on 6 August, 1986.

Yours sincerely,

Sir George Lush
Presiding Member

18 July 1986

IN THE HIGH COURT)
OF AUSTRALIA)
SYDNEY REGISTRY)

No. 87 of 1986.

BETWEEN

THE HON. LIONEL KEITH MURPHY

Plaintiff

AND

SIR GEORGE LUSH

First Defendant

SIR RICHARD BLACKBURN

Second Defendant

THE HON. ANDREW WELLS

Third Defendant

AND

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA

Fourth Defendant

STATEMENT OF CLAIM

DELIVERED the 16th day of July, 1986.

WRIT issued the 25th day of June, 1986.

1.
This action is within the original jurisdiction of this Honourable Court as it involves matters arising under the Constitution and involving its interpretation and as as it seeks injunctions against officers of the Commonwealth.

2.
The Plaintiff is the person named in S.5 of the Parliamentary Commission of Inquiry Act, 1986 ("the Act").

3.
On 27th day of May, 1986, the First, Second and Third Defendants were appointed as members of the Parliamentary Commission of Inquiry ("the Commission") pursuant to the Act and have commenced to and will unless restrained to continue to act pursuant to the Act and to exercise the powers given to it by the Act.

4.
The Act is invalid in that it is not authorized by any power vested in the Parliament of the Commonwealth of Australia nor is it incidental to any such power and in that it is contrary to the separation between the Parliament and the Judicature and the independence of Federal Judges provided for by the Constitution.

5.
Further, or in the alternative, in purported pursuance of the powers vested in it under the Act the Commission has done or has threatened to do the following acts and things each of which is beyond the power vested in it by the Act or by the Constitution.

PARTICULARS

(a) The Commission is considering or has threatened and intends to consider information and material other than specific allegations made in precise terms within the meaning of S.5 of the Act by persons other than the Commission and those assisting it.

(b) The Commission is considering or has threatened and intends to consider allegations of conduct which cannot constitute proven misbehaviour within the meaning of S.72 of the Constitution namely conduct otherwise than in judicial office in the absence of any allegation of prior conviction of an offence.

(c) The Commission is carrying out its inquiries and investigations otherwise than at hearings and otherwise than by itself considering material and information received by it and threatens and intends to continue so to do.

6.
The aforesaid acts of the First, Second and Third Defendant and each of them have caused and will unless restrained continue to cause serious loss and damage to the Plaintiff.

7.
The Plaintiff claims:

(i) A declaration that the Parliamentary Commission of Inquiry Act, 1986 ("the Act") is invalid.

(ii) An order interim and permanent restraining the First, Second and Third Defendants by themselves, their officers, servants and agents from doing any act or thing pursuant to the Act.

(iii) An order interim and permanent restraining the First, Second and Third Defendants by themselves, their officers, servants and agents from:-

(a) investigating or inquiring into or considering any material or information that is not a specific allegation in precise terms made by persons other than the Commission and those assisting it;

(b) investigating allegations relating to the Plaintiff's conduct otherwise than in judicial office in the absence of any allegation of his prior conviction for an offence.

(c) inquiring otherwise than at hearings in the presence of the Plaintiff;

(d) delegating to any person its power of inquiry under the Act.

(iv) Such further or other orders as to the Court seems fit.

.....
Counsel for the Plaintiff

This Statement of Claim is filed by STEVE MASSELOS & CO., Solicitors of 44 Martin Place, Sydney, Solicitor for the abovenamed Plaintiff, The Hon. Lionel Keith Murphy whose address is Arthur Circle, Forrest, ACT.

IN THE HIGH COURT)
OF AUSTRALIA)
SYDNEY REGISTRY)

No. 87 of 1986.

BETWEEN

THE HON. LIONEL KEITH MURPHY

Plaintiff

AND

SIR GEORGE LUSH

First Defendant

SIR RICHARD BLACKBURN

Second Defendant

THE HON. ANDREW WELLS

Third Defendant

AND

THE ATTORNEY-GENERAL FOR THE
COMMONWEALTH OF AUSTRALIA

Fourth Defendant

STATEMENT OF CLAIM

STEVE MASSELOS & CO.,
Solicitors,
44 Martin Place,
Sydney.
Telephone 232 7366
Reference SGM/vc
DX 305 SYDNEY.

HIGH COURT OF AUSTRALIA

P.O. Box E435
QUEEN VICTORIA TERRACE, A.C.T. 2600
Telex: AA61430
Telephone: (062) 70 6861

REGISTRY
CANBERRA

Ref.

Your Ref:

11 July 1986

Mr David Durack
Solicitor
Parliamentary Commission of Inquiry
A.D.C. House
99 Elizabeth Street
SYDNEY NSW 2000

Dear Mr Durack,

RE: MURPHY v. LUSH & ORS - S 87 OF 1986

I wish to advise that the abovementioned matter has been listed for hearing in Canberra on Wednesday 6 August 1986 at 10.15 am, subject to part heard matters.

I would be grateful if you would confirm the names of counsel who will be appearing on behalf of your client.

Counsel are to be reminded that a typewritten list of authorities is to be lodged in the Registry Canberra TWO CLEAR WORKING DAYS prior to the date of hearing. If authorities are not received within the specified time then counsel will be required to provide 9 photocopies of all authorities to be cited to the Court. These copies should be handed in at the Registry on the morning the matter is to be heard.

The list of authorities should clearly distinguish between those authorities from which passages are to be read to the Court and those authorities to which merely a reference is to be made. The two most convenient ways to forward authorities are by telex (AA61430) or facsimile ((062) 73 1758).

Instructing solicitors and counsel are advised that early morning fog at this time of the year necessitates arriving in Canberra the evening before the hearing date.

Yours sincerely,

Frank W.D. Jones
Registrar

D Murphy
file

MEMORANDUM

To

S. Charles QC

M. Weinberg

D. Durack

P. Sharp

From

A. Robertson

This memorandum addresses the question of the role, if any, before the High Court on 5 and 6 August, 1986 of counsel assisting the Parliamentary Commission.

It seems to me that any attempt to appear for the Parliamentary Commission or for its members will be met with the same strictures as were directed to Mr Hughes in The Queen v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13 at 35. No doubt there are differences between the functions and powers of the Australian Broadcasting Tribunal and those of the Parliamentary Commission and (possibly) care could be taken to put the arguments with less vigour than they were put by Mr Hughes. Nevertheless, it would appear to be most inadvisable for the

Commission itself or its members to seek to put any view. The prospect of bias or apparent bias would be clear.

but powers of AG's involved.

I think it would be preferable if junior counsel for the Attorney-General for the Commonwealth appeared for the first, second and third defendants and submitted to any order the Court might make apart from any costs order. I understand that this is what Mr Gummow did in Brisbane.

However in the absence of intervention by any of the Attorneys-General for the States under section 78A of the Judiciary Act the arguments put to the High Court as to the meaning of the words "proved misbehaviour" within section 72 of the Constitution will be, in all likelihood, very narrow. In other words, the likely submissions on behalf of the plaintiff, Mr Justice Murphy, and of the fourth defendant, the Attorney-General for the Commonwealth, will both be that misbehaviour in matters unconnected with the discharge of the office of a justice of the High Court can only be constituted by a serious criminal offence. There would be a slight divergence of views but only on the question of whether a conviction is necessary, the plaintiff saying that it is and the Commonwealth Attorney-General denying it.

2 views likely at present

In that context it might well be said that there would be no proper contradictor and that the High Court might see some

benefit in counsel appearing to argue a broader view of the meaning of "proved misbehaviour".

A recent example of a similar course being adopted by the High Court is to be found in Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (No. 2) (1982) 152 CLR 179. In that case none of the parties wished to argue that the Federal Proceedings (Costs) Act 1981 (Cth) was invalid. The point having been raised by Mr Justice Brennan the High Court invited the Attorney-General to brief counsel as amici curiae so that the proposition could be properly tested. This is the background to the appearance of D.M.J. Bennett QC and J.D. Heydon as amici curiae. Their presence was solicited by the Court and the Court's request was, with some reluctance as I recall, acceded to by the Commonwealth Attorney-General.

The most recent discussion of the proper role and function of counsel appearing as amici curiae appears in the decision of Mr Justice Hunt in R v Murphy (1986) 64 ALR 498. There Mr Simos QC and Mr Biscoe, acting on instructions from the President of the Senate, sought leave to appear as amici curiae for the purpose of making submissions relating to the law of parliamentary privilege. At page 503 of the report it appears that Hunt J permitted those counsel to appear as amici curiae and also:

> In so far as that leave to appear as such might be determined by others to go beyond the principles applicable to that procedure (but because of the absence of any other contradictor), I formally invited Mr Simos and Mr Biscoe as bystanders to appear to assist me upon the argument as to parliamentary privilege.

In his judgment, Hunt J referred to the decision of the New South Wales Court of Appeal in Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391 where the Commonwealth (by its counsel D.G. McGregor QC and R.V. Gyles) was the unsuccessful respondent to an appeal on the question of whether the Commonwealth should have been admitted by the primary judge as an intervener. I would not recommend such an attempt by the Parliament in the present circumstances even allowing for the fact that it is ultimately the powers of the Parliament, amongst others, which will be affected by any decision of the High Court on the meaning of "proved misbehaviour".

It seems to me that, instead, (and this is a matter referred to by Hunt J at page 502) counsel assisting should seek the invitation of the High Court to appear in their own right. The basis of seeking the invitation would be the purely pragmatic one of the absence of any other contradictor. I do not think there is any need to be apologetic about the basis being pragmatic, it appears that the whole concept of amici curiae is one based in pragmatism.

However although counsel seek leave to appear as amicí curiae in their own right, it is not a course to embark upon without instructions.

The most attractive course would be for the Australian Government Solicitor, as solicitor for the Parliament or for the Speaker of the House of Representatives and for the President of the Senate, to seek instructions which would allow counsel assisting the Parliamentary Commission to put before the High Court the argument that those counsel assisting would ultimately propose to put before the Parliamentary Commission as to the meaning of "proved misbehaviour". It could be intimated to the Speaker of the House of Representatives and to the President of the Senate that the submissions proposed to be put before the Parliamentary Commission and, if leave were granted, before the High Court on 5 and 6 August, 1986, would be that "misbehaviour" within the meaning of section 72, leaving aside behaviour in the performance of judicial duties, is not limited to conduct which constitutes a serious criminal offence whether consequent upon a conviction or not.

My recommendation is therefore that letters be written now to the Speaker and to the President seeking instructions to seek leave to appear before the High Court as amici curiae to present argument only on the meaning of "proved misbehaviour". If those instructions were forthcoming and if

the High Court were to grant leave on the basis of there being no other contradictor, then I would suggest that the arguments be propounded as arguments proposed to be put before the Parliamentary Commission. It will, of course, be a matter for the High Court as to whether it wishes to hear such argument from counsel assisting or, indeed, whether it wishes to hear argument on the meaning of "misbehaviour" at this stage at all.

A. ROBERTSON

7 July, 1986

The Hon Sir George Lush
The Hon Sir Richard Blackburn CBE
The Hon Andrew Wells QC

I enclose for your early infomation a copy of the transcript of proceedings in the recent High Court hearing involving the Commission. You will see that, unfortunately, the reasons for judgment are not recorded (p.79). I am endeavouring to obtain copies of the reasons for judgment but indications are that they may not be available until after the High Court's vacation.

Yours sincerely,

J F Thomson
Secretary

3 July 1986

Since dictating this letter a copy of the reasons and orders has come to hand and is attached.

DD

THE HONOURABLE LIONEL KEITH MURPHY

v.

SIR GEORGE LUSH AND OTHERS

ORDER

Application for interlocutory injunction dismissed.

THE HONOURABLE LIONEL KEITH MURPHY

v.

SIR GEORGE LUSH AND OTHERS

JUDGMENT

GIBBS C.J.
MASON J.
WILSON J.
BRENNAN J.
DEANE J.
DAWSON J.

THE HONOURABLE LIONEL KEITH MURPHY

v.

SIR GEORGE LUSH AND OTHERS

Before the Court is an application for an interlocutory injunction directed to Sir George Lush, Sir Richard Blackburn and the Honourable Andrew Wells, three retired judges who have been appointed pursuant to the Parliamentary Commission of Inquiry Act 1986 (Cth) ("the Act"), as a parliamentary commission of inquiry to inquire and advise the Parliament whether any conduct of the plaintiff, Mr Justice Murphy, a member of this Court, has been such as to amount in its opinion to proved misbehaviour within the meaning of s.72 of the Constitution. Ordinarily an application for an interlocutory injunction would be heard by a single justice but because of the gravity and importance of the matter it was deemed proper to constitute a Court of six judges to hear it. The constitution of the Court in this way does not mean that it was appropriate at this stage to advance full argument as though this were the occasion for the final determination of the issues raised by the case, with the result that other cases would have been displaced from the list and other parties disadvantaged. There was no reason why the Court should, in this case,

depart from the ordinary procedure when an interlocutory injunction is sought, and that means that except in relation to one of the arguments advanced on behalf of the plaintiff, it will be sufficient to inquire whether there is a triable issue and, if so, whether the balance of convenience favours the grant of an injunction.

By s.5(2) of the Act it is provided that in carrying out its inquiry the Commission shall consider only specific allegations made in precise terms. The Commission is to report to the President of the Senate and the Speaker of the House of Representatives its findings of fact and whether any conduct of the plaintiff has been such as to amount, in its opinion, to proved misbehaviour within the meaning of s.72 of the Constitution. The report is to be made on or before 30 September 1986 unless that date is extended by a resolution of each House of the Parliament and the Commission is to submit with its report a record of so much of the evidence before the Commission as the Commission thinks necessary to substantiate its findings of fact and its conclusions: see s.8. The Commission is given compulsive powers to summon witnesses, take evidence, conduct searches and obtain material: ss.11, 12 and 13. For the purposes of its inquiry the Commission may hold

hearings (s.14(1)) and at a hearing before the Commission the plaintiff is entitled to appear and to be represented by a legal practitioner at any time during the hearing (s.14(4)). By s.15, the Commission may appoint a legal practitioner to assist the Commission as counsel. Mr Charles, Q.C., has been so appointed.

The Commission has expressed the view that the operation described by the word "inquire" may be divided into (a) the collection of information and (b) the consideration of allegations. It has been indicated that it may appoint persons, including policemen, to assist it in its inquiry. The information which is being considered by counsel for the Commission falls into two categories: (a) allegations relating to the plaintiff's conduct in judicial office and (b) allegations relating to the plaintiff's conduct otherwise than pertaining to judicial office. None of the information supplied includes any allegation that the plaintiff has been convicted of any offence. The information contained in category (b) relates both to allegations of breaches of the general law and other matters not constituting breaches of the general law which, if proved, would (it is said) arguably constitute misconduct sufficient to justify removal from office. In each case the

allegations cover periods of time commencing both before and after the date of the plaintiff's appointment to the bench.

In the course of the proceedings before the Commission, Mr Charles explained what counsel assisting the Commission proposed to do in the process of collecting information, as follows:

> "All we are doing is looking at a very substantial volume of material which has been put to us and then sifting or filtering that material, where it is not clear to us whether an allegation is made at all or where it is imprecise or where it has, let us say, not a date attached to it, we are then making inquiries, or propose rather to make inquiries of persons outside for the purpose of seeing if that allegation has definition."

On the following day, Sir George Lush said:

> "The Commission's view is that it is entitled to gather information, examine it and conduct investigations, if necessary with the assistance of investigators, including members of the police forces if made available, based upon the information to ascertain with what precision is possible exactly what the relevant point, if any, of the information is; and that it is its duty and specifically the duty of counsel assisting, to formulate the specific allegations which emerge from materials received. It considers that this is no more than a realistic interpretation of the various provisions of the Act. In particular it

> rejects the submission of counsel that the terms of section 5(2) confine the consideration of the Commission to allegations in the required form originating outside the Commission's activities. If confirmation of this view were required, it may be found in the statements of the Minister in charge of the Bill in the Senate in the course of the second reading."

Counsel for the plaintiff, in support of their argument that an injunction should be granted, relied on three broad arguments: (1) that the Act is invalid, (2) assuming that the Act is valid, it does not authorize investigations of the kind proposed to be made, and (3) that one of the Commissioners, Mr Wells, is disqualified from taking part in the inquiry.

Having heard such argument as was necessary to indicate the contentions on which the plaintiff wishes to rely in relation to the first and second of these arguments we accept that there are, in the sense used in the well known authorities, serious questions to be determined which, if determined in favour of the plaintiff, would require the grant of an injunction in one form or another. With regard to the third argument, it is not possible to dispose of the matter in that way. It would be wrong to allow the inquiry to proceed before a Commissioner who might prove to be

disqualified, even if the balance of convenience appeared otherwise to favour that course. We must therefore decide now whether Mr Wells is disqualified.

It is clear that a judge should not sit to hear a case if, in all the circumstances, the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the questions involved in it: Livesey v. New South Wales Bar Association (1983) 151 C.L.R. 288, at p.294. We are prepared to assume, without deciding, that the same principle applies to a Commissioner appointed under the Act. It is argued on behalf of the plaintiff that it might reasonably be apprehended that Mr Wells would not bring an independent and unprejudiced mind to the inquiry, having regard to a statement which he made in 1984 when he was a judge of the Supreme Court of South Australia. On 23 February 1984, an article appeared in the Adelaide Advertiser which discussed a number of matters arising out of tapes and transcripts of telephone conversations suggested to have been recorded by members of the New South Wales Police. Some of these conversations had a reference to a judge who, it is suggested, is the plaintiff. Part of the article was in the following terms:

"In March 1979, the solicitor and the judge discussed the appointment of a contact of the solicitor to a high position in the New South Wales public service. The position was closely related to the solicitor's activities being investigated by federal police although there is no evidence that the appointee actually did favours for the solicitor.

The solicitor asked the judge to lobby the senior politician who would make the appointment and the judge replied that he would.

Later, he rang the solicitor back to tell him that the solicitor's contact had been appointed to the position by the politician, although it is not made clear whether this was as a result of the judge's intervention.

Interestingly, the chairman of the Australian Law Reform Commission, Mr Justice Michael Kirby, has said this sort of thing goes on all the time in judicial circles. It had simply not been made public knowledge before the publication of the transcripts. He said the intervention of judges in public service appointments was part of the netherworld of the legal arena and explained that it was a practice inherited from Britain."

In the Adelaide Advertiser of the following day there appeared some comments by Mr Justice Wells, as he then was, on the remarks attributed in this article to Mr Justice Kirby. The article in the Advertiser reports Mr Justice Wells as referring to those alleged remarks and continues as follows:

"Mr Justice Wells, during an unconnected trial in the Supreme Court yesterday, said that the statements were 'irresponsible' and without the 'slightest foundation'. He said he was speaking on behalf of present and former S.A. judges. The implication of two paragraphs of the article, 'more especially of the emotive word "netherworld" is that judges corruptly and wilfully intermeddle in the appointment of officers of all ranks, presumably up to the highest rank in the public service ...'

'Not only does that impute corruption to us but implies that we are from time to time willing to act in flagrant defiance of constitutional principles governing the separation of powers', Mr Justice Wells said.

He said that no judge of his acquaintance 'would ever dream of doing such a thing'.

He comprehensively rejected what had been asserted and stated that it was 'utterly false'.

'On behalf of all SA judges, as well as on my own behalf, I express my deep resentment of this calumny. It cannot be too soon or too emphatically denied', he said."

We were informed by counsel for the plaintiff that part of the material in vol.2 of the report by Mr Justice Stewart, which has been placed before the Commission for its consideration, contains material from which the inference can be drawn that a solicitor, Mr Morgan Ryan, requested the plaintiff to approach the Premier of New South Wales for the purpose of securing the appointment of Mr Jegarow as Deputy

Chairman of the Ethnic Affairs Commission, that the plaintiff did approach the Premier and that the appointment was made. It was submitted that the views of Mr Wells on this sort of alleged behaviour are clear and extreme and represent a public prejudgment on the propriety of the activity alleged against the plaintiff. It should be said immediately that we do not know, and could not know at the present stage of the Commission's inquiries, what significance, if any, counsel assisting the Commission or the Commission itself will attach to that alleged incident.

The remarks made by Mr Wells were made long before the inquiry was set up and were not made in reference to the plaintiff or his conduct but to rebut the assertions attributed by the writer of the article in the newspaper to Mr Justice Kirby. We, of course, do not know whether Mr Justice Kirby did make remarks to that effect. However, in our experience, it would not be right to say that judges commonly intervene to influence the making of public service appointments or that there is a practice inherited from Britain whereby judges descend into some shady netherworld of dubious behaviour. The remarks of Mr Wells amount to no more than a denial that judges, to his knowledge, engaged in conduct of the kind allegedly described by Mr Justice Kirby,

conduct of a kind which Mr Wells regarded, understandably, as contrary to accepted standards of judicial behaviour. It would be preposterous to hold that the expression by a judge of generally held views as to the standards of judicial propriety should be thought to disqualify him from, acting in a judicial capacity.

The material before us completely fails to raise the slightest doubt that Mr Wells is able to bring an impartial and unprejudiced mind to the consideration of the matters into which he has to inquire. Neither the parties nor the public could reasonably entertain an apprehension that he might not be impartial or unprejudiced.

It remains then to consider whether, accepting that there is a triable issue that the Act is invalid, or that on its proper construction it does not authorize the investigations to which the Commission proposes to make, the balance of convenience favours the grant of an injunction. Counsel for the plaintiff submitted that if police or other officers conduct, under the authority of the Commission, inquiries of which the plaintiff is unaware, the plaintiff may suffer irremedial damage and may not even know that it is being caused to him. The likelihood of damage of this

kind was, in our opinion, exaggerated. The mere conduct of private inquiries, in what we must assume will be a responsible manner, is not likely to cause any real damage to the plaintiff's reputation. Further, no one requires special authority at law simply to make inquiries. There is no suggestion that the Commission will be considering the holding of a public hearing before this Court is asked finally to determine the issues. On the other hand, the Commission's work is inherently urgent and the Act requires its report to be furnished by 30 September unless the time is extended in the exceptional manner for which the Act provides. To prevent its counsel and officers from collecting information would seriously impair its ability to complete its work by that date. On the whole, we are clearly of the view that the balance of convenience requires that the investigations for the Commission should proceed and that the injunction sought should be refused.

The application is accordingly dismissed.

IN THE HIGH COURT OF AUSTRALIA

THE HONOURABLE LIONEL KEITH MURPHY

V.

SIR GEORGE LUSH & OTHERS

REASONS FOR JUDGMENT

Judgment delivered at BRISBANE

on 27th June 1986

Full Court

RM74/30574

Sir George Lush
Sir Richard Blackburn
Hon Andrew Wells

High Court Proceedings

Attached is a copy of part of the decision of the High Court handed down last Friday in Brisbane. It is not the official transcription but was obtained under a special arrangement by Attorney-General's.

2. Copies have been provided to Counsel assisting, Mr Durack, Ms Sharp and Mr Phelan.

J F Thomson
Secretary

June 1986

It remains then to consider whether, accepting that there is a triable issue that the Act is invalid, or that on its proper construction it does not authorize the investigations ~~to~~ which the Commission proposes to make, the balance of convenience favours the grant of an injunction. Counsel for the plaintiff submitted that if police or other officers conduct, under the authority of the Commission, inquiries of which the plaintiff is unaware, the plaintiff may suffer irremedial damage and may not even know that it is being caused to him. The likelihood of damage of this kind was, in our opinion, exaggerated. The mere conduct of inquiries in what we must assume will be a responsible manner, is not likely to cause any real damage to the plaintiff's reputation.

Further, no one requires special authority at law simply to make inquiries. There is no suggestion that the Commission will be considering the holding of a public hearing before this Court is asked finally to determine the issues. On the other hand, the Commission's work is inherently urgent and the Act requires its report to be furnished by 30 September unless the time is extended in the exceptional manner for which the Act provides. To prevent its counsel and officers from collecting information would seriously impair its ability to complete its work by that date. On the whole, we are clearly of the view that the balance of convenience requires that the investigation for the Commission should proceed and that the injunction sought should be refused.

The application is accordingly dismissed.

On the whole, we are clearly of the view that the balance of convenience requires that the investigation for the Commission should proceed and that the injunction sought should be refused.

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S87 of 1986

B e t w e e n -

THE HON. LIONEL KEITH MURPHY

Plaintiff

and

SIR GEORGE LUSH

First Defendant

SIR RICHARD BLACKBURN

Second Defendant

THE HON. ANDREW WELLS

Third Defendant

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA

Fourth Defendant

GIBBS CJ
MASON J
WILSON J
BRENNAN J
DEANE J
DAWSON J

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON THURSDAY, 26 JUNE 1986, AT 12.10 PM

MR R.V. GYLES, QC: If Your Honours please, I appear with my learned friends, MR M.R. EINFELD, QC and MRS A. BENNETT for the plaintiff. (instructed by Steve Masselos & Co)

MR W.M. GUMMOW: If the Court pleases, I appear for the first, second and third defendants who submit in the manner I indicated to Your Honour the Chief Justice earlier this morning. (instructed by the Australian Government Solicitor)

MR G.E. FITZGERALD, QC: May it please the Court, I appear with my learned friend, MR W.M. GUMMOW, for the fourth defendant, the Attorney-General. (instructed by the Australian Government Solicitor)

GIBBS CJ: Yes, Mr Gyles.

MR GYLES: If Your Honours please, there is a writ of summons claiming relief, interim and permanent, and there is a notice of motion seeking certain interim orders. That notice of motion is supported by two affidavits of Mr Masselos, both sworn 25 June.

Your Honours, because of the urgency with which the matter has been brought on and the necessity to come here, there has been some administrative failure - and I am not suggesting on the Court's part - in relation to some documents which were exhibited to the original affidavit. In the events which have happened I do not think that has any consequence but I should deal with that and tender documents which do not bear an exhibit note.

GIBBS CJ: Yes.

MR GYLES: I think we have all bar one of the exhibits here and that exhibit really is barely relevant to the questions which arise.

Do Your Honours wish us to go through the affidavits or shall I take those as read subject to the documents?

GIBBS CJ: Take them as read. Of course you make your submissions as to what you say is relevant in the affidavits and the annexures.

MR GYLES: Yes. Your Honours, I should, in that event, tender a copy of a senate select committee report of August 1984. It is not the very document but it is the same as SM1 would have been.

GIBBS CJ: Yes. Is this an annexure to one of the affidavits?

MR GYLES: It is an exhibit, Your Honour. It is referred to in paragraph 6 of the affidavit.

GIBBS CJ: Was it given an exhibit number?

MR GYLES: SM1, Your Honour.

GIBBS CJ: Yes, very well.

MR GYLES: Then, SM2 I tender.

GIBBS CJ: I am not sure what the relevance of these documents is, but no doubt it will appear.

MR GYLES: Yes. SM3 I am not in a position to tender, Your Honours, and it does not matter. SM4 - Your Honours, we have copies of those exhibits. They, however, are documents which have hitherto been regarded as confidential and we would ask that that confidentiality continue to be preserved.

GIBBS CJ: Anything to say about that, Mr Fitzgerald?

MR FITZGERALD: No, Your Honour. Those who are instructing me are not quite sure whether it is a correct description in the paragraph which speaks of a copy of the entire volume. Apparently some extracts from the volume had been provided to those representing the plaintiff but the entire volume had hitherto been thought of as confidential.

MR GYLES: That is what I am saying.

MR FITZGERALD: But, confidential including to the exclusion of the plaintiff.

MR GYLES: That is simply not correct. The Commission itself afforded us access to the document.

MR FITZGERALD: It is only in that context that I query the description as to whether it is truly a copy of the entire volume, Your Honours, because - perhaps I am wrong but my understanding is that part only of the volume was provided.

GIBBS CJ: Yes.

MR GYLES: Well, Your Honour, I tender it. I ask that the confidentiality which has hitherto prevailed be maintained and my friend can have a look at it and - - -

MR FITZGERALD: It seems my learned friend may be correct on that, Your Honour. There is some confusion about it.

GIBBS CJ: Yes. Do we need it in any case?

MR GYLES: Yes, Your Honour. It is relevant to one aspect of the matter. I do not think Your Honours will need to - well, it is relevant to one aspect, yes.

GIBBS CJ: Yes.

MR FITZGERALD: Your Honours, might I say something on that question?

GIBBS CJ: Yes.

MR FITZGERALD: The procedure of handing up copies of documents because of administrative difficulties is, of course, not objected to by the Attorney. At the moment the relevance of much of this material is not obvious to us - we are not quite sure - - -

GIBBS CJ: It is not obvious to me either, Mr Fitzgerald.

MR FITZGERALD: - - - and we would like to preserve our position in relation to that.

GIBBS CJ: Yes.

MR FITZGERALD: And perhaps I might add the rider that it might be thought appropriate, in view of the potential nature of the content of that material that only so much as is going to be asserted as relevant ought be put forward at this stage.

GIBBS CJ: Yes. Is it possible for you, Mr Gyles, to make extracts from this report of the Commission? I should make it clear, of course, that what you have tendered as volume 2 of Mr Justice Stewart's report which, no doubt - I have not seen or read it - deals with a good many matters which do not concern this case at all and its confidentiality, in many respects, has nothing to do with this case. If it were possible to make extracts which do concern the case then that would simplify matters.

MR GYLES: Your Honour, if the Court would be happier if we withdrew the tender and came back at some stage with some extracts we will do that.

GIBBS CJ: Well, if you can conveniently do that I think it would be best.

MR GYLES: We may need the physical document, Your Honour.

GIBBS CJ: Yes, very well.

MR GYLES: Thank you, Your Honour. Your Honours, might I go immediately to the Act itself. I believe it is only available in bill form and we have provided Your Honours with a copy of the Bill, I believe?

GIBBS CJ: Yes.

MR GYLES: For immediate purposes may I concentrate on some of the key provisions of the Act without going to every section. The functions of the Commission are to be found in section 5 of the Act which provides that:

The Commission shall, in accordance with this section, inquire, and advise the Parliament, whether any conduct of the Honourable Lionel Keith Murphy has been such as to amount, in its opinion, to proved misbehaviour within the meaning of section 72 of the CONSTITUTION.

(2) In carrying out its inquiry the Commission shall consider only specific allegations made in precise terms.

(3) In considering any allegation, the Commission shall have regard to the outcome of any previous official inquiry into that allegation, and only consider it to the extent that the Commission believes it necessary.....

(4) The Commission shall not consider -

(a) the issues dealt with in the trials .....except to the extent that the Commission considers necessary for the proper examination of other issues.....

6.(1) The Honourable Lionel Keith Murphy shall not be required to give evidence on a matter before the Commission unless the Commission is of the opinion that there is before the Commission evidence of misbehaviour within the meaning of section 72 of the CONSTITUTION sufficient to require an answer and the Commission has given to the Honourable Lionel Keith Murphy particulars in writing of that evidence.

(2).....the Commission shall not make a finding except upon evidence that would be admissible in proceedings in a court.

7.(1) The Commission shall, unless it thinks the circumstances require otherwise, conduct the whole of its inquiry in private.

(2) The Commission shall conduct its inquiry as quickly as a proper consideration of the matters before the Commission will permit.

8.(1) The Commission shall report to the President of the Senate and the Speaker of the House of Representatives -

(a) its findings of fact; and

(b) its conclusions whether any conduct of the Honourable Lionel Keith Murphy has been such as to amount, in its opinion, to proved misbehaviour within the meaning of section 72 of the CONSTITUTION.

Then there is a time limit and a provision that they shall submit -

so much of the evidence.....as the Commission thinks necessary to substantiate its findings of fact and its conclusions.

Then there are consequential provisions which I think I need not trouble the Court with at the moment. Division 2 deals with the powers of the Commission. There are powers that Your Honours will see for summonses, in section 11; taking of evidence; provision for search warrants; 13:

Access to certain material held by the National Crime Authority.

Provision for hearings in 14 at which, by subsection (4) the plaintiff:

is entitled to appear, and to be represented by a legal practitioner, at any time.

There are consequential provisions and there is a right, in subsection (8) of examination and cross-examination; (9) the procedure is in the Commission's hands; and then, (10), there are prohibitions about the publication of certain of the matters occurring before the Commission without a direction of the Commission.

I might say, Your Honours, that none of the material which is before the Court here would be caught by that subsection, as we would understand the rulings of the Commission so far. Then there is a penalty provision; provision for counsel assisting; section 16 - there is a protection as to the use of material which is disclosed to the Commission although there is no provision for taking any common law privilege; there is the arrest of witnesses failing to appear and certain consequential powers given to the Commission in relation to documents and things by section 18.

Whilst the administrative provisions may have some marginal relevance I do not take the Court to those at the moment nor to the offence provisions or the miscellaneous provisions.

Going back, then, Your Honours, to sections 5, 6 and 8, which are the critical sections, we submit that - - -

GIBBS CJ: By the way, Mr Gyles, have you an outline of your submissions?

MR GYLES: I have an outline of certain of them, Your Honour, but I do not have a comprehensive outline of submissions. It simply, I am afraid, has not been possible in the time available to do so but I will be handing up an outline of submissions on certain aspects of it which I will explain in a moment.

GIBBS CJ: Yes.

MR GYLES: What I had proposed to do for the assistance of the Court is to take the Court to the key provisions of the Act; then go to the facts as to what has happened to date; then pose the questions and take the Court through them.

Your Honours, paragraphs 5, 6 and 8, in combination, have the effect that this Commission has a fact-finding role and a fact-finding role based upon its opinion as to whether conduct is proved misbehaviour within the meaning of section 72 of the CONSTITUTION.

This Commission is in no sense a Commission which poses alternatives for parliament; it finds facts and it expresses its conclusion on those facts.

GIBBS CJ: Mr Gyles, have you handed up a submission in relation to section 72?

MR GYLES: Yes.

GIBBS CJ: My brother Mason has a copy; I do not seem to be favoured with one. The proper procedure is to hand them up in Court, of course, not to hand them up beforehand.

MR GYLES: Your Honour, because of the place in which the Court is sitting and the time which has been taken in the preparation of the case we have had to bring up with us, physically, all of the authorities. We simply have not had the opportunity of giving a list of authorities to the Court. Administratively it was thought simpler to hand up a bundle of cases relevant to a topic to the Court and included in that bundle was the submission which related to that bundle. Your Honours, we came, with respect - - -

GIBBS CJ: Yes, I know, the urgency of the matter - there is no need to take time explaining it, Mr Gyles - the urgency of the matter no doubt put certain constraints upon you. I just want to point out, though - we now have the document - but, not only in this case but in

other cases, counsel do seem to hand in these outlines of part of their submissions to the registrar or to some Court official before the hearing commences. That has never been intended to be the practice.

MR GYLES: Yes, I understand that, Your Honour.

MR FITZGERALD: Your Honours, I understand my friend's difficulties but I wonder if we might ask for a copy?

GIBBS CJ: Yes.

MR GYLES: That is not an unreasonable request. Well, it is not a bad start: the Chief Justice and my opponent without one.

Your Honours, as to the way in which the Act works: I had put that it is plain enough from 5, 6 and 8 that the Commission is not having a role to find facts based upon alternative views as to what "proved misbehaviour" might mean?

GIBBS CJ: I take it that your submissions about "proved misbehaviour" do not cover the whole field of your argument?

MR GYLES: No, Your Honour, they do not.

GIBBS CJ: Then I think the convenient thing would be for you to give us now the heads of your submissions. You can elaborate - then we can see how the argument is going to progress.

MR GYLES: Yes. Your Honours, there are three groups of questions: there are questions which arise as to the true construction of the Act; there are questions as to the validity of the Act; there is a question as to the appropriateness of one of the Commissioners continuing to sit. We had proposed to deal with that last matter last. The other questions which arise overlap because one cannot discuss in this case, we would submit, construction without understanding the constitutional basis for the Act and the constitutional basis for the Act, of course, is very much interwoven with the true construction of the Act.

GIBBS CJ: Those are the broad aspects of your submission but what I, speaking for myself, would like to know is why it is you say that an injunction should go - what are the reasons for that?

MR GYLES: Yes, Your Honour. I will respond to that but may I put, with respect, that that will become clearer when I have taken the Court in a little while to what has happened in the Commission. But I will, of course, respond immediately: what is proposed by the Commissioners is that staff, by its authority, will,

without there being before the Commission any specific allegation made in precise terms about the conduct of the Judge at all, make inquiries and conduct investigations amongst the public without us knowing what they are doing; without us knowing what is being looked at or investigated; and without us having any particulars at all of any allegation or conduct of ours which is in question.

(Continued on page 10)

MR GYLES (continuing): What we do know as to what is proposed is that that secret process will encompass the following: conduct by the plaintiff in office as a Justice of this Court; secondly, conduct during his appointment as a Justice of this Court but not relating to office, that conduct not being limited to conduct which is a breach of the law; and the investigation will include conduct of the Judge before he was appointed a Justice of this Court and will relate to conduct not limited to a breach of the law.

It is conceded by the Commission and those speaking for it, that there is no suggestion that the Judge has been convicted of any offence. Now that is what brings us to the Court for an injunction. That conduct carries with it the precise authorization of these Commissioners.

Now, in our submission, that conduct is both a breach of this statute and illustrates starkly the constitutional invalidity of the statute. Now, Your Honours, it may be convenient to go then to what has happened to date, and that is best revealed by going to the transcript of the proceedings. Your Honours, the first sittings of the Commission were on 1 June 1986, and - - -

GIBBS CJ: Yes, Mr Fitzgerald.

MR FITZGERALD: Your Honours, I am instructed to mention something although not in order to raise some difficulties, which might confront the Court and that is simply to draw attention to section 14(10) in case it is though that there may be some possible question of a contravention of the statute involving dealing with this matter publicly - this aspect of the matter. I do not want to develop an argument but it is - I have no instructions to do that, Your Honours - I am simply asked to draw it to the Court's attention.

GIBBS CJ: Section 14(10) has a bearing, does it? Is there any evidence or document tendered before the Commission which is going to be revealed?

MR FITZGERALD: I think it is probably correct that there is not evidence involved, Your Honour.

GIBBS CJ: Section 7 then which simply provides, "That the Commission shall conduct the whole of its inquiry in private". It has done that. If there is anything in this material which anyone suggests should be kept confidential, our attention should be drawn to the passage before it is read because anything said in this Court, of course, will be public. So that the proper course would be to refer us to page X and say that on that page is something that you want kept confidential. Then we can consider what we shall do about it. In the absence of any such submission we will just proceed.

MR FITZGERALD: Yes. I think it could be taken, Your Honours, that while we will do that, it is most unlikely that there is anything which we would want to keep out of the public domain.

GIBBS CJ: Yes, thank you Mr Fitzgerald.

MR GYLES: Thank you, Your Honours. The relevant transcript of the first day's sittings is annexure B to the affidavit of Mr Masselos. May I take Your Honours directly to page 31 of that transcript, this constituting a ruling which I think is self-explanatory and I need not go back through the argument which had preceded it. Sir George Lush said:

> Two matters have been the subject of preliminary discussion before the commission. The first is the question whether an advertisement inviting submissions to the commission should be published and the second is whether members of the commission should peruse documents already in the possession of the commission, being reports of previous inquiries. As to the first question, that of the advertisement, counsel for the judge objected to the suggested course. They argued that the acts must be incidental to the investigation of misbehaviour under section 72 to be valid at all. They indicated that they would at an appropriate stage submit that acts other than acts in office which had not led to criminal conviction cannot be misbehaviour within section 72 and therefore it would be useless to invite commentaries upon the private life of the judge and in any case to do so would go beyond anything which the act was constitutionally capable of authorising.
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> For my part I am unable to accept this argument. The advertisement may conceivably attract allegations of different kinds, some relating to matters connected with judicial offices and some not. The act provides for the elimination in the first place of any allegations which are not sufficiently particular, a process which may be compared to striking out a pleading and showing no cause of action. Those which survive this process will proceed to what counsel assisting the commission called the second stage, which involves ascertaining whether there is a case to answer.
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> At some point in this stage the decision on the meaning of proved misbehaviour in section 72 will have to be made, but that

decision will be more realistically made and more pertinent to the actual facts than if it were made at the present stage when it would in effect be made in vacuo.

I do not think that the validity of the commission's proceedings can be affected by the fact that an advertisement has the potential to attract material which may be discarded at one or the other of these stages. Section 5 requires the commission to inquire and report. The operation described by the word "inquire" may be divided into (a) the collection and (b) the consideration of allegations. I think that the commission should proceed at once with collecting information and for that purpose should advertise. It is not really to the point that we may receive some useless information.

And there was other discussion.

As to the second matter, the perusal by the members of the commission of materials being reports of previous inquiries, in my view the task of the inquiry, in the double sense which I have attempted to define of collecting and considering material, is entrusted to the commission. It was argued that counsel assisting the commission should perform the task of collecting and sifting and the members themselves should not study the materials until counsel assisting frame particulars which satisfy section 5 subsection 2. It was argued that otherwise the commission cannot properly perform its function of consideration which is essentially a curial function. Again, I am unable to accept this argument. There are substantial curial aspects of the commission's function but it is an administrative commission of inquiry. Jurists have always criticized the combination of some of the functions involved in the inquiry and report, but there is nothing exceptional about the form of the present act as I construe it in that respect.

Counsel assisting the commission are given no responsibilities under the act nor are they given the role of prosecutors. It is the commission's responsibility to make the inquiry with counsel's assistance. Consistently with this members of the commission are given authority to inspect documents

delivered to the commission, see section 18, and to have access to information not in the possession of the commission, see section 13.

No doubt the commission will rely on counsel assisting it to a large extent in this particular area, but it is finally the commission that has to make the report. The commission should therefore be aware of and supervise the collection of information.

It was then ruled that the material which is exhibited to these proceedings should then go to the Commissioners for them to consider in that capacity.

Then, Your Honours, at page 36, Sir George Lush:

If counsel assisting engaged on this task, the task of examining material and extracting particulars, during the next fortnight up to 20 June, could a progressing set of particulars be given the judge's counsel on 20 June so that they would be able at least to start working on the problem. If you postpone until 30 June the giving of the whole body of particulars, that means that they need two, three weeks for reasons mentioned in chambers, which may lead to the loss of the first week in July.

If you add.....another two weeks.....we are getting close to reaching the end of July before we have even started. We have got to hear substantial argument on section 72 which undoubtedly will have us reserving and writing for a time. You see, we have managed to sit -

and so on. So at that point, Your Honours will see again that counsel's role was to examine material and extract particulars. Then counsel assisting said that they thought they could certainly give some, if not all, by the 20th, and that was the ruling. We pressed upon the Commission the view that it should make a ruling on its view of proved misbehaviour before even that stage had taken place but the Commission declined to do that saying, "We want to at least see some particulars in order to have an argument which is not simply an argument in principle".

So that when we left on 3 June the plaintiff was entitled to expect that what would happen would be that there would be an advertisement published; that counsel assisting would be looking at the material which was received and had been received from other sources and

would by 20 June produce the allegations, specific allegations, in precise terms within section 5(2) of the statute. And that once those allegations were produced then there would be two things that would happen: the first would be that the Commission would hear argument as to whether those allegations were specific allegations in precise terms. Those which were not would be rejected. And as Sir George Lush said, "A sort of a striking out procedure".

The second sifting mechanism would be an argument then as to whether any of them, or which of them, fell within the Commission's view of section 72 or proved misbehaviour within section 72. Once that sifting process had been complete and if there were any allegations which fell through those two nets, then the Commission would proceed in accordance with the statute to their inquiry and consideration of those allegations.

Then, Your Honours, there was a discussion between counsel involved following which my instructing solicitors wrote to counsel assisting as at that stage we did not know who his instructing solicitor was, and that letter is annexed to Mr Masselos' affidavit and it is marked C. And it is this letter and the reply to it which gave rise to the ruling given on Tuesday morning this week which brings us before the Court. Do Your Honours have that annexure C? It is a letter of 18 June from Steve Masselos & Co to counsel assisting the Commission - annexure C to Mr Masselos' affidavit:

> We refer to Mr Charles' conversation with Mr Gyles yesterday in which he advised that he would not be able to provide allegations and particulars of allegations on Friday next as had been arranged at the previous sitting of the Commission by reason of the volume of information which has been received. He further referred to the possibility that investigators might be engaged to follow up information received. He suggested that it was therefore premature to have the argument as to the meaning of proved misbehaviour within s.72 of the CONSTITUTION next week as had been envisaged, and suggested an adjournment until July 14 next.
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> It seems to us that this procedure is at odds with the rulings of the Commission given on the last occasion, and with the true construction of the Statute.
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> Sir George Lush, in a ruling which was agreed with by the two other members of the Commission said that the operation described by the word

"inquire" may be divided into (a) the collection, and (b) the consideration, of allegations. We had understood that only the first stage would be dealt with prior to the next hearing of the Commission. We had understood from the ruling that after a list of allegations had been compiled, there would then be a process of eliminating those allegations which were not sufficiently particular to comply with s.5(2) of the Act, and also those allegations which could not (even if proved) amount to proved misbehaviour within s.72 of the CONSTITUTION. We did not understand that there would be any movement to the second or investigatory phase until the first phase was complete. Our contention is that our client should have the fullest opportunity of putting whatever submissions he wishes concerning the allegations which are to be considered before any step is taken by or on behalf of the Commission to actually investigate them.

It will be recalled that the Commission ruled that Counsel assisting should give a progressing set of particulars to our Counsel on June 20. It will also be recalled that Counsel assisting the Commission said that on the material they had read to that stage, they could frame a number of allegations with specificity, although reserving the position in relation to other allegations in the light of other material received. We can see absolutely no reason why that ruling should not be complied with. Furthermore, we can see no reason why the sifting process on both bases - that is lack of particularity and lack of relevance - should not take place in relation to that progressing list of allegations at the first possible opportunity, namely next week.

We are also very concerned at the suggestion that the services of investigators might be engaged. We see no role to be played under the Statute by anybody in this matter save for the Commission and Counsel assisting the Commission and those carrying out essential administrative functions. The Act lays down the method of bringing material forward with our client present. Indeed, our client wishes to protest as vigorously as he can as to the procedure which has been outlined. It is secret, it is open-ended, it amounts to a roving inquiry

into the whole of his life by persons without any Statutory or Constitutional authority, and is quite foreign both to the CONSTITUTION and to our system of justice.

As Counsel made clear on the last occasion, our client does not authorise or consent to any invasion of his privacy at all and waives no right he has to proceed against any person who interferes with his privacy or his rights in excess of authority granted by the Statute or the CONSTITUTION. To send investigators out into the community is to seriously defame our client, and he certainly reserves all his rights in relation to anything done by them.

It goes without saying that it would be quite inappropriate and indeed unlawful for the Commission to obtain the services for example of any policeman or other person connected with law enforcement for this function.

Lest there be any doubt about the position, our client does not regard it as appropriate that the Commission should seek to "verify" any allegation for the purpose of eliminating it on the basis that no admissable evidence can be obtained in relation to it. That puts the cart before the horse. This Statute does not authorise any investigation of anything other than a specific allegation of misbehaviour within the meaning of s.72. The task of ascertaining whether there is admissible evidence to support an allegation should follow not precede consideration of the relevance of that allegation and its
T10 particularity.

Then assurances were sought and access was also sought to material which had been received.

GIBBS CJ: That might be a convenient stage at which to adjourn. We will adjourn till 2.15 pm.

AT 12.48 PM LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.20 PM:

GIBBS CJ: Yes, Mr Gyles.

MR GYLES: Your Honours, before going to the reply to the letter I read before the adjournment, might I take the Court back to the transcript of the first day, 3 June, to reinforce a point that we make as to the reasonable expectations which we had hitherto had as to what process was involved.

GIBBS CJ: I do not quite understand the relevance of that, Mr Gyles. Your challenge is on the basis of constitutionality and on the basis of the interpretation of the statute. What does it matter what you thought was going to happen? Surely, what matters is what the statute provides?

MR GYLES: Yes, Your Honour. If there is no question of time - we are primarily here on notice of motion for injunction and I cannot anticipate the arguments which might be put against us. I am merely seeking to show that what is - - -

GIBBS CJ: Yes, but surely you put your own arguments and you then you reply to what arguments are put against you?

MR GYLES: Your Honour, if the Court thinks that the progress of the matter is not germane, I will not trouble about it.

GIBBS CJ: I just do not see the relevance of it and I do not see why we should take up time with irrelevant considerations.

MR GYLES: Your Honour, may I then go to the reply from the solicitor instructing counsel assisting to my instructing solicitors which is annexure D to Mr Masselos' affidavit:

> Your letter dated June 18th 1986 addressed to Mr Stephen Charles Q.C., Counsel Assisting The Parliamentary Commission of Inquiry, has been referred to me for reply.
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> I confirm that those assisting the Commission have been placed in possession of a very considerable body of material, which is being examined with all reasonable speed, and that it has not proved possible to provide specific allegations in precise terms before the next proposed sitting of the Commission on Monday 23rd June. There are two reasons for this: the quantity of documentary material which has been received is greater than anticipated at the time Mr Charles informed

> the Commission (on 3rd June 1986) that he hoped to be in a position to supply a preliminary set of specific allegations with particulars by 20th June; and secondly it would be impossible for Counsel assisting the Commission to draw and settle specific allegations with proper particulars before at least some investigations have been carried out and statements obtained from potential witnesses.

Now, Your Honour, stopping there, that is a clear statement as is later confirmed that there are no specific allegations in precise terms which have so far been received or collected.

> I note your contention that your client should be entitled to make submissions concerning the allegations which are to be considered before any step is taken by or on behalf of the Commission to investigate them; and your further contention that it would be inappropriate and unlawful for the Commission to obtain the services of any policeman or other person connected with law enforcement for this function. I do not accept that either of these contentions is correct. However, to enable these -

then there is a statement they would not do anything before the Commission met, but -

> In order that these comments be not misunderstood, I should add the Commission has appointed to its staff a senior research officer and information has already been received, in oral form, by Counsel assisting the Commission. Those who have thus far supplied oral information are not, at present, expected to give evidence in any Commission hearings.

Then, there is the threat:

> In any event, subject to any arguments that may be raised on Monday next, you should assume that the Commission may appoint persons (including policemen) to assist it with its inquiries as from Tuesday 24th June and that the taking of statements may commence on that date.
>
> In order that you and your client may be fully informed as to the approach which is being taken by Counsel assisting the Commission, I am instructed to add the following comments. The information now being considered by Counsel falls into two general categories -

(a) allegations relating to Mr Justice Murphy's conduct in judicial office;

(b) allegations relating to Mr Justice Murphy's conduct, but not pertaining to judicial office.

None of the information supplied includes any allegations that the Judge has been convicted of any offence.

The information contained in category (b) relates both to allegations of breaches of the general law and other matters, not constituting breach of the general law which, if proved, would arguably constitute misbehaviour sufficient to justify removal from office. In each case the allegations cover periods of time occurring both before and after the 14th February 1975, being the date of the Judge's appointment to the High Court Bench.

And then they decline to make available material for inspection. So, in that state of circumstances, the Commission sat again on 23 June, and that is annexure B to the affidavit and I will not take the Court right through this transcript because it consists of argument and counter-argument but there is some clarification by counsel assisting which I should draw attention to.

At pages51 and 52 - or perhaps I should say from 51 through to 56, counsel assisting puts their view as to the nature of the inquiry and what they propose to do and without reading all of it, may I draw attention to some passages. At the foot of page 51:

> Now it will be, we would submit again, obvious enough that information arrives with the commission staff, by which I include counsel, in a form which is necessarily imprecise. Members of the public supplying information do not generally couch their information, or for that matter, speech in the form of specific allegations in precise terms. When they make a complaint relevantly they will say something such as: the judge did X; but not giving a date. And they go on to say: you can test this by asking A, or B, or C, who were present. Now what it will be seen is that based on section 5(2) Mr Masselos's letter suggests that counsel assisting have no business because of that section in engaging in any investigatory or interrogatory activity for the purpose of making an imprecise allegation specific.

And the Court will appreciate that what is there being said - and it is not a matter of tidying up the

language, it is a matter of finding out the substantive facts in order to fashion, or put forward, an allegation from within the Commission, including going out to people who are pointed to as being the sources of information. Let us say, for example, that people who, as we see from this evidence, have come along and given oral evidence - oral information has been given to the Commission from people who it is not expected to call, in other words, informants - they could be journalists - and they say, "We think the Judge has done such and such. We cannot tell you anything about it but if you see Mr X and Mr Y, they can tell you." and it is proposed that policemen be engaged to do that.

Your Honours, at page 54, at the top of the page, there is a distinction drawn - perhaps if I read it:

> We would submit, in addition to what we have put before, that the collection of information which is at present occurring is an undertaking by counsel assisting the commission, and we submit that when section 5(2) prohibits the commission from considering anything other than specific allegations in precise terms, that is, a direction to the commission in proceedings of this kind where the commission is sitting in hearing, the commission is prevented at that time from considering anything other than the specific allegation in precise terms, and for that purpose the commission must then have a series of specific allegations to which the evidence would relate.

Our difficulty about that, Your Honours, is that the Commission, on the previous occasion, had ruled that counsel assisting had no statutory role and all counsel was there to do was to act as counsel to assist them which would no doubt mean getting evidence into an orderly fashion and leading evidence in an orderly fashion but here we are confronted with a submission that counsel assisting did have such a function, they were able to make these independent inquiries and what they were doing was not inquiring by the Commission. With respect, it will be our submission that if it is not inquiring under colour of this statute then it is occurring wrongfully.

Then it is clarified, and I will not read all the passages, from there to the end of the page. It said that they:

> are acting responsively and not of their own initiative in the starting of their inquiries.

That is, it is said that somebody has come in,

presumably, with some oral information and they are following that up. Then, at page 56 counsel, in the first full paragraph:

> Now, as to that matter, we would contend that if we are entitled to ask questions of those persons who supplied information to us -

and, of course, those who they pointed to -

> there equally ought to be no reason why we could not ask questions of persons mentioned as possible witnesses in information supplied. If we can ask those questions, we would put it, why cannot the commission employ persons to ask those questions. We know of no principle of law, and we submit that there is none, which would prevent the commission employing persons to ask those questions, and equally we would respectfully submit if persons may be employed, why may they not be police investigators who may be persons particularly well qualified to carry out that task. If they are made available to the commission, we would submit the commission is entitled to use them for that purpose.

And that includes, of course, using policemen to go out and, for example, if somebody came into the Commission and said, "We believe that Mr Justice Murphy has not been diligently attending to his duties at the High Court. He is very often late arriving and leaves very early. He is doing it persistently. I cannot tell you that, I have just been told that, but if you go out and speak to the Court staff, the Judges' associates, the Court attendants, the driver, if you obtain access to the driver's dockets you may be able to find out about that, or go and speak to the other Judges, they will tell you." and a policeman can come to the High Court and ask those questions of people under colour of statutory authority. It is, with respect, a startling proposition.

BRENNAN J: But does he need statutory authority? What is the exact point that you make about this, Mr Gyles? Is it that the Commission is exceeding its function?

MR GYLES: Yes.

BRENNAN J: With what result? That the inquiries that are made are made unlawfully in some way?

MR GYLES: With the result that what is authorized by the Commission is an interference with the rights of the plaintiff. To go out and make those inquiries is to interfere with his privacy and his rights and to do so, particularly, if I may say so, although the point

is the same if it is not a policeman, but to have a policeman saying, "I am here by virtue of a statute, a parliamentary commission of inquiry " is to put those people in a position where they can oppress people by colour of the statute. If there is no statutory base for it, we submit that it should not be permitted and that is the short point on that aspect of it, Your Honours.

GIBBS CJ: I thought it was clear law that anyone is entitled to ask questions about the doings of someone else, unless it is done in a way which is, in itself, defamatory or in breach of some other law, written or unwritten.

MR GYLES: But, Your Honour, that may be so but it is not the clear law, with respect, that one may do so under colour of a statute. Either what the Commission proposes is lawful or it is unlawful and it is a relevant question for this Court to answer. It is a question of law as to whether or not these investigators, so acting, would be acting under this statute and that may make a very big difference, not only to my client but the people to whom they speak. It is one thing to say, "I am here in the middle of a police inquiry or I am here because I am conducting a survey". It is another thing to say, "I am here by virtue of statutory authority given to me by three ex-Judges, two of them knights, and I ask you to answer my questions."

The fact that there may be no sanction if they do not answer the questions does not mean that it is an academic or moot point. At pages 87 to 89, for the sake of completeness, counsel for the Commission put further submissions as to that matter but nowhere resiles from his contention that he is entitled to do as he had earlier outlined. Then, Your Honours, on the following morning, the Commission made a ruling on the arguments which had taken place and that is at page 96 of the transcript which is annexure E to Mr Masselos' affidavit:

> On 3 June 1986, the commission indicated that specific allegations relating to the conduct of the judge should be delivered to the judge's advisers on 20 June. It was at that time contemplated that the particulars then to be given might be incomplete. It was further indicated that argument upon the interpretation of section 72 of the CONSTITUTION might begin, upon the basis of the then particulars on 23 June.
>
> Senior counsel assisting the commission spoke to senior counsel appearing for the judge on 17 June, with the result that a letter

was written by the solicitor acting for the judge to senior counsel assisting the commission, which raised the following points:

Your Honours have read the letter so I need not read the summary of it. It is not quite accurate but there is no point taken about that. This letter was answered on 20 June and there is a summary of that. There then follows a repetition of argument and at page 98, the second full paragraph, the Commission commences its ruling:

> The commission is unable to accept the argument. The act does not say who is to make or to prepare the allegations. It would be unreal to suppose that outside sources would supply in all cases allegations in a form complying with section 5(2), and it would be equally unreal to suppose, particularly in the presence of section 5(1), that the commission was to discard all information which was not at the time of receipt in the required form.
>
> The commission's view is that it is entitled to gather information, examine it and conduct investigations, if necessary, with the assistance of investigators, including members of the police forces if made available, based upon the information to ascertain, with what precision is possible - - -

BRENNAN J: My copy ends at page 94.

MR GYLES: Is it annexure E, Your Honour.

GIBBS CJ: It is annexure K, actually.

MR GYLES: I am sorry, I have misled Your Honour, it is K.

BRENNAN J: Thank you very much.

MR GYLES: The actual ruling itself commences, or the substantive part of the ruling commences at the second full paragraph of page 98, and I have read that paragraph:

> The commission's view is that it is entitled to gather information, examine it and conduct investigations, if necessary, with the assistance of investigators, including members of the police forces if made available, based upon the information to ascertain, with what precision is possible, exactly what the relevant point, if any, of the information is; and that it is its duty, and specifically the duty of counsel assisting, to formulate the specific

allegations which emerge from materials received. It considers that this is no more than a realistic interpretation of the various provisions of the act.

In particular it rejects the submission of counsel that the terms of section 5(2) confine the consideration of the commission to allegations in the required form originating outside the commission's activities. If confirmation of this view were required, it may be found in the statements of the minister in charge of the bill in the Senate in the course of the second reading.

So that, what the Commission is ruling is that it is entitled by others to take information and see if that can be converted into allegations to be made, not by anybody outside, but by the Commission staff, the counsel assisting the Commission.

(Continued on page 25)

R GYLES (continuing): Perhaps when I answered Your Honour Mr Justice Brennan's question earlier I assumed that Your Honour understood we took that basic point. We say that this statute does not permit anybody, whether it be investigators or the Commission itself, to do more than inquire into and consider specific allegations in precise terms.

BRENNAN J: Made by other persons.

MR GYLES: Made by other persons. Already made, I mean, made outside the Commission.

GIBBS CJ: Might I just ask this: suppose somebody is minded to make an allegation and he knows that he has to make it specifically and in precise terms, is he entitled to make some inquiries so that he can be sure he has got his particulars right?

MR GYLES: The person himself?

GIBBS CJ: Yes.

MR GYLES: Naturally.

GIBBS CJ: Well, why cannot an investigator do that if he is thinking of making an allegation?

MR GYLES: Because the investigator is not a person - the investigator employed by the Commission, in our submission, has no role to be making allegations.

GIBBS CJ: But I thought you said anyone could make an allegation.

MR GYLES: Yes, anyone apart from the Commission.

GIBBS CJ: Well, what is there is the Act to show that an investigator employed by the Commission cannot make an allegation?

MR GYLES: Well, that is a matter of statutory construction, Your Honour. We submit that that comes from the whole of the Act. It would be, in our submission, not a view of the Act which could reasonably be come to. This is not - - -

GIBBS CJ: Why is that, there must be some reason for the proposition, surely?

MR GYLES: Your Honour, apart from the wording of the Act itself in section 5 - you see, with respect, what section 5 does is to set up a Commission to consider, to inquire into, and advise about conduct. In carrying out its inquiry the Commission shall consider only specific allegations made in precise terms. Now, I would have thought, with respect, that it could not be argued that an allegation under 5(2) could be made by the Commission

itself, that would be a ludicrous result. Now does it make any difference that it is made by a person employed by the Commission? Now again, we would submit, that that would be a ludicrous statement. A counsel assisting a Commission or a person employed by the Commission is simply there to assist the Commission and speaks for it. This is not a statute which is aimed at taking, we would submit, on this construction - a judge's life and saying that we, as a Commission, can investigate that judge and make allegations about him which have not been made by others, whether based on information or not.

DEANE J: Mr Gyles, are there any provisions in the Act about the Commission itself employing counsel?

MR GYLES: No.

DEANE J: Is the Commission employing counsel? I had always understood it was the Attorney-General or some officer of the government who instructed counsel to assist the Commission. I am not talking about this Commission I am talking about other commissions.

MR GYLES: No, it does say, Your Honour - section 15 says:

> The Commission may appoint a legal practitioner to assist the Commission as counsel -

that is section 15.

DEANE J: Thank you.

MR GYLES: There are also administrative provisions, section 20, which deal with employment or engagement of staff.

GIBBS CJ: Who is said to have appointed the investigators here, is it counsel or the Commission?

MR GYLES: We do not know, Your Honour. But the Commission is taking responsibility for it. As we understand it, no investigator has yet been appointed although they stand ready depending upon the ruling of the Court to engage them.

DEANE J: It seems though that it would be wrong to refer to counsel as being employed by the Commission.

MR GYLES: Yes, but, Your Honour, section 15 - what section 15 does is to appoint a legal practitioner to assist the Commission as counsel. That would not encompass any form of investigation. It surely encompasses the leading of witnesses in their evidence at hearings and no doubt the perusal of documents and the tendering of documents at hearings. Now the process which counsel indicated originally they were going to do which was to sift and filter material, we have no quarrel about. What we do submit is plainly wrong is

for counsel to adopt the role of a policeman - investigator.

DEANE J: Does not this all come down, though to specific allegations made in precise terms, because otherwise what you are saying counsel is doing is, on my understanding, precisely what counsel assisting a commission of inquiry always do? I get the point when you come to the precise section but it seems to me that is the beginning and the end of the point.

MR GYLES: Your Honour, we do submit that section 15 must be given force. Counsel assisting may well have a role to give advice on evidence, if you like, I quite concede that as well. He may say, "Well, what we need is X or Y and a normal sort of inquiry".

DEANE J: I mean the ordinary sort of royal commission, on my understanding, counsel assisting if he is not under these sort of restraints does say, "We will look at this, we will look at this, inquire about that", and so on. I mean, does one really go beyond section 5 for this point.

MR GYLES: Section 5(2) is the key to the submission, Your Honour.

DEANE J: Yes, I follow that.

MR GYLES: Particularly when one links it with 6 - well, particularly 6. This is not a roving commission of the sort that a royal commission is and that is the point there, Your Honour. The ruling at 98, the second last record:

> The act protects the judge's position by requiring that only those things which can be reduced to a specific allegation can be raised against him, and that he shall not be required to give evidence unless there is evidence supporting an allegation or allegations sufficient to require an answer. It is not consistent with this appreciation of the act's provisions to construe this act as requiring or entitling the participation of the judge in the preparation of the specific allegations, nor can the requirements of natural justice extend to such participation.
>
> The commission notes an argument that to take the view which it has now expressed would be inconsistent with statements -

Well, that is perhaps not important. Then there was a rejection of our application. Then there was an adjournment and at page 101 - page 100, I said:

> Might I just, before adjourning, ask for confirmation of what we believe to be implicit in what the commission has ruled this morning, that is, that the commission expressly authorises the course which is proposed to be adopted by those assisting the commission in the letter from the solicitor instructing my learned friend to my instructing solicitors. I refer in particular to page 2.

And then the Presiding Member of the Commission requested that that be read and it was then read. It was the portion of a letter which dealt with the - perhaps if I could remind the Court - appointment of:

> persons (including policemen) to assist it with its inquiries as from Tuesday 24 June and that the taking of statements may commence on that date.

And then there was a catalogue of information which is to be followed up which in addition to conduct in office is said to relate to conduct not in office, none of which includes an allegation the Judge has been convicted of any offence. But it relates to:

> allegations of breaches of the general law and other matters, not constituting breach of the general law.....both before and after..... appointment.

So that is what the Commission proposes to do and, of course, they would no doubt propose to - and that is all done before there is any argument as to the meaning of proved misbehaviour in section 72. Then by arrangement, Your Honours, later in the morning - there was an arrangement come to that the matter would stand over until next Monday to await an application to a court to have the matter tested.

Your Honours, fundamental to all of this, both the arguments of construction and what is proposed to be done and the constitutional arguments, is the meaning of section 72(ii) of the Constitution. And I would now propose to go to that point, if I could. As the Court will have seen from the contentions which have been advanced to the Commission, it is our submission that proved misbehaviour in section 72(ii) of the Constitution is primarily directed to misbehaviour in and during office but does include conviction - or may include conviction of an infamous offence. In conduct out of office it is only conviction which can qualify and on no account can behaviour prior to being appointed to office qualify.

Your Honours, before going to the considerable body of authority and commentary upon the point, may I make the simple and perhaps trite point, that section 72(ii) does not say that a person can only remain a justice of this Court for so long as he remains a fit and proper person. There is no general supervisory power over judges which requires that they qualify as fit and proper people. There is a particular statutory formula which has a very long history which was chosen which does not incorporate that notion at all and that misconception lies at the heart of much of the - what, in our submission, has been ill-informed discussion about this section. Indeed, it would be our submission that until the controversy of which this case forms part arose, no serious commentator has ever taken any other view but the one that I have advanced in these submissions. We point to what amounts to an unbroken line of authority and commentary for centuries as to the meaning of these words.

Your Honours, we have handed up some notes of argument on proved misbehaviour. It is our first submission that the words of section 72(ii) so far as are relevant, have the effect that justices of this Court hold office during good behaviour. Now so much has been said in the WATERSIDE WORKERS' FEDERATION case and in the CAPITAL TV AND APPLIANCES V FALCONER, the passage there referred to. I will be coming back to Mr Justice Windeyer's dicta in CAPITAL TV directly, but perhaps I should remind the Court of some of the passages from WATERSIDE WORKERS' FEDERATION, (1918) 25 CLR 435.

GIBBS CJ: Mr Gyles, an initial difficulty and it is an important question, of course, is whether we should consider at all at this stage, the question of the meaning of proved misbehaviour. It is, of course, fundamental that this Court does not decide hypothetical or abstract questions. There is no suggestion that any particular misbehaviour or any particular conduct is alleged to constitute misbehaviour. Why should we consider it now?

MR GYLES: Your Honour, for a number of reasons. The first is that we challenge the constitutional basis of the Act because it - - -

GIBBS CJ: Yes, but the Act tells them to inquire into the meaning of proved misbehaviour. Now, you may have grounds which you wish to advance to challenge the constitutionality of the Act but that cannot involve, surely, the meaning of the expression, "proved misbehaviour".

MR GYLES: Well, Your Honour, I suppose on one view it does, on one view it does not. That is the first point, we do submit that it is intertwined inevitably in the constitutional challenge to the Act.

GIBBS CJ: But the Act uses the very words of the CONSTITUTION. Whatever they mean, the Act means and therefore - - -

MR GYLES: With respect, not, Your Honour, because it says, "in the opinion of the Commissioners". That is one of the constitutional problems.

GIBBS CJ: Yes, well then the intention is the Commission reports to parliament and then if parliament is so minded it can consider for itself whether it agrees with the Commission's opinion.

MR GYLES: Yes, Your Honour, but if I may just complete the points. We say that it directly arises in the constitutional challenge in two ways. Firstly, we say that the Act gives to the Commissioners the role of delimiting their inquiry by reference to their opinion as to the Constitution and that is necessarily invalid, in our submission. Secondly, the argument as to whether or not an Act of this type can be incidental to anything requires, in our submission, an understanding of the true meaning of section 72 when one looks at the extent of the incidental power. But, Your Honours, most importantly we are under the - I withdraw that - the plaintiff is under the threat laid out in a letter of the solicitor instructing counsel assisting this Commission that they will investigate matters which, on our submission, plainly are outside the statutory field. So that at the very beginning of this inquiry these Commissioners have committed themselves to a view of section 72 which is plainly wrong, if our submission is correct. They have specifically authorized investigation of conduct - private conduct before appointment, private conduct during appointment, all of it without conviction.

GIBBS CJ: Is it right to say they have committed themselves to any view of section 72?

MR GYLES: They must have, Your Honour, to authorize what they - - -

GIBBS CJ: They have not said so, have they? Correct me if I am wrong.

MR GYLES: Your Honour, they said what they said on Tuesday morning that they have authorized and taken responsibility for counsel inquiring, as their delegate in effect, or arranging the inquiry into matters which, if our submission be correct, are well outside the bounds of their constitutional - or any constitutional framework. So on one construction of the Act it is not beyond the Act because the Act commits the opinion to them. They can say what, in their opinion, is proved misbehaviour and investigate accordingly and they are doing it. You go out and you investigate this range of conduct. Your Honours, if we are correct

in our view that that is beyond the constitutional power this Court, with respect, has a duty to say so because there is a threat to the rights of the plaintiff. Now, in my submission, the day is long past where it can be said that an inquiry of this sort has no impact upon a person. That is not a view which, in our submission, is arguable in this day and age. To suggest that a parliamentary commission of inquiry acting under this statute could investigate these matters, make a solemn report to parliament with all the facts and their opinion as three judges or retired judges - in the event they are retired judges, but they could have been judges and that that is a view to some sort of academic exercise, in my submission, is just not a tenable argument. If there is to be any examination of the question it ought be now, with respect. Otherwise people - my client is in the position where he may be summonsed to give evidence compulsorily if these Commissioners take a particular view of section 72 as we must accept - - -

GIBBS CJ: But then, of course, the situation changes - whether you are right or wrong, the situation changes once there is an attempt to exert authority over your client. But at the moment I am not quite clear why it is that persons may not inquire into whatever they wish to inquire into provided that in so doing they do not infringe anyone's rights. It is not an infringement of someone's rights to ask a question of someone who is willing to answer it.

(Continued on page 32)

MR GYLES: But, Your Honour, perhaps I am repeating myself, but to equate an inquiry by somebody on a voluntary basis with a statutory body purporting to exercise statutory power is not a correct analogy. To say that anybody can inquire about anything is not to answer the question, "Do these Commissioners have the lawful power to do what they are proposing to do?" - the power under the statute, I am sorry, to do what they are going to do. If the answer to that is, "No", then they should stop doing what they doing. They are purporting to act under this law of the Commonwealth. If they are not acting under the law of the Commonwealth this Court, with respect, should say so, so that they stop acting unlawfully, people to whom they ask questions know where they stand, and my client is not prejudiced. The mere fact of having a policeman go to somebody and say, "I am inquiring into some information I have obtained about Mr Justice Murphy" inevitably leads to damage and he does not know about it. He cannot stop it. He cannot sue.

With respect, to say that policemen, or indeed anybody on behalf of this Commission, will not be exercising what they exercise under colour of the statute, in my submission, would be to take an unrealistic view of the world.

BRENNAN J: Mr Gyles, I do not want to take you out of the order of your submissions, but I notice that section 5 and the subsequent sections use a variety of verbs as to what may be done by the Commission. There is, for example, the verb, "to inquire". In subsection (2) there is the verb "to consider". There is the formation of an opinion. There is a finding of evidence of misbehaviour in 6 and there is "making a finding" in section 6(2). Now, as I have understood the submissions thus far - - -

MR GYLES: And then section 8 too, if I could add that, Your Honour.

BRENNAN J: Yes, of course. In the submissions that I have understood thus far, you draw no distinction between the limitation which is contained in section 5(2) with respect to consideration, and the injunction to make an inquiry. For my part, I would be advanced if you could direct your attention to the difference in those verbs and see whether there is the precise correspondence on which your submissions are based.

MR GYLES: If Your Honour pleases, we primarily base it upon the substance of subsection (2) which commences with the words:

> In carrying out its inquiry the Commission shall consider only specific allegations.

Now, in our respectful submission, that makes it plain that the injunction in subsection (2) is to govern all that they do under subsection (1). It does not say, "for carrying out part of its inquiry", or "for carrying out" - Your Honour will recall that counsel assisting put the argument that that only governed them once they got into the hearing stage.

BRENNAN J: That is under section 14?

MR GYLES: Yes. We would primarily contend indeed that this Commission should act in hearing. It should not have private inquiries going on. Whether that be right or wrong, we submit that one cannot divide up the inquiry and say as to part of it, "You are at large"; as to part of it, "You are confined by the necessity to have specific allegations". The thing that we cannot understand, and I appreciate that the Chief Justice has put that it does not matter, but when we first went to this Commission, we were told that there would be a two-stage sorting out process. First of all, they would reject or discard those allegations which were not specific and precise; and secondly, they would decide which were within and which were without section 72.

Now, that was a form of procedure which would be, in our submission, acceptable. They collect - receive - allegations and say, having collected them, "We now examine them. We say that is not precise, that is not precise. That is not specific, and that is outside 72".

Now, Your Honour, that is a way of saying that, "You shall do nothing in this inquiry, or when you are inquiring you shall only consider specific allegations". It cannot be plainer than parliament was saying this is not the sort of inquiry Mr Justice Deane was putting to me before, a sort of builders labourers type inquiry. It is an inquiry only into specific allegations made in precise terms, not generated by the Commission, but which exist, which are alleged by somebody. Once they have been alleged, then they must pass two tests. And, in our submission, as a matter of English, 5(2) so governs 5(1). As a matter of common sense it governs it too. And for what it is worth, the legislative speeches would, we say, support us rather than the other side. In the end there may be no great advantage to be taken from what individual members of parliament may say, but this was not intended to be any sort of roving Commission, in our respectful submission, nor should it have been because, as we will come to later, this statute, as with all others, must be construed in the light of the history of parliamentary addresses

to the Crown for removal of judges where there is a well recognized procedure which involves the laying of specific charges.

Secondly, it will be construed against the background of the necessity to have judicial independence, particularly judicial independence of a federal judiciary which holds the balance between centre and State and between citizen and State. And that this statute will be construed not just as an ordinary piece of English, but bearing in mind those fundamental matters of history and policy.

Now, I will have to develop those in the constitutional submission. I will be taking the Court through the history of parliamentary addresses for removal and the procedure which related to them to indicate that the bringing of specific charges has always been a fundamental feature of that procedure. And if that is correct, then it would be very sensible that this statute would so operate.

DAWSON J: Mr Gyles, when you look at, say, section 5(2), can you say who it is envisaged will make the specific allegations?

MR GYLES: No, it does not say that.

DAWSON J: Do you have any submission to make about that?

MR GYLES: No, the only submissions I make, Your Honour, is that it is not an allegation by the Commission or anybody acting on its behalf.

DAWSON J: Well, it might on one reading cover that, might it not?

MR GYLES: The Chief Justice put that to me earlier and I submit that that would be an untenable construction.

DAWSON J: Well, putting that aside?

MR GYLES: Putting that aside, the alternative submission is it would be an allegation which was made prior to the setting up of the Commission, an existing allegation, not something which is generated later.

DAWSON J: By anyone?

MR GYLES: By anybody - apart from the Commission itself.

DAWSON J: And allegations to whom?

MR GYLES: There is no requirement that they be made to anybody, although the Commission must become aware of them, I suppose is the best way I can put it. Now, Your Honours, those feature of the statute, in my submission, lead

to it being constitutionally invalid, but that is a separate argument.

Now, to come back to the point I was asked to direct the submissions to, I submit that in no sense is it academic to decide now for various purposes, or to hear argument for various purposes, upon what is the true meaning of section 72 of the CONSTITUTION. It may be at the end of the day the Court for other reasons says the statute is unconstitutional, but this submission does lie at the heart of what I wish to put to the Court. Where it leads is another matter. I submit that it leads both to the Act being unconstitutional or to the Act being construed in a certain fashion. And I have already put I hope sufficiently that we say we are here for an injunction to restrain infringement of our rights by people acting under colour of office, and that that is an appropriate ground for relief.

GIBBS CJ: This argument, if successful of course, would not entitle you to restrain the Commission from making any inquiries but only from making inquiries into events that had occurred before the appointment of Mr Justice Murphy as a Justice.

MR GYLES: And events outside office unless there is a conviction, and it is conceded there is none. It would leave the Commission in a position where, if the Act is otherwise valid, they could investigate allegations, specific and precise allegations, about Mr Justice Murphy's wrongful conduct in office. That is the effect of the submission. Now, that has a fundamental importance to the conduct of this Commission.

GIBBS CJ: But the anterior question surely is if one is to inquire whether there has been misbehaviour, and assuming misbehaviour to have a narrower connotation than the author of the letter of 20 June might have thought, does that mean that those who are conducting the inquiry must exclude all evidence of events outside the period and unrelated to acts that occurred in office? Why cannot it look at surrounding circumstances?

MR GYLES: Your Honour, it may be possible that the events earlier may be relevant to an allegation. I do not know about that. But what we do know is that the allegation must be as to conduct. It must be a precise allegation - - -

GIBBS CJ: But that is a different point.

MR GYLES: Well, it is the point I am endeavouring to make, Your Honour. The statute proceeds upon the footing there

will be an allegation being inquired into. It is not at large. It is an allegation. That allegation must be specific and precise. It is not a case of saying the Judge is unfit for office. It has to be an allegation he has done something, some conduct. That conduct is limited to, on our construction, conduct as a Justice in office during his term of office.

BRENNAN J: How does that square with the provisions of section 5(4) which excludes certain matters from consideration?

MR GYLES: No, Your Honour, it is constitutional, I am sorry. As a matter of construction of the Act, it plainly goes beyond the constitutional area. That is at the heart of our submission. We say that this Act, when you construe it as a whole, authorizes an inquiry and findings going well beyond the constitutional area. Therefore, it is necessary to delimit your constitutional area, if indeed this statute permits or authorizes conduct outside it, then it is to that extent invalid.

Indeed, what has happened to date merely shows the potentiality, I suppose. They are now proposing to do what we say they could not do under the CONSTITUTION. If it permits it to do so, then it is invalid just as the CSR case indicates, any form of - - -

GIBBS CJ: Let it be supposed that a police officer was authorized to investigate only the conduct of, say, an alderman or a member of a statutory authority committed while in office during a certain period. Does that mean that he could not ask any questions about any facts that did not occur during that period, or that were not acts done by the alderman actually while in office?

MR GYLES: Your Honour, as to whether he could ask questions about prior matters, it is impossible for me to give a final answer to that until one knew the allegation. It is conceivable, for example, that if there was an allegation that the Judge took a bribe to make a decision in a certain fashion, that it may be relevant to hear evidence about the association between the Judge and the person offering the bribe, or if it be said the Judge had - well, there are various allegations that one could think of that may let in, if you like, evidence of what happened before. It does not let in though the investigation of an allegation about conduct before, with respect. That is the difference.

GIBBS CJ: Suppose it was a continuing course of conduct?

MR GYLES: Well, with respect, Your Honour, that is what is not permitted. That would be quite wrong. If we are right about the constitutional framework, then it is only conduct in office which can disqualify. The fact that it has been done before is not to the point. Secondly, this statute - well, I withdraw that because we are talking about the constitutional area - it does not matter, with respect, what a judge has done before his appointment. On this view that would not entitle you to go back into his past life except in so far as that may be relevant to the particular allegation.

In other words, in order to investigate allegation A, you cannot investigate allegation B. You are limited by the subject-matter.

GIBBS CJ: What light, if any, does the COMMISSIONS OF INQUIRY case throw on this?

MR GYLES: Considerable, we would submit, Your Honour. Your Honour has in mind the CSR case?

GIBBS CJ: Yes. It would seem to me that logically we ought first to consider the scope of the inquiry and of the permissible investigations conducted by officers appointed either by the Commissioners themselves or by counsel for the Commission before we consider the meaning of "proved misbehaviour". When we have considered that we shall know whether or not it is necessary to consider the meaning of "proved misbehaviour" because if the right to inquire extends without any limit except the sense of relevance of those conducting it, until they come to consider the specific allegations that have been formulated by those who have been gathering the information, well then, we are not concerned at this stage at all with "proved misbehaviour".

MR GYLES: But, Your Honour, with respect, that prejudges the question as to whether - - -

GIBBS CJ: No, it does not. There are two questions which your argument - or there are a number of questions, but there are two at the moment which we are considering which have been raised by your argument. And the only issue is which of them should be considered first. And it seems to me that logically one should first consider the scope of the power - - -

MR GYLES: The statutory power.

GIBBS CJ: - - - the scope of the statutory power, and then its constitutionality. But also that does not involve the meaning of "proved misbehaviour" in the CONSTITUTION.

MR GYLES: Well, Your Honour, I am in the Court's hands. I am perfectly happy to do that, and I will put aside "proved misbehaviour" for the moment. And what I will do, if I may, is then go to the argument on constitutional validity because that history and those principles throw a great deal of light upon the true construction of this Act, with respect. So that I will come in to the Act from that angle.

GIBBS CJ: You are trying to embark by one road or another into an inquiry into the meaning of "what is proved misbehaviour", are you not?

MR GYLES: Your Honour, the answer at the end is we are here to obtain the orders that we seek and really, it does not matter how we get there. But when I put a moment ago that we will come to the construction of the Act via the constitutional argument, I do not mean the argument about "proved misbehaviour". I am not seeking to come in through the side door. I have a separate argument, Your Honour, which will, in my submission, if it does not lead to constitutional invalidity, it will lead to a narrow construction of the Act. So that is the way I would propose to approach the matter, and I will put aside "proved misbehaviour" unless and until it becomes relevant.

May I hand up then, Your Honours, some notes of argument on this matter? I hasten to say, as always, they are only notes, Your Honours. This particular point has been really only looked at recently, and I apologize for any inability on my part to put it adequately.

Your Honours, I think, also have a bundle of material which will be relevant to this point. Your Honours, the basis which counsel assisting the Commission outlined the other day as the legislative basis for the Commission is placitum (xxxix) together with section 72.

Now, if I could ask the Court to take the wording of 51(xxxix) and 72, it is necessary, in our respectful submission, when seeking to apply 51(xxxix) to ask at least two questions: What is the power which is vested in an organ of government to which the matter is incidental? And which organ is it vested in?

MR GYLES (continuing): Now, section 72(2) is looked at, in our submission. Section 72 is a power aof removal and the constitutional organ in whom that is vested is the Governor in Council.

As the Court will see from the history of these provisions that accords with history; the appointment is by the Governor-General in Council; he is the grantor of the office and he removes the judge - that has always been the case and it remains the case under this CONSTITUTION.

The address by parliament, which is again an historical procedure, is merely a condition precedent to the exercise of the power and is not part of the exercise of the power. It may be the occasion for it but it is no part of it.

So that, in our submission, it is quite fallacious to imagine that section 51(xxxix) can operate qua houses of parliament because of section 72, the power simply is not in parliament. Put another way, the ability to address the Governor in Council is not a power within the meaning of section 51(xxxix).

GIBBS CJ: Suppose the officious bystander asked the question: "Has a house of the parliament power to make an address praying for the removal of a justice on the ground of proved misbehaviour?", would would the answer be?

MR GYLES: The officious bystander would probably say he has the power in that sense - in the same sense as Your Honour asked me a little while ago - has anybody got the power to ask anybody else a question? It would be a loose use of language, it would not be a correct use of language. They have the ability to do so and the power is the power of the Governor-General in Council.

Your Honours, there are, in the CONSTITUTION, a number of powers expressly vested in parliament - and if the Court will pardon me for putting the obvious - Part V of the CONSTITUTION is headed "Powers of the Parliament", and there are many other powers through the CONSTITUTION which I will mention in a moment and as far as the houses of parliament are concerned section 50 is an example of power in the House of Parliament.

There is virtually no discussion in the texts of this question. The most reliable guide is Quick & Garran, in our submission, and if I could refer Your Honours to Quick & Garran under this heading - the heading of 51(xxxix). The consideration

of the question commences at paragraph 226 at page 651. I believe we have photocopies available for Your Honours. Apart from general discussion Your Honours see paragraph 228:

"Power Vested . . . in the Parliament" -

and the learned authors have gone through the CONSTITUTION and identified many powers vested in parliament and Your Honours will notice that they pass from section 71 to section 73 - this is in paragraph 228 - and, with respect, rightly so. They then go right through the rest of the CONSTITUTION. Then the discussion -

"Powers Vested . . in Either House."

There is no suggestion that the address is appropriate. So, as to that submission - we have looked at, I think, all the other commentaries and none of the other commentators approached the matter as analytically as did Quick & Garran. Lumb & Ryan - and we have not got this out for Your Honours, but Lumb & Ryan are the other annotated Constituion - have a similar commentary to Quick & Garran may indeed owe something to it.

Apart from there being no authority against us, the commentary is for us, we submit that the plain words of the CONSTITUTION are for us. In any event, if Your Honours please, section 72 envisages an address from both houses of parliament, that is a joint address, and that is neither parliament - because "parliament" is defined in section 1 of the CONSTITUTION as:

Federal Parliament -

consisting -

of the Queen, a Senate, and a House of Representatives -

so when section 51(xxxix) talks about the "parliament", it is talking about a section 1 parliament, not both houses of parliament, and section 72 provides for a joint address, not a power vested in either house. So that even approaching the matter in that way one does not arrive at any result that section 51(xxxix) can be incidental to section 72.

Your Honours will see, when we come to the history later, that this rather textual analysis, which we submit is sound, also accords with basic principle and with the intention of the founders of the nation.

Looking at other possibilities, and I suppose I may be falling into a trap in doing so because it has not been submitted against me, we do submit that it cannot be incidental to the execution of any powers vested in the federal judicature, that clearly assumes a federal judicature which is operating - it does not deal with the removal of a judge - nor can it be said to be ancillary to the execution of any power vested in the Government of the Commonwealth or any department or officer of the Commonwealth, as the removal of federal judges is a matter dealt with by the CONSTITUTION and the government, any department or officer of the Commonwealth, have no role to play in that unless and until there is an address from both houses on one or more of the grounds set out in section 72(2).

This distinguishes this situation completely from the Executive Royal Commission cases.

DEANE J: What is "the government"?

MR GYLES: "The government", Your Honour, in the context, we have taken to be the executive government. In section 61 - - -

DEANE J: Which is vested in the Governor-General?

MR GYLES: Governor-General in Council - I am sorry, the Governor-General, yes. I suppose it is either, Your Honour, the Governor-General or the Governor-General in Council and it may be the second is the - - -

GIBBS CJ: It is technically vested in the Queen and exercisable by the Governor-General who is assisted by the executive council.

MR GYLES: Yes, thank you.

GIBBS CJ: Advised by the executive council.

MR GYLES: Yes. We take "the government" to mean the executive power of the executive arm and the executive arm is as set out in sections 61 and 62.

DEANE J: Why is not this a power vested by the CONSTITUTION in the Government of the Commonwealth?

MR GYLES: Removal, Your Honour?

DEANE J: Yes.

MR GYLES: Yes, I would not argue about that, but this Act is not incidental to that.

GIBBS CJ: Why not?

DEANE J: It is part of the process.

MR GYLES: With respect, the role of the executive government only comes into play when there is an address from the houses. The executive government has nothing to do with the addresses or the existence of an address - if an address arrives they must then deal with it. It is not, in our submission, part of the process, it is a separate power which it has once somebody has asked it to do something.

This Act, as Your Honour appreciates, provides for the Commissioners to advise parliament, not to advise the executive. I would not be contending, Your Honour, that there could not be such an inquiry after address and before decision by the - not such an inquiry but you could have a commission of inquiry after address and before removal. That is the point of time at which section 51(xxxix) would assist the executive power. It may be that a royal commission could be established at that point.

BRENNAN J: For what purpose, to advise the Governor-General?

MR GYLES: There is a debate, Your Honour, as to whether at that point there is a residual discretion. It is no part of my function to enter that debate. If there were a residual discretion then there could be an inquiry to assist that process.

BRENNAN J: If there is not then the inquiry before the address of parliament could be seen more easily to be incidental, though, can it not?

MR GYLES: I would submit not, Your Honour, because it still remains two separate matters. What parliament does is for parliament, what the executive does with what parliament does is for it. It would be, in my submission, a very strange result if - the parliamentary process is quite separate from the executive process as far as its procedure is concerned as history shows. One of the very important protections for the independence of the judiciary under this CONSTITUTION is the requirement that there be a concurrence between the parliament and the executive. The fact at the moment that there may be control by the executive of the parliament because at any particular time the executive can have its will in parliament is not to the point. The constitutional arrangement was to provide for security of tenure for judges and independence of judges by ensuring that parliament and the executive had the same view.

It would not be correct to describe, therefore, it as the one process, certainly one follows the other

but there are separate stages. Your Honours, it is for that reason that we distinguish executive royal commissions and - - -

GIBBS CJ: You would say, of course, that the two senate inquiries into this matter were invalid?

MR GYLES: That is a quite separate point - they were not statutory.

GIBBS CJ: They were even less valid.

MR GYLES: Your Honour, I do not, with respect - it had not occurred to me that that would follow, I would like to think about that. At the moment I see no reason why parliament should not - leaving aside the meaning of "proved misbehaviour" - under its processes, carry out its inquiry. Indeed, that is my submission as to what should happen. Plainly, parliament has power to conduct an inquiry into the conduct of a judge.

GIBBS CJ: The parliament has that power?

MR GYLES: The parliament has that power, plainly.

GIBBS CJ: Then why can it not delegate the power to a committee?

MR GYLES: To a committee?

GIBBS CJ: Or commission.

MR GYLES: It may do.

GIBBS CJ: Not a committee of the parliament but a committee which it sets up or a commission which it sets up.

MR GYLES: Your Honour, that is one of the end points of our submissions, it is not incidental to any power vested in parliament that that be done. The parliament has - - -

GIBBS CJ: If the parliament itself can inquire, surely it must have a power to inquire?

MR GYLES: I have answered Your Honour incautiously. Either house of parliament may investigate for the purposes of any of their proceedings; anything which is validly before them they may investigate as a parliament. But that does not mean that everything they do in parliament is a power vested in them for the purpose of section 51(xxxix) - far from it. Generally speaking their powers and privileges are

fixed by section 49, and I will develop that argument a little later, indeed, it is the next argument to which I must come.

If one puts aside the - I think, just to complete the point I was endeavouring to put: this statute, on its face, purports to provide advice to parliament and because of its context it is plain that it is advice in relation to a possible address for removal. That could not properly be categorized as being incidental to the executive power.

Your Honours, turning then to sections 49 and 50 of the CONSTITUTION it is submitted that those sections - our first submission is that whilst those sections provide an ample procedure for parliament to deal with matters before them, including a motion for an address to the Crown and may hold whatever inquiries are appropriate because the House of Commons had that power, those sections do not constitute the Commonwealth Parliament the grand inquest of the nation.

There is, in our submission, the same limitations upon parliament's power as other organs in relation to - it cannot investigate all or anything that happens in this country. That was so decided in ATTORNEY-GENERAL V MacFARLANE, 18 FLR 150. It is a single judge, Your Honours, but it is the only discussion that we are aware of of the particular point - ATTORNEY-GENERAL FOR THE COMMONWEALTH V MacFARLANE, (1971) 18 FLR 150. That was a case in which the Northern Territory Legislative Council set up a committee to, in effect, have a system of administrative review of all that was done in the Northern Territory and the discussion commences at page 156.

> It is said by the plaintiff that the powers given by s. 4SA only enable the Council to give to itself or to exercise the powers privileges and immunities relevant to the exercise of its legislative function committed to it by s. 4U and that whatever may have been the powers of the House of Commons as "Grand Inquest of the Nation" these powers have not been transmitted to this or any other colonial or dominion legislature. The Crown later the Imperial Parliament granted legislative powers to various colonial legislatures. Later after it had been held that the grant of such powers did not carry with it a grant of some of the privileges of Parliament.....ancillary powers privileges and immunities were granted but these powers privileges and immunities, it is argued, must

be construed as being limited to those powers privilages and immunities which are necessary to, or aid in the carrying out of, or are otherwise relevant to, the legislative function. It is said by the defendants that subject to the limitations imposed by the disallowance provisions of.....and by possible inconsistency with any law validly passed by the Commonwealth Parliament with respect to the Northern Territory and by the power of the Commonwealth Parliament to pass overruling legislation, the Council has all the powers privileges and immunities except legislative powers possessed by the House of Commons at the establishment of the Commonwealth. In particular it is said that the Council has the powers of the House of Commons as "the Grand Inquest of the Nation", "the Grant Inquisitor of the Realm", which enable it to inquire into anything at all having the necessary nexus with the Northern Territory and to do so in any way it chooses.

All of the great cases on the topic of powers privileges and immunities of dominion and colonical legislatures concern what are, in common parlance, called privilege questions dealing with contempt of the parliament or its properly constituted committees or the members of either and the protection of those members from improper interference.....In these cases all of the powers privileges and immunities dealt with are powers privileges and immunities seen to be necessary for the adequate carrying out by the parliament concerned of its proper legislative function. Although in some cases the language may be wide enough to suggest otherwise it is nowhere held that a colonial parliament has the powers of "grand inquest". It is my view that these cases must be considered in the context in which they arose, and in each one a power, privilege or immunity which was held to be valid was a power, privilege or immunity directly relevant to the proper carrying out of the legislative function of the parliament concerned.

The argument which in my view puts the matter beyond doubt is that however it may be described from time to time the power to act as "grand inquest" or "grand inquisitor" is, when properly understood, a function of the House of Commons and not a power. That House has a legislative function and has an inquisitorial function. The latter function is exercised in the matter of impeachment

proceedings and also as a function of general inquiry into topics and areas of the House's choosing. This inquisitorial function does not depend in any way upon the legislative function and could and does operate quite independently of it. Likewise in order to fulfil its legislative function the House of Commons does not need to exercise its broad inquisitorial powers. It only needs power to inquire into topics or areas for proposed or possible legislation.

If it is true to say that the House of Commons had in 1900 these two functions, legislative and inquisitorial, it seems plain to me that the only function committed by the Imperial Parliament to the Commonwealth Parliament was the legislative function and not the inquisitorial function. The function granted by s. 51 of the Commonwealth CONSTITUTION although it is described as a power is "to make laws for the peace order and good government of the Commonwealth". The Commonwealth in turn has committed to the Council its legislative function and not the inquisitorial function. It is doubtful if the Commonwealth could have passed on to the Council more than it possessed itself. Whether this be so or not it is in my view plain that it has passed on the legislative function alone together of course with such powers privileges and immunities as are necessary for or relevant to the proper carrying out of that function.

Your Honours, applying that reasoning in the present case, there is undoubtedly a function of or an ability to address the Crown for removal of a judge and with that would go whatever inquisitorial power is necessary for the performance of that function.

(Continued on page 47)

MR GYLES (continuing): But support for this legislation cannot be found by saying, "Well, parliament has an unlimited power of inquest, therefore you can aid that by legislation".

Your Honours, a discussion of that topic may be found in a paper by the Attorney-General and Solicitor-General: "Parliamentary Committee's powers over and protection afforded witnesses". I do not propose to take the Court through that paper but it has been reproduced. I should identify it. It is 1972 Parliamentary Paper No 168.

Your Honours, before going to the COMMISSIONS OF INQUIRY case and some other cases, could I go straight to FITZPATRICK V BROWNE, 92 CLR 157. Your Honours will recall the way in which the case arose but the precise circumstances and the basis of the decision is, with respect, a very narrow one. And if I may read from Mr Justice Dixon at page 161, the first full paragraph:

> There are two applications for habeas corpus which come before us on a reference from the Supreme Court of the Australian Capital Territory. The Supreme Court of the Australian Capital Territory issued what we think, having looked at the rules of that court, must be an order nisi for two writs of habeas corpus directed to Edward Richards as the person for the time being performing the duties of Chief Commissioner of Police at Canberra. The writs, if issued, would be for the production of the bodies of Raymond Edward Fitzpatrick and Frank Courtney Browne. The return to the writs, if issued, must be that warrants had been ussued by the Speaker of the House of Representatives commanding Mr Richards to take the two persons into his custody, and the return would have recited the warrants. The question on the return to the writs of habeas corpus would then be whether the warrants would be a sufficient answer so that it would be proper for the court to remand the two prisoners and not to discharge them.

Skipping a few lines, the Chief Justice recites section 49 and then goes on:

> The Speaker's warrants were, as they say on their face, issued pursuant to resolutions of the House. The basis upon which the House appears to have proceeded and upon which the warrants were issued is that the Parliament has not declared

so far the powers, privileges, and immunities of the Senate and of the House of Representatives, and that the latter part of s. 49 is in operation, with the consequence that the powers of the House of Representatives are those of the Commons House of Parliament of the United Kingdom and of its members and committees at the establishment of the Commonwealth.

The question, what are the powers, privileges and immunities of the Commons House of Parliament at the establishment of the Commonwealth, is one which the courts of law in England have treated as a matter for their decision. But the courts in England arrived at that position after a long course of judicial decision not unaccompanied by political controversy. The law in England was finally settled about 1840.

The first question is, what is that law? It must then be considered whether that law is, by virtue of the provisions which we have read, in force in Australia and applies to the House of Representatives.

GIBBS CJ: What is the point which you are endeavouring to reach in this case, Mr Gyles?

MR GYLES: The point about this case is, Your Honours, is - it may be defensive, I suppose, Your Honours, lest it be suggested that this case provides anything to support the view that this statute may be supported as being incidental to the powers and privileges of parliament in some way.

I would submit that the powers and privileges of parliament are themselves to be declared by parliament and this statute is not such a statute.

GIBBS CJ: Well, I think if it is cited merely for defensive purposes you should wait until you have something to defend.

MR GYLES: If Your Honours please. I should take the Court to LE MESURIER V CONNOR, 42 CLR 481. I will just check that Your Honours have this case.

GIBBS CJ: Well, it is a familiar case. What does it decide that is relevant to the present question?

MR GYLES: Well, Your Honour, both this case and the JUDICIARY ACT case, in my submission - and perhaps I should adopt the same course in relation to these cases as I have with the earlier, FITZPATRICK AND BROWNE.

They are, really, the only cases which are close to deciding what is incidental to powers of this sort and there is nothing in any of them which is contrary to the submissions I am putting. Perhaps I should leave it at that, Your Honours.

GIBBS CJ: Yes.

MR GYLES: It may be that one could have legislation to provide for a parliamentary oaths Act, for example, which would assist parliament but the incidental power would not enable there to be any expansion of function and would not enable legislation providing for a particular inquiry, in my submission.

Now, as we have said in our submission, even if those submissions be rejected and in some fashion legislation of this type may be regarded as incidental to proceedings in parliament which govern an address to the Crown, this Act goes far beyond that procedure. And what we do then is to reproduce - and may I read them to the Court - a selection of the commentaries on this point:

> It is the invariable practice of parliament never to entertain criminative charges against any one, except upon the ground of some distinct and definite basis. The charges preferred should be submitted to the consideration of the House in writing, whether it be intended to proceed by impeachment, by address for removal from office or by committee to inquire into the alleged misconduct, in order to afford full and sufficient opportunity for the person complained of to meet the accusations against him.

And that is from Todd, Parliamentary Government at pages 195 and 196. Then, from May's Parliamentary Practice:

> Certain matters cannot be debated save upon a subsidy of motion which can be dealt with by amendment or the distinct vote of the House such as the conduct of judges of the superior courts of the United Kingdom. These matters cannot therefore be questioned by way of amendment nor upon a motion for adjournment under Standing Order No. 17. For the same reason no charge of a personal character can be raised save upon a direct and substantive motion to that effect.

And that has remained the principle in Erskine May down to the present day.

And then some passages from Shetreet:

> A motion for an inquiry into the conduct of a judge should be made upon previous notice, to allow the accused to meet the charges by communicating his defence to other M.P.'s.....After due notice has been given, the Member at a later date will state the alleged misconduct.....
>
> Before the matter may be referred for further inquiry, the charges must satisfy established procedural requirements. Charges against the judge must be specific and distinct, and specific and reliable evidence in support should be introduced..... It is an established 'constitutional practice that such procedure.....should not be instituted unless a prima facie case against a judge was so strong as to justify an address. If these procedural requirements are not satisfied, the matter will not be referred for further inquiry.

And Shetreet, in those passages, Your Honours, cites a number of precedents for those conclusions. We submit that that states the procedural way in which parliament deals with allegations of misconduct against a judge whether leading to a motion for an address to the Crown or not.

BRENNAN J: What is the full citation of Shetreet there?

MR GYLES: Yes, I am sorry. I have been assuming that the argument on proved misbehaviour would have gone through all these authorities.

BRENNAN J: Is it "Judges on Trial", pages 88 to 89?

MR GYLES: No, that is the earlier reference. The reference here was at pages 130 to 131, Your Honour. Shetreet, "Judges on Trial". There is only one edition. Your Honours have a photocopy of both 88 and 89 and 130 and 131.

Your Honours, because of the difficulty of getting books here, Your Honours could not be given a full copy of Todd and - - -

GIBBS CJ: No, of course not-

MR GYLES - - - Erskine May and so on and we have endeavoured to get out the relevant pages.

If those quotations correctly state parliamentary practice and procedure, it is our submission it is not

ancillary to such a proceeding to have an outside inquiry with coercive power to seek to find whether there is a charge and whether there is conduct which might justify the charge. In other words there is nothing before parliament at the moment. There is no suggestion that the Act is ancillary to any proceeding before parliament for removal. Indeed, it is not part of the parliamentary process at all, it is the exercise of legislative will and therein lies the question. Whilst it is attractive to say, "Well, the two of house of parliament have joined in passing this piece of legislation, therefore it is part of the parliamentary process," in our submission, that is to confuse a section 51 power, that is the legislative power of parliament on the one hand. with the powers and privileges of parliament of section 49 on the other. And here a statute is an unwarranted, an unconstitutional interference with the independence of the judiciary, one of the great principles of our CONSTITUTION.

It is one thing for parliament, in the course of a proceeding properly before it, to inquire into the charge which has been brought. It is quite another to have the legislative arm of government reach into the judiciary in this way in a roving commission. There is no charge before parliament - no motion before parliament. There is no charge been identified.

Now, what this Act seeks to do is to expand the power of parliament by use of legislation into an area which it is prohibited from treading into. There is no warrant for parliament to be making any roving inquiry into the conduct of a particular judge. If it had charges befo e it, if charges were made in parliament - the allegations were made in parliament as to particular conduct, then it has adequate power to deal with that if one is talking about addressing the Crown.

So, it is certainly not, in our respectful submission, ancillary to anything there that there be this sort of inquiry which does not have any allegation. It says: "If there is an allegation, investigate it; inquire into it." Now, of course, Your Honours will readily follow that my alternative submission in the end would be, if that is wrong, then these principles compel the construction that section 5(2) governs everything and, as a matter of construction of the Act, it would not be contemplated that this Commission would do anything but investigate precise charges from the beginning. It is no part of its function to go out looking for them.

Now, as we put, before going to the case of BARRINGTON, which I think I must because it is the

only case where a judge has been removed by addres the position contended for in these submissions is consistent with the separation of powers and with the fundamental importance of the independence of a federal judiciary in its constitutional responsibilities.

One of the primary roles of this Court is to strike the constitutional balance between States and Commonwealth. To permit the Commonwealth Parliament, by use of legislation, to widen its power to reach into the affairs of this Court is to upset that balance. To permit the Commonwealth Parliament to legislate that which they cannot do under section 49, their powers and privileges is, in my respectful submission, a fundamental misconception and will be giving this Court's imprimatur to a change in the basic constitutional arrangements of this country. The Federal Parliament has whatever powers it has under section 49. It has no legislative base to reach out into judges' behaviour.

Now, Your Honours, the convention debates, which I had thought by now I would have taken Your Honours through on the basis of proved misbehaviour, place very great stress upon the special place that this Court was to play in the new nation and the very special precautions that were needed to ensure no political interference in the affairs of this Court. Now, what has happened at the moment by the passing of this legislation is the very thing that the founding fathers would not have countenanced and for good reason because it amounts to legislative interference with the independence of the judiciary which they were astute to avoid.

The convention debates, Your Honours, can be found in the bundle to deal with proved misbehaviour. There were debates in Adelaide in 1897 and Melbourne in 1898.

GIBBS CJ: I take it they do not deal with this specific question?

MR GYLES: No, Your Honour. Indeed, the debate on 5139 was brief in the extreme. It throws no relevant light upon it.

GIBBS CJ: We are, of course, familar with the convention debates and familiar with the importance which they attach to the position of this Court under the CONSTITUTION.

MR GYLES: Yes. And the distinction that they drew between this Court, because of its constitutional functions, and the arrangements which govern the removal of judges in both the United Kingdom and the then colonies. It is a different procedure which

has been laid down in order to preserve independence. And if I am not to argue proved misbehaviour, Your Honours, then I do wish to take the Court to these debates because it is fundamental to the point we are seeking to make.

GIBBS CJ: Yes, but you have made the point, surely, have you not? I mean, unless the convention debates dealt specifically with the procedures that the parliament might or might not adopt in pursuance of its power of removal, then we are fully aware and it is elementary to our thinking that the convention debates emphasized and the CONSTITUTION recognizes the importance of the independence of this Court from parliamentary interference.

(Continued on page 54)

MR GYLES: Yes. What I will do overnight, Your Honours, is to go through the debate and see if there is anything which particularly bears upon this point. I have prepared them for another argument and I will go through them without wearying the Court now.

Now the case of BARRINGTON, Your Honours, I should deal with. Your Honours will find - - -

GIBBS CJ: Where do we find that?

MR GYLES: It is in the MIRROR OF PARLIAMENT - the extracts that Your Honours have - there is a set of them, Your Honours. In chronological order there is an extract from the MIRROR OF PARLIAMENT, it is in typescript, 1577, it says 828, it should 1828. Then, Your Honours, there is the MIRROR OF PARLIAMENT (1830) 1702; and then there is the MIRROR OF PARLIAMENT (1830) 1897; then there is the Lords' Journal (1830). Do Your Honours have those? This traces, I think not all, but certainly most of the proceedings to do with SIR JONAH BARRINGTON. He was a judge in Admiralty in Ireland. Now the first document, the 1828 document - it seems to start in the middle of something - it has been very difficult to get hold of these documents, Your Honours:

> By returns laid on the Table of the House, it will be found that the time of sitting to determine causes is altogether arbitrary, as to specific days and varies as to hours, from 10 to 2, from 10 to 1 and finally to 10 o'clock. The delay which arises from all this uncertainty and irregularity is just as might be expected and will be best exemplified by a reference to the case of a suit instituted in this court for the recovery of a seaman's wages....

This is a discussion, Your Honours, about how the Admiralty Court was working in Ireland.

> Upon this evidence, it is really a question with me, however, friendly to Irish independence and Irish institutions whether it would not be better if the whole Admiralty jurisdiction were not merged in and consolidated with the High Court of Admiralty here. Unfortunately, however, by the articles of union it was settled that the Admiralty Court of Ireland should continue a distinct court, for which stipulation I can see no reason, except that it might be to serve the purpose of some disgraceful Irish job.
>
> I shall move an address to His Majesty praying "that he would direct the Commissioners of

> Inquiry into the constitution and practice of courts of law in Ireland, to examine particularly into the state of the Admiralty Court there, the extent and nature of the duties performed, as well as the manner in which they are performed; the amount of charge usual on prosecuting a suit in that court, with an account of fees payable to the officers of the court, with the amount of securities registered and money paid into the hands of the officers of the court for a given period of years, and also the Commissioners should be directed to examine if these causes are determinable by other courts, and at what comparative expense such decisions might be obtained.
>
> The Commissioners are already employed in this precise inquiry. I have no doubt their report will embrace the main objects of the present motion.
>
> I wish the motion had been framed so as to leave the matter referred more with the control of the Commissioners, or rather with the terms of their former reference under that Commission which originally authorized their inquiry.
>
> The motion was agreed to.

Now, that shows, Your Honours, that there was then in train a general inquiry into the constitution and practice of the courts of law in Ireland which we understand to be a royal commission. And this was a request to include the administration of a particular court in those general terms of reference. And as Your Honours will see from the terms of the motion, they were matters pertaining directly to administration of the court, the handling of money, the manner in which they were performing and so on.

BRENNAN J: Are these parliamentary commissioners of inquiry?

MR GYLES: That is not clear, Your Honour. As best one can understand they were commissioners appointed by the Crown on address from the parliament. That is not entirely clear. They are referred to as "parliamentary commissioners" but they were appointed, as we understand it, by the Crown. But the significance of the motion is that it was a general motion into the administration of courts in Ireland and then, in particular, the Admiralty Court.

Then, if Your Honours come to the later extracts we find - and perhaps I can summarize it for Your Honours without reading them all - what happened in the case of

SIR JONAH BARRINGTON was that he did not give evidence before or co-operate with the parliamentary commissioners into the state of the judiciary in Ireland. They reported in due course, and reported amongst other things, adversely to him and his administration of the Admiralty Court; in particular as to his taking money, dealings with moneys obtained from wrecks and the like.

Then there were proceedings in parliament because of those findings - there was a motion brought to parliament. That was referred to a select committee of the House. That conducted an inquiry. He again did not give evidence. It reported unfavourably to him to the House as a whole. He then sought the House's agreement to have the matter tried again, as it were, and be heard. He was not allowed to present a full defence. The matter then went to the Lords where he was permitted to appear by counsel, again to put defence but he was limited to - counsel put a submission as to the appropriateness of the procedure and he gave no evidence and the joint address was duly made to the Crown and he was removed. He was the only judge removed by address.

But the significance from our point of view for present purposes, Your Honours, is this: there is much in these statements which supports the procedural view that there must be distinct charges; there must be full opportunity for answer and so on. And these debates will be found to be completely consistent with that submission that I have already put.

GIBBS CJ: It is perfectly clear that according to practice and procedure of parliament, if this is relevant, there must be a specific and distinct charge before the question of misconduct of a judge is alleged and debated in the House. The question is whether it follows from that that the parliament cannot authorize officers to investigate whether there is material which would justify the laying of such a charge.

MR GYLES: Yes, before a charge is before them.

GIBBS CJ: Yes, before a charge is before them.

MR GYLES: Yes, I agree, with respect, that is the point.

GIBBS CJ: Are you saying that unless somebody specifically formulates a charge the parliament could never embark upon the inquiry?

MR GYLES: Yes, Your Honour, that is the effect of all of these statements. They will not entertain any aspersions about a judge unless it is reduced to a specific charge.

GIBBS CJ: It is reduced to a specific charge before they debate the motion. Does that mean they cannot send their

officers out? They get a report that there has been grave misconduct. Can they not send their officers out to investigate whether they should lay a specific charge?

MR GYLES: But, Your Honour, parliament does not lay a charge, individual members may do so, and - - -

GIBBS CJ: Well, can not the minister send someone out?

MR GYLES: Well, the minister as an executive can do what he will as an executive. That is not parliament. We are not debating here, Your Honour, what the Attorney-General could do; we are arguing what parliament could do. The Attorney-General can take his own course about it but that is not a parliamentary - - -

GIBBS CJ: Well, what about a case such as FITZPATRICK AND BROWNE where there is a contempt - a contempt of the parliament, or something is done which in the view of some people is contempt of parliament - who is going to formulate the charge?

MR GYLES: Contempt of parliament, Your Honour, with respect, is a totally different subject, nothing to do with an address to the Crown because of misconduct of a judge. I am afraid I do not know the answer to that, Your Honour, because I have not - and I must confess my ignorance - I do not know what the procedures of parliament in 1900 were by way of investigating charges of contempt; who laid them, who made them and how they were investigated. But it has nothing to do - it is a quite separate subject-matter than address to the Crown, and the answer to one would throw no light on the other. And if we are correct that this was the invariable practice of parliament, there is no support in any of this that parliament would send its officers out to make an inquiry into the conduct of a particular judge without a specific charge.

Now, these circumstances that I was going on to put it will be seen, I think in Todd there is a note, that indicates on its face that precisely what Your Honour has put might happen; that there might be a parliamentary commission of inquiry into something. Now, when the actual circumstances are appreciated, as will be appreciated here, it is as if there had been, let us say, a royal commission into the administration on a topic and in the course of that royal commission there were evidence of misconduct of judges in office. That could then be brought by a member to parliament with a motion or a petition or in some other fashion and those findings having been made by the external commission, parliament could then take it on board, as it were.

MR GYLES (continuing): That is precisely what has not happened here. This Judge has been charged with an offence and he has been acquitted. There has simply been no other charge of any description anywhere laid against him apart from in some newspapers. It is an extraordinary procedure to think that that gives rise to an Act of this sort, quite unprecedented. And my simple submission at the moment is that the BARRINGTON case has nothing to do with it, it is quite distinct and - - -

GIBBS CJ: That is why I do not quite see why we are going into the BARRINGTON case if it has nothing to do with it.

MR GYLES: Because, Your Honour, in Todd there will be found a statement which says - I just have not got it here at the moment - that says that the parliament may, as it were, investigate - what Your Honour was putting to me a moment ago, whether a charge should be laid.

GIBBS CJ: Yes.

MR GYLES: Now, that is not what happened in BARRINGTON at all. In the course of an inquiry into the Courts of Justice in Ireland, the commissioners made certain findings of fact against that person. That having happened, Parliament then took it on board.

DAWSON J: How did it take it on board?

MR GYLES: By appointing a Commission - took it on board by, I think, Your Honour, originally by a form of motion. I am not sure what form of motion it was. But a committee was then - - -

GIBBS CJ: Well - commissioners of inquiry - we do not know who they were or what they were.

MR GYLES: No, Your Honour. The commissioners of inquiry we know were conducting an inquiry into the judiciary in Ireland. The motion in 1828 which is the earliest reference we can find - there must be another motion somewhere - but the 1828 resolution said you should take on board in your general inquiry the administration of the Admiralty Court in Ireland not into the conduct of a judge but the administration of the court.

MASON J: Well, is that so? I think the passage that you are referring to is in Todd at page 197 - - -

MR GYLES: Yes, Your Honour.

MASON J: - - - where there is a reference to parliamentary action being initiated:

after a preliminary inquiry - by a royal commission (at the instance of government, or at the request of either House of Parliament) -

MR GYLES: Yes, that is the passage, Your Honour. That is historically correct but unless you go back and see how it happened you maybe left with the impression that without any allegations being made against a judge there could be a general inquiry into the conduct of the judge and that is simply not what happened in the BARRINGTON case.

GIBBS CJ: But we do seem to be getting a little off the track, Mr Giles. This is a motion for an interlocutory injunction.

MR GYLES: Yes.

GIBBS CJ: Now, what do you say the principles are upon which this Court should consider whether or not to grant an interlocutory injunction in a case of this kind where there is a constitutional issue involved.

MR GYLES: Your Honour, assuming that there are questions to be tried it becomes then a matter of balance of convenience. That is the principle to be applied. Now, does Your Honour wish me to address on that or - - -

GIBBS CJ: Well, yes in a moment. But perhaps you can tell us what further branches of your substance of argument remain to be considered.

MR GYLES: Yes. Your Honour, as to this argument - the next argument which although shorter and comes next, we do not regard it as - we are not ranking them, Your Honours - is that the invalidity of the Act because of the - as it is put at the foot of that page of the submissions - this Act is invalid if it authorizes an inquiry into conduct which could amount to proved misbehaviour within section 72 of the - sorry, other than conduct which could amount to proved misbehaviour in section 72. Now, that can be because either as a matter of construction the Act authorizes inquiry into any conduct without limitation or alternatively, because it authorizes inquiry into any conduct which in the opinion of the Commissioners constitutes proved misbehaviour within the meaning of section 72. As the facts show, this is not an academic possibility. It is happening now. They have authorized inquiry into conduct outside that which could be regarded as misbehaviour within the Constitution. Furtermore, we say that the use of the word, "proved", adds special force to that submission. Whatever the precise meaning of, "proved", is - it could be proved to the satisfaction of parliament, the Governor in Council, this Court, another court on

conviction -it certainly does not mean, "proved to these parliamentary Commissioners". It would be pure coincidence if this parliamentary Commission came to the same view as to what may or may not be or could not be proved misbehaviour, that any of those other organs that are the repositories of the constitutional power - pure coincidence if they happen to arrive at the same division as would this Court, parliament or the Governor in Council. In other words it is on all fours with the CSR case. You cannot have a statute authorizing something which may go beyond constitutional power. Without developing it, Your Honours, that is the point there and we submit it is destructive of the Act and is really such a short simple and, in our submission, unanswerable point, that if it is correct there ought be no hesitation in saying so and bringing to an end this inquiry with all that goes with it.

Your Honours, that is there in short summary of the constitutional arguments. Then there are the arguments of construction which have been adumbrated in the course of the debate this afternoon

GIBBS CJ: Yes, then there is the question of - - -

MR GYLES: Proved misbehaviour.

GIBBS CJ: Question of bias.

MR GYLES: That is so and then there is a separate question of bias.

GIBBS CJ: Well, are you not going to deal with that?

MR GYLES: Oh yes.

GIBBS CJ: Let us deal with it now.

MR GYLES: I have not put my arguments on these other matters, Your Honour.

GIBBS CJ: On which? What have you not put your arguments on?

MR GYLES: I have outlined what my argument would be on the constitutional matters. I have not put those arguments. I mean there is a great deal I would wish to put. If there is any question about the issue to be tried point - -

GIBBS CJ: Apart from the question of proved misbehaviour, what is there you wish to add?

MR GYLES: I wish to develop the submissions, Your Honour. I have barely outlined them and there are a number of authorities which we submit will throw a light upon them. I mean I have not put a full argument.

GIBBS CJ: The Court will retire for a few minutes.

AT 4.23PM SHORT ADJOURNMENT

UPON RESUMING AT 4.38 PM:

GIBBS CJ: Mr Gyles, this matter was brought on urgently because you are seeking an interlocutory injunction.

MR GYLES: Yes, Your Honour.

GIBBS CJ: The principle, which is usually followed in relation to interlocutory injunctions, is that if the person seeking the injunction makes out a triable case then the question becomes one of the balance of convenience. Now, I think we have had an outline of all of your points, have we not, except the question of bias?

MR GYLES: Yes, that is so.

GIBBS CJ: In relation to those points, except bias, we are prepared to assume that you have made out a triable case, a case that should be heard at proper length by the Court at the August sittings so the question then will become whether, on the balance of convenience, or not, an interlocutory injunction should be granted. Now, bias stands in a different position. If there is bias it should be dealt with now so we must hear you in relation to the question of bias and in relation to the question of the balance of convenience.

MR GYLES: And Your Honours wish to hear me on those matters now.

GIBBS CJ: Yes, now. I should add, of course, that we have interposed this case in the list. In tomorrow's list there are a number of cases listed, including a criminal case. It would not be right to deny justice to them in order to givejustice to someone else.

MR GYLES: Your Honours, could I deal with it in this way. May I deal with the balance of convenience?

GIBBS CJ: Yes.

MR GYLES: Because of the exigencies of time, I had asked Mr Einfeld to prepare the case on bias and it would just be convenient if he could put that argument.

GIBBS CJ: Yes, very well.

MR GYLES: As to balance of convenience, Your Honours, might I put these considerations? The present state of the inquiry is that counsel assisting had indicated that they have not finished the task of sifting - may I leave for the moment the question of external

investigations. They have not finished their task of sifting the material that they have in the Commission at the moment. On an interlocutory basis we have no objection to that continuing. We do not seek to stop that. It has been generally accepted that we would not receive any specific allegations before 14 July and there may be further delays after that.

It was accepted, at that point, that there would need to be an adjournment to enable us to consider those allegations and put whatever views we had of a preliminary nature about them. It was also accepted that we would need time to prepare to deal with them on a factual basis and possibly on the section 72 basis. All of that can continue without any disadvantage to us. Either in the next several weeks counsel assisting will find there are some specific allegations or he will find there are not any. If there are not any, then that will be, presumably, the end of the matter. If there some, we may wish to put submissions to the Commission. That can all continue.

There is virtually no possibility of anything by way of hearing commencing in any event in this Commission or inquiry before August and the chances of - this has been the acceptance of the timetable to date, that the chances of any substantial inquiry finishing in time to write a report by the statutory time limit is very remote if there are, indeed, any allegations which remain to be investigated. What we submit should not happen in the meantime is any external investigation, that is, by investigators going out and interviewing people, seeking information and seeking allegations.

As to the damage which that could do, if that does happen, Your Honours, whatever damage is inherent in it will happen and cannot be recalled. It will not even be known about by Mr Justice Murphy. The fact that investigators have been out talking to people will become public knowledge, he may not find out about it, there is nothing he can do to nail the defamation. Once the poison spreads no one knows where it will end and the interviewees, of course, are not inhibited as to what they may say to anybody and as to the damage which happens to somebody in those circumstances, I endeavoured to put before, perhaps not terribly persuasively or well, the practical position which exists if an investigator comes out to somebody, acting under colour of a statutory authority, where that statutory authority has the power to summons, both the person and his documents and has the power to issue search warrants.

It is the sort of situation where the investigator can say to the individual being interviewed, "It really is much better for you to co-operate with us, come in and see counsel assisting and we will take a statement from you because, as you know, we have power under our Act to summons you." That is all quite true and that is something which cannot be controlled by this Court or by the former Judges who comprise this Commission. Once they let it out of their hands to do the inquiry, then control is absolutely lost.

Your Honours, the arguments we put about precise allegations and about the constitutional basis of the matter, if they ultimately succeed, this inquiry will come to an end or almost to an end on any view, if we are correct. Even if the statute is constitutional but is limited to the constitutional area, it would be action in office. Apart from a letter which came from counsel assisting, I do not believe there has ever been any suggestion anywhere that I have ever heard that Mr Justice Murphy has acted in any way improperly in office.

If there is a specific allegation, it has never been heard of by us or by him and, indeed, the fact that after some weeks now, counsel assisting find themselves unable to give us any allegation of any conduct anywhere at any time hardly indicates that there is a topic of urgency requiring investigation. If the consequence of this is that parliament has to make a decision, do they extend the time or not, they will no doubt be very influenced in making that decision by what, if anything, has come forward. That will be well known by the time this Court comes to hear the case in the August sittings and it will be well known well before parliament have to consider whether to extend the time.

On the one hand, the prejudice we suffer is irremediable. There is no order which this Court can make which will recapture the harm that will be done if the Commission carries on as it proposes to by way of investigation. On the other hand, the prejudice on the other side is simply delay in a matter - which this Court knows - has been extant for a considerable period of time. That is not to say that it does not require the most urgent of resolution. That is agreed on all hands and most, I suppose, by my client but as far as this Commission of Inquiry is concerned, all that we have on the other hand is the fact that the Houses of Parliament will have to decide whether they extend the time of the inquiry or not. If there is work to be done they will, if there is not work to be done they will not. It will be assumed that parliament will make a rational decision about that.

R GYLES (continuing): On the one hand, there is a delay which is a delay occasioned by the Court's vacation, not by anything that my client has done or failed to do. And we have, Your Honours, waited - and I know that I was told not to be concerned about matters of progress - but we waited until there was a real controversy. There may have been no allegation. There may have been no threat to do anything beyond the CONSTITUTION. As soon as a real issue arose we have come to this Court at the first possible opportunity. As it happens, that coincides with the Court vacation, which is a fact of life , but it should not be to the disadvantage of Mr Justice Murphy.

So, we submit that on the balance of convenience we suffer a lot, and nothing really is suffered on the other side. If the Court pleases. I do not think I need trouble Your Honours with the cases about the principles of balance of convenience.

GIBBS CJ: Well, if there is any exposition which explains the words more than they explain themselves, we would be glad to hear it, but they are self-explanatory, are they not, the words?

MR GYLES: Your Honours, I do not need I need trouble you with authorities. Might I ask Mr Einfeld to put the argument on bias?

GIBBS CJ: Yes.

MR EINFELD: May it please Your Honours, we have an outline of submissions in writing. And Your Honours will also need for this purpose a small section of the document that was presented this morning but withdrawn for selective photocopying, and it is a section from Mr Justice Stewart's second report, pages 27 and 28, of which we have some copies. It is the section which commences under the heading, "Appointment of W. Jegerow". If Your Honours would just put that aside for one moment and we go to the submissions.

Our fundamental submission is that the Parliamentary Commission has a duty to act judicially. Though it is administrative, it is, as Your Honours have already been shown, necessary to be consistent of judges or former judges, and that is to be found in section 4(3), and as Your Honours have seen under section 5 and 6 and so on of their duties.

GIBBS CJ: I think we can accept that, Mr Einfeld.

MR EINFELD: Your Honours, the well known provisions now of this Court's decisions in WATSON and LIVESEY, the two cases mentioned in paragraph 1 of the submissions set out the test for disqualification for bias.

Certain other principles are set out in paragraphs 2 and 3 - first of all that the matter should be determined objectively; secondly that it should be considered in accordance with the circumstances of the case, some of which are set out in 4, and the cases that are there referred to - I do not propose to take Your Honours to the detail of those cases right now unless Your Honours would require it.

The question that arises in paragraph 5 of the written outline is that it is necessary to consider the whole of the circumstances in the field of the inquiry and the nature of the jurisdiction exercised.

The principal matter that arises in this particular case commences at paragraph 6 of the submissions. As Your Honours will see from the part just handed up in relation to Mr Justice Stewart's second report, there is a detail set out in paragraph 2.72 to 2.77 which amounts in substance to this: that it is suggested that Mr Justice Murphy was in some way instrumental in achieving, or involved in the achievement, of the appointment of Mr Jegerow as a full-time Deputy Chairman of the Ethnic Affairs Commission. And it is said that this was done through a series of telephone calls which involved Mr Justice Murphy having discussions with a man named Morgan Ryan, and in which he also had discussions with the Premier of New South Wales, the Honourable Neville Wran. And it is said in relation to that that the inference that is sought to be raised is that Mr Justice Murphy's intervention was decisive or highly influential in the attainment by Mr Jegerow of the appointment which he subsequently received on 27 October 1980. There are inferences to be drawn, it is no doubt to be suggested, by the timing of the discussions and their content and the fact that the position of Deputy Chairman of the Ethnic Affairs Commission was a position to which a person becomes appointed by an act of the executive of the New South Wales Government.

Your Honours have, by contradistinction, an affidavit, a second affidavit of Mr Masselos, the solicitor for the plaintiff, dated 25 June which particularly deals with this matter, to deal with both the aspect of the bias to which we wish to point on the one hand, and on the other hand the question of expedition of bringing the matter to attention. Mr Masselos says in this affidavit that he first became aware of a question addressed by Senator Coleman to Senator Evans in the Senate after reading the article reporting the matter in the Sydney Morning Herald of June 11th, and that is annexure A

to the affidavit. That draws attention to the fact - I do not read the whole article, as Your Honours will see in annexure A. It draws attention to the fact that the third defendant spoke on a certain subject-matter in February 1984 in response by him to some remarks allegedly made by Mr Justice Kirby just prior to the remarks of the third defendant while still serving as a judge of the South Australian Supreme Court.

The Sydney Morning Herald reported in that particular article at the bottom of the first column that the third defendant -

> then sitting on the Bench in an unrelated case had taken particular exception to Justice Kirby's reported suggestion that judicial intervention in Public Service appointments was part of a "netherworld" of the legal field inherited from Britain.
>
> He had said these remarks implied that judges "corruptly and wilfully intermeddled" in Public Service appointments at all levels.
>
> "On behalf of all South Australian judges, as well as on my own behalf, I express my deep resentment of this calumny", he had said. "It cannot be too soon or too emphatically denied."

The affidavit goes on in paragraph 3 to point out that shortly after he had read the article the plaintiff in these proceedings informed him that he had just read the article and asked him to draw the matter to the attention of counsel, that he advised his solicitor and he verily believed that the article was his first knowledge that the third defendant had these views on the subject-matter.

The solicitor goes on in paragraph 4 that he instituted further inquiries and ascertained that the third defendant's views had been published in the Adelaide Advertiser of February 24th, 1984. That article is annexure B. We have blown it up as best we can from a very poor copy, and I am sorry that Your Honours do not have the best copy that could conceivably be imagined but I would draw attention to these passages of it. It commences, "Judicial 'job meddling' claims rejected" - that is the heading:

> A Supreme Court judge yesterday denied claims by the chairman of the Australian Law Reform Commission, Mr Justice Michael Kirby, that judges intervened in Public Service appointments.

In yesterday's Advertiser Mark Bruer reported from Sydney that Justice Kirby had said the intervention of judges in Public Service appointments was part of the "netherworld" of the legal arena and had explained that it was a practice inherited from Britain.

Mr Justice Wells -

as he then was -

during an unconnected trial in the Supreme Court yesterday, said the statements were "irresponsible" and without the "slightest foundation". He said he was speaking on behalf of present and former SA judges.

The implications of two paragraphs in the article, "more especially of the emotive word 'netherworld', is that judges... corruptly and wilfully intermeddle in the appointment of officers of all ranks, presumably up to the highest rank in the Public Service.

"Not only does that impute corruption to us, but implies that we are from time to time willing to act in flagrant defiance of constitutional principles governing the separation of powers," Mr Justice Wells said.

He said that no judge of his acquaintance "would ever dream of doing such a thing." He comprehensively rejected what had been asserted and stated that it was "utterly false".

"On behalf of all SA judges, as well as on my own behalf, I express my deep resentment of this calumny. It cannot be too soon or too emphatically denied," he said.

And then there is a reference to Mr Justice Kirby's response.

GIBBS CJ: By the way, if it matters there is nothing whatever to show is there that when Mr Justice Wells made these remarks in 1984 he was aware that they had anything to do with Mr Justice Murphy?

MR EINFELD: Absolutely, Your Honour. I am sorry, I misunderstood what Your Honour's question was. There is indeed because the next annexure, which is referred to in paragraph 4 of the affidavit, is the article of the previous day of the Adelaide Advertiser, the so called "Mark Bruer article"

which is a complete article about matters allegedly arising corruptly in New South Wales involving the Premier of New South Wales, and some investigations of a man named Bottom into corrupt appointments and activities in New South Wales.

The article is to be found as the first part of the annexure. Again I apologize for the fact that we could not produce a better copy, and I certainly do not propose to read the whole lot to Your Honours now unless Your Honours require it. But Your Honours will find, for example, that at the bottom of the second column of the articlesthere is reference to the following matters, the last paragraph in the second column:

> However, while Senator Evans has decided that the actual taping was illegal, he has also decided that the conduct of the Federal judge was not, and that the judge's actions will not be investigated.
>
> This opinion has been echoed in other legal quarters, and indeed was also voiced by the National Times when it published sections of the transcripts.
>
> If the judge's activities were not illegal, and did not constitute the "misbehaviour" under which he could be dismissed, then they were at least questionable.
>
> According to the transcripts the judge and the solicitor had 15 telephone conversations that were intercepted. Five of these conversations had been initiated by the judge, including one call the judge had made to the solicitor's home.
>
> Clearly the two men had a close association, although this in itself cannot be considered improper unless it can be proved that the judge was aware of the solicitor's association with a crime figure. This knowledge is not forthcoming from the transcripts.
>
> According to the policy summary of one conversation, the solicitor told the judge that a Liberal Party politician was paying him back some money in a way that involved defrauding the Tax Department.

And it goes on to deal with other, but not immediately relevant matters concerning the same Judge who ultimately turns out to be the plaintiff, and a series of other quotations or summaries from the tapes involving the Judge and the question of appointments.

MASON J: You want the passage at the end of the fifth column, do you not? The bottom of the fifth column and then the sixth column.

MR EINFELD: Indeed, Your Honour. Thank you.

GIBBS CJ: Well then, if Mr Justice Wells had read that he would have seen the reference to Mr Justice Murphy.

MR EINFELD: It is that article that he was commenting on, Your Honour.

GIBBS CJ: No, he is commenting on Mr Justice Kirby's remarks. Where do we find them?

MR EINFELD: They are in the very next column, at the top of the next column. And Mr Justice Kirby's remarks immediately follow those observations.

GIBBS CJ: Yes, well that explains that, thank you.

MR EINFELD: Paragraph 5 is merely a statement that this matter was raised before the Commission, and paragraph 6 annexes the response of the third defendant which is as follows - this is annexure D:

> I am in no way embarrassed in discharging my duty as commissioner by what I said in the South Australian Supreme Court on 23 February 1984, nor in my opinion is there any reason why I should be.
>
> What moved me to say what I did were remarks to which my attention had been directed by another Supreme Court judge, which were reported to have been made by Mr Justice Kirby, who was then presiding over the Australian Law Reform Commission. Mr Justice Kirby had said, according to the report, that the intervention of judges in public service appointments was part of the "nether world" of the legal arena and that it was a practice inherited from Britain.
>
> Those remarks seemed to me to apply to me as a Supreme Court judge in Australia. The occasion for Mr Justice Kirby's remarks was immaterial. I shall therefore continue to act and sit as a commissioner.

GIBBS CJ: I see, yes.

MR EINFELD: So that our submission is therefore, as we take up in the last four paragraphs of our written submission, that these are clear views. They are

extremely and positively determinately expressed. In the context of the matters that we have referred to they represent a public prejudgment on the propriety of such activity as is alleged against the plaintiff.

(Continued on page 72)

MR EINFELD (continuing): We submit that it is relevant that the Judge's remarks, the third defendant's remarks, were made not in connection with the case which was then before him - they were volunteered by him; they clearly arose out of the article in which the plaintiff was being was being discussed and his activities were being discussed and the very matters which are going to be considered - or may very well be considered and are certainly presently evidence before this Commission - in our submission they could not but be taken by the public or any reasonable observer as entertaining an apprehension that the third defendant might not bring an impartial and unprejudiced mind to the resolution of such matters.

It can be anticipated, in our submission, that this matter concerning the appointment of Mr Jegerow, in particular, may very well be a serious matter that has to be considered. It is already part of the evidence before them because the full copy of Mr Justice Stewart's second report is an exhibit before the Commission and, in our submission, as this Court has held in WATSON's case and in LIVESEY's case, all that is actually necessary is that a person might not bring an impartial and unprejudiced mind. In our submission, that is the very least that could be said about the third defendant's remarks in this particular case.

There is, if Your Honours are considering the matter concerning other expressions of opinion, in REG V WATSON, 136 CLR, of which a copy has been handed to Your Honours, a quotation in that case at page 260 and 261 from certain other cases including a case in this Court called REG V AUSTRALIAN STEVEDORING INDUSTRY BOARD: EX PARTE THE MELBOURNE STEVEDORING COMPANY, at page 261, and there is, in the quotation which appears in the middle of page 261, reference to the fact that:

> it is necessary to consider whether the person can be expected fairly to discharge his duties....."preconceived opinions"..... do not constitute such a bias.

In a quotation there from an English case that is set out, "preconceived opinions" do not necessarily constitute bias but what does arise, in our submission, is that in the old formulation as Your Honours remember, "reasonable suspicion of bias" which this Court held in this very case, is not a desirable formulation because it has unfortunate overtones but the effect of the Court's decision in WATSON was that if the reasonable members of the public, acting reasonably, might consider that - "right-minded persons" is one of the expressions - that in the circumstances there had either been a pre-judgment of an important issue or that the person might not be able to bring an unbiased mind or an

unprejudiced mind to the determination of important issues, especially issues that go to the heart of the subject-matter which he has to decide then, in our respectful submission, it would become clear that it was a case where the Court ought to intervene.

Your Honours have annexure B, which is the only other matter to which I want to refer, to the first affidavit of Mr Masselos, which is the transcript of the first day of hearing on 3 June.

GIBBS CJ: Yes. What page of the transcript?

MR EINFELD: Page 32, Your Honour.

GIBBS CJ: Yes, thank you.

MR EINFELD: The first fresh paragraph on the page, commences:

> As to the second matter, the perusal by the members of the commission of materials being reports of previous inquiries, -

this includes Mr Justice Stewart's report -

> in my view the task of the inquiry, in the double sense which I have attempted to define of collecting and considering material, is entrusted to the commission. It was argued that counsel assisting the commission should perform the task of collecting and sifting and the members themselves should not study the materials until counsel assisting frame particulars which satisfy section 5 subsection (2). It was argued that otherwise the commission cannot properly perform its function of consideration which is essentially a curial function. Again, I am unable to accept this argument. There are substantial curial aspects of the commission's function but it is an administrative commission of inquiry. Jurists have always criticized the combination of some of the functions involved in the inquiry and report, but there is nothing exceptional about the form of the present act as I construe it in that respect.
>
> Counsel assisting the commission are given no responsibilities.....It is the commission's responsibility to make the inquiry with counsel's assistance. Consistently with this members of the commission are given authority to inspect documents delivered.....and to have access to information not in the possession of the commission.

His Honour, the learned presiding member, went on to refer to the fact that - over the next page, page 33. In the first paragraph he merely says that:

> The commission should therefore be aware of and supervise the collection of information.
>
> I think that for these reasons and in the interests of expediency, since the commission is under statutory instruction.....the most efficient course is for the commission to proceed to the study of this material which is in substance public material already.

He reserved the position in relation to part II of the Stewart's report for technical reasons but ultimately that became an exhibit as well and this was a decision in which the other two members, including the third defendant, agreed and did not wish to add anything.

So that, in our respectful submission, the position is that this matter, which may very well be an important matter in the context of any possible specific allegation in precise terms against the plaintiff, is the very type of matter, having regard to the views which the third defendant has expressed with was considered by the Court to offend the principles of natural justice in WATSON's case and in LIVESEY and in a number of the other cases that are referred to in the report in WATSON's case as well - including some English cases that are there referred to, that I will not delay the Court with, but which are contained also in the earlier parts of our written submission.

The other matter on which I would imagine that the Court would be interested to consider in this aspect is the question of the consequences of the disqualification of the third defendant and we point out in our written submission that section 9(1) makes provision for the continuance of the Commission by two members. As the Court has already been advised, the Commission has made very little, if any, progress up till now except the reading of material that has been obtained and been tendered. Therefore it is our submission that there could be no prejudice to the functioning of the Commission if the third defendant is required to withdraw.

BRENNAN J: Mr Einfeld, section 9(1) does not cover this situation at all, does it?

MR EINFELD: It does not, Your Honour, unless one of the persons resigns. But that might involve the way in which the Court would frame its order in regard to the third defendant because if the Court made a declaration or order that he resign then, in our submission, section 9(1) would be adequate for this purpose.

GIBBS CJ: We could not order him to resign? However, I see the point, though; it would be possible to frame an order which might give him the opportunity to resign if that were the appropriate course.

MR EINFELD: Yes. And I imagine there would be no difficulty in doing so if the Court expressed the view that he should not sit. Thank you, Your Honours.

GIBBS CJ: Yes, thank you, Mr Einfeld. Yes, Mr Fitzgerald. We do not need to hear you on the question of bias but we do want to hear you on the question of balance of convenience.

MR FITZGERALD: Yes, thank you, Your Honours. Your Honours, we will content ourselves with attempting to put our submissions in the form of a few propositions: the first being that there is a clear public interest in permitting the inquiry to continue at this point; there is obvious urgency, confirmed by the parliament's view which is reflected in the reporting requirement; and that even if that requirement is unable to be met it would be wrong to delay it any further than is necessary. An entitlement to inquire, Your Honours, independently of statute - and it is important to appreciate, in our respectful submission, that the proposal to investigate is not related to lines of inquiry other than those which are indicated by available material.

(Continued on page 76)

MR FITZGERALD (continuing): Your Honours, may we take you very briefly to annexure E to the first affidavit of the solicitor for the plaintiff, and in particular, Your Honours, to page 54 at about point 5 where counsel assisting the inquiry, in answer to something said by the presiding Commissioner said this:

> I am not quite sure if I have fully understood what the presiding member is putting to me. We are not in a sense generating anything ourselves. All we are doing is looking at a very substantial volume of material which has been put to us, and then sifting or filtering that material, where it is not clear to us whether an allegation is made at all or where it is imprecise or where it has, let us say, not a date attached to it, we are then making inquiries, or propose rather to make inquiries of persons outside for the purpose of seeing if that allegation has definition.

The presiding Commissioner said:

> I might make it clearer if I put it in this way. It is implicit that counsel are acting responsively and not of their own initiative in the starting of their inquiries.

Answer, "Yes".

Your Honours, it is respectfully submitted that the suggestion that the inquiry could continue for what is described as "sifting" is unrealistic and that it is not possible to separate out the perusal of material or sifting the collection of evidence, the formulation of allegations and the sort of investigation which is spoken of in those passages. As against that, therefore, and the urgency of the inquiry and the obvious public interest, there is a conjectural observation or assertion that there may be damage to the plaintiff. When analyzed, that seems to be developed into a proposition that there may be improper conduct by those who conduct the investigation by attempting to persuade persons who would not otherwise give evidence to give evidence by misrepresentation or duress as to their obligation to do so.

Your Honours, in our respectful submission, there is no reason why the Commission should not proceed for the purposes which are indicated in the passage which has been read out. They are our submissions, Your Honour.

GIBBS CJ: Thank you, Mr Fitzgerald. Yes, Mr Gyles, anything in reply?

MR GYLES: I think I have referred already, Your Honours, to pages 51 and 52 of the transcript which indicate a view much wider than that reflected in the other passage and, of course, the letter in reply, annexure D or E, is the charter which the Commission has adopted, and has stated in their reasons - D - and have adopted expressly as the charter by their ruling expressly at page 101 of the transcript. They have asserted the right to do all that is there set out.

GIBBS CJ: Yes.

MR GYLES: Thank you.

GIBBS CJ: That is all you wish to put, Mr Gyles?

MR GYLES: Yes, Your Honour.

GIBBS CJ: We shall give our judgment in this matter at a quarter past ten in the morning.

AT 5.19 PM THE MATTER WAS ADJOURNED
UNTIL FRIDAY, 27 JUNE 1986

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S87 of 1986

B e t w e e n -

THE HON. LIONEL KEITH MURPHY

Plaintiff

and

SIR GEORGE LUSH

First Defendant

SIR RICHARD BLACKBURN

Second Defendant

THE HON. ANDREW WELLS

Third Defendant

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA

Fourth Defendant

GIBBS CJ
MASON J
WILSON J
BRENNAN J
DEANE J
DAWSON J

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON FRIDAY, 27 JUNE 1986, AT 10.42 AM

(Continued from 26/6/86)

(Reasons for judgment were delivered)

GIBBS CJ: Is there anything further?

MR FITZGERALD: Your Honour, there is one matter that perhaps it may not be thought convenient to deal with at the moment, but if I might mention it. The Court has intimated that the matter will come on for final determination at an early time and I think Your Honour the Chief Justice may have mentioned the month of August. At the moment there is no statement of claim in these proceedings and it may be thought it would be of some assistance in the definition of the final issues for determination at the time that there should be a statement of claim. I understand my learned friend is not opposed to such a course but thought it should be mentioned to the Court so that an intimation could be given from the Court as to whether it wished such a course to be followed.

T2

GIBBS CJ: Yes, certainly that should be done and should be done promptly but the actual timetable, unless there is agreement, can be worked out by a Judge in chambers.

MR FITZGERALD: Yes, I think we could probably agree a timetable, Your Honour.

GIBBS CJ: Yes.

MR FITZGERALD: Thank you, Your Honour.

GIBBS CJ: Is there anything further? Very well, the Court will adjourn.

AT 11.05 AM THE MATTER WAS ADJOURNED SINE DIE

File
C7.

PARLIAMENTARY COMMISSION OF INQUIRY

GPO Box 5218
SYDNEY NSW 2001

Ph :(02) 232 4922

Roger Gyles Esq QC
Barrister-at-Law
10 Selborne Chambers
Phillip Street
Sydney 2000

Dear Sir,

You will recall the informal discussion which took place yesterday with members of the Parliamentary Commission of Inquiry.

In the course of that discussion you suggested to the Commissioners that the transcript of the proceedings of Monday and Tuesday be exempted of the direction of the Act that the Inquiry be conducted in private. I am directed by the Presiding Member to inform you that the Commissioners do not consider that any circumstances have arisen which require the ordinary rule established by S.7(1) to be departed from in this instance.

I am also directed to repeat the statement made yesterday that the Commission will take whatever steps may be considered necessary to facilitate the use of the transcript for the purposes of the forecast application to the High Court or the Federal Court.

Yours sincerely,

J F Thomson
Secretary

26 June 1986

MEMORANDUM

TO: Sir George Lush
Sir Richard Blackburn
The Hon Andrew Wells
F Thomson
C Charles
M Weinberg
A Robertson
A Phelan
P Sharp

FROM: D Durack

HIGH COURT PROCEEDINGS 26/27 JUNE 1986

Attached hereto the following documents re the recent High Court challenge by Murphy J:

1. Copy Section 78B Judiciary Act Notice
2. Notice of Motion
3. Writ of Summons
4. Affidavits of Steve Masselos sworn 25 June 1986
5. Outline of submissions to be put on behalf of the Attorney-General (not handed up):
   - A. Construction of the Act
   - B. Validity of the Act
   - C. Apprehended Bias

   ] Excluded as not handed up.
6. Submissions on behalf of the Plaintiff (Murphy J):
   - A. Proved misbehaviour - Section 72
   - B. Submissions concerning disqualification of Mr Commissiioner Wells.

D Durack

1 July 1986.

Ok to include on file — cleared with Robert Meeks 27/8/86

S.18B
NOTIC

FROM STEPHEN MASSELLOS & CO.

WE GIVE YOU NOTICE THAT A WRIT OF SUMMONS AND NOTICE OF MOTION ARE BEING FILED IN THE HIGH COURT OF AUSTRALIA BY THE HON. LIONEL KEITH MURPHY AS PLAINTIFF AGAINST SIR GEORGE LUSH, SIR RICHARD BLACKBURN AND THE HON. ANDREW WELLS AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA AS DEFENDANTS SEEKING THE FOLLOWING RELIEF:

1) AN ORDER INTERIM AND PERMANENT RESTRAINING THE FIRST, SECOND AND THIRD DEFENDANTS BY THEMSELVES, THEIR OFFICERS, SERVANTS AND AGENTS FROM:

   A. INVESTIGATING OR INQUIRING INTO OR CONSIDERING ANY MATERIAL OR INFORMATION THAT IS NOT A SPECIFIC ALLEGATION IN PRECISE TERMS

   B. INQUIRING OTHERWISE THAN AT HEARINGS WITH THE PLAINTIFF PRESENT

   C. INVESTIGATING ALLEGATIONS RELATING TO THE PLAINTIFF'S CONDUCT OTHERWISE THAN IN JUDICIAL OFFICE IN THE ABSENCE OF ANY ALLEGATION OF HIS PRIOR CONVICTION FOR AN OFFENCE

   D. PROCEEDING TO INVESTIGATE THE MATTERS SET OUT IN THE LETTER FROM THE INSTRUCTING SOLICITOR TO COUNSEL ASSISTING THE FIRST, SECOND AND THIRD DEFENDANTS TO THE PLAINTIFF'S SOLICITORS DATED 20 JUNE 1986.

2) A DECLARATION THAT THE THIRD DEFENDANT SHOULD BE DISQUALIFIED FROM ACTING AS A COMMISSIONER.

3) AN ORDER RESTRAINING THE THIRD DEFENDANT FROM ACTING IN ANY WAY IN FURTHERANCE OF THE FUNCTIONS CONFERRED UPON HIM PURSUANT TO THE ACT.

4) A DECLARATION THAT THE PARLIAMENTARY COMMISSION OF

   INQUIRY ACT 1986 ("THE ACT") IS INVALID.

5) AN ORDER INTERIM AND PERMANENT RESTRAINING THE FIRST, SECOND AND THIRD DEFENDANTS BY THEMSELVES, THEIR OFFICERS, SERVANTS AND AGENTS FROM DOING ANY ACT OR THING PURSUANT TO THE ACT.

6) SUCH FURTHER OR OTHER ORDERS AS TO THE COURT SEEMS FIT.

DECLARATION 4 AND CONSEQUENTIAL ORDERS ARE MATTERS ARISING UNDER THE CONSTITUTION OR INVOLVING ITS INTERPRETATION.

IT IS UNDERSTOOD THAT THE NOTICE OF MOTION WILL BE HEARD IN BRISBANE AT 9.15 AM ON 26 JUNE 1986.

IN THE HIGH COURT)
OF AUSTRALIA)
SYDNEY REGISTRY)

No. 67 of 1986

BETWEEN THE HON. LIONEL KEITH MURPHY

Plaintiff

AND SIR GEORGE LUSH

First Defendant

SIR RICHARD BLACKBURN

Second Defendant

THE HON. ANDREW WELLS

Third Defendant

AND THE ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA

Fourth Defendant

NOTICE OF MOTION

TAKE NOTICE that the High Court of Australia will be moved at Brisbane on the 26 day of June, 1986 at 9.15 in the forenoon or so soon thereafter as Counsel may be heard on behalf of Lionel Keith Murphy for the following orders:-

1. An interim order restraining the First, Second and Third Defendants by themselves, their officers, servants and agents from:-

(a) investigating or inquiring into or considering any material or information that is not a specific allegation in precise terms;

(b) inquiring otherwise than at hearings with the Plaintiff present;

(c) investigating allegations relating to the Plaintiff's conduct otherwise than in judicial office in the absence of any allegation of his prior conviction for an offence;

(d) proceeding to investigate the matters set out in the letter from the instructing solicitor to Counsel Assisting the First, Second and Third Defendants to the Plaintiff's solicitors dated 20 June, 1986.

2. An interim order restraining the Third Defendant from acting in any way in furtherance of the functions conferred upon him pursuant to the Act.

3. An interim order restraining the First, Second and Third Defendants by themselves, their officers, servants and agents from doing any act or thing pursuant to the Act.

4. Such further or other orders as to the Court seems fit.

Dated: 25. 6. 1986.

.....

Solicitor for the Plaintiff

To: Sir George Lush
Sir Richard Blackburn
The Hon. Andrew Wells
The Attorney-General for the Commonwealth of Australia

IN THE HIGH COURT)
OF AUSTRALIA)
SYDNEY REGISTRY)

No. 87 of 1986

L.O.

BETWEEN THE HON. LIONEL KEITH MURPHY

Plaintiff

AND SIR GEORGE LUSH

First Defendant

SIR RICHARD BLACKBURN

Second Defendant

THE HON. ANDREW WELLS

Third Defendant

AND THE ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA

Fourth Defendant

WRIT OF SUMMONS

ELIZABETH THE SECOND by the Grace of God Queen of Australia, and Her other Realms and Territories, Head of the Commonwealth:

To: Sir George Lush
Sir Richard Blackburn
The Hon. Andrew Wells
all of 8th Floor, A.D.C. House,
Elizabeth Street,
SYDNEY. 2000

AND TO: The Attorney-General for the Commonwealth of Australia
of Parliament House, Canberra

L.S.

WE command you that within ~~fourteen (14)~~ twenty one (21) after the service of the Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our High Court of

Australia in an action at the suit of Lionel Keith Murphy and take notice that, in default of you so doing, the Plaintiff may proceed therein, and judgment may be given in your absence.

WITNESS: The Right Honourable Sir Harry Talbot Gibbs
P.C., GCMG, K.B.E.
Chief Justice of Australia

The 25th day of June in the year of Our Lord one thousand nine hundred and eighty-six.

L.S.

N.B. This writ is to be served within twelve calendar months from the date hereof or, if renewed, within six calendar months from the date of the last renewal including the day of such date and not afterwards.

If a defendant resides or carries on business in the State of New South Wales, his appearance to this Writ may be entered, either personally or by solicitor at the Sydney Registry.

If a defendant neither resides nor carries on business in the State or New South Wales, he may, at his option, cause his appearance to be entered either at the Registry above mentioned or at the Principal Registry of the High Court at Canberra.

The Plaintiff's claim is for:-

1. An order interim and permanent restraining the First, Second and Third Defendants by themselves, their officers, servants and agents from:-

(a) investigating or inquiring into or considering any material or information that is not a specific allegation in precise terms;

(b) inquiring otherwise than at hearings with the Plaintiff present;

(c) investigating allegations relating to the Plaintiff's conduct otherwise than in judicial office in the absence of any allegation of his prior conviction for an offence.

(d) proceeding to investigate the matters set out in the letter from the instructing solicitor to Counsel Assisting the First, Second and Third Defendants to the Plaintiff's solicitors dated 20 June, 1986.

2. A declaration that the Third Defendant should be disqualified from acting as a Commissioner.

3. An order restraining the Third Defendant from acting in any way in furtherance of the functions conferred upon him pursuant to the Act.

4. A declaration that the Parliamentary Commission of Inquiry Act, 1986 ("the Act") is invalid.

5. An order interim and permanent restraining the First, Second and Third Defendants by themselves, their officers, servants and agents from doing any act or thing pursuant to the Act.

6. Such further or other orders as to the Court seems fit.

This Writ was issued by Steve Masselos & Co. 1st Floor, 44 Martin Place, Sydney in the State of New South Wales whose address for service is a above for Lionel Keith Murphy who resides at Abbey Circle, Forrest A.C.T.

Dated:

(L.S.)

.....
Solicitor for the Plaintiff

IN THE HIGH COURT
OF AUSTRALIA
SYDNEY REGISTRY

No. 87 of 1986

BETWEEN THE HON. LIONEL KEITH MURPHY

Plaintiff

AND SIR GEORGE LUSH

First Defendant

SIR RICHARD BLACKBURN

Second Defendant

THE HON. ANDREW WELLS

Third Defendant

AND THE ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA

Fourth Defendant

AFFIDAVIT

On the day of June, 1986 I STEVE MASSELOS of 42-46 Martin Place Sydney in the State of New South Wales, solicitor, make oath and say as follows:-

1. I am the solicitor for the Plaintiff.

2. I crave leave to refer to the Parliamentary Commission of Inquiry Act, 1986 ("the Act").

3. On 27 May, 1986 the First, Second and Third Defendants were appointed Members in accordance with S.4 of the Act of the Parliamentary Commission of Inquiry and the First Defendant was appointed the Presiding Member.

4. The Plaintiff Lionel Keith Murphy is a person referred to in the Act.

5. The Parliamentary Commission of Inquiry ("the Commission") commenced sitting on 3 June, 1986. Annexed hereto and marked "A" is a copy of the transcript of public proceedings on that date. Annexed hereto and marked "B" is a copy of the transcript of proceedings of the Commission sitting in private on that day.

6. Exhibited to me at the time of swearing this Affidavit and marked "SM1" is a copy of the Report of the Senate Select Committee on the conduct of a judge of August 1984 referred to in the transcript.

7. Exhibited to me at the time of swearing this Affidavit and marked "SM2" is a copy of the Report of the Senate Select Committee on allegations concerning a judge of October 1984 referred to in the transcript.

8. Exhibited to me at the time of swearing this Affidavit and marked "SM3" is a copy of Volume 1 of the Report of the Royal Commission of Inquiry into alleged telephone interceptions of 30 April, 1986.

9. Exhibited to me at the time of swearing this Affidavit and marked "SM4" is a copy of Volume 2 of the Report of the Royal Commission of Inquiry into alleged telephone interceptions of 30 April, 1986 together with a letter from Mr. Justice Stewart to the Plaintiff dated 25 March, 1986. I have placed them in a sealed envelope and request that they are not to be opened without further submisson.

10. Annexed hereto and marked "C" is a copy of a letter from me to Stephen Charles Q.C. Counsel Assisting the Commission dated 18 June, 1986.

11. Annexed hereto and marked "D" is a copy of a letter from Mr. Charles' instructing solicitor to my firm dated 20 June, 1986.

12. Annexed hereto and marked "E" is a copy of the transcript of proceedings of the Commission sitting in private of 23 June, 1986.

13. Annexed hereto and marked "F" are extracts from Hansard for the House of Representatives and the Senate of 8 May, 1986 relating to the Bill.

14. Annexed hereto and marked "G" is a copy of an article appearing in the Adelaide Advertiser of 23 February, 1984.

15. Annexed hereto and marked "H" is a copy of an article appearing in the Adelaide Advertiser of 24 February, 1984.

16. Annexed hereto and marked "K" is a copy of the transcript of proceedings of the Commission sitting in private of 24 June, 1986.

SWORN by the Deponent)
this [illegible] day of [illegible]) _____
1986)

BEFORE ME:
A Justice of the Peace

AB

IN THE HIGH COURT
OF AUSTRALIA
SYDNEY REGISTRY

NO. 87 of 1986.

BETWEEN

THE HON. LIONEL KEITH MURPHY

Plaintiff

AND

SIR GEORGE LUSH

First Defendant

SIR RICHARD BLACKBURN

Second Defendant

THE HON. ANDREW WELLS

Third Defendant

AND

THE ATTORNEY-GENERAL FOR
THE COMMONWEALTH OF AUSTRALIA

Fourth Defendant

AFFIDAVIT

ON the 25th day of June, 1986, I, STEVE GREGORY MASSELOS, Solicitor, of 44 Martin Place, Sydney in the State of New South Wales, being duly sworn make oath and say as follows:

1.
I am the Solicitor for the Plaintiff.

2.
I first became aware of a question addressed by Senator Coleman to Senator Evans representing the Attorney-General in the Senate after reading the article reporting that matter in the Sydney Morning Herald dated June 11, 1986. This article is annexed hereto and marked with the letter "A".

3.
Shortly after reading that article the Plaintiff informed me that he had just read the article and asked me to draw the matter to the attention of Counsel. He advised me and I verily believe that that article was his first knowledge of the Third Defendant's views on the subject matter.

4.
I then instituted further inquiries and ascertained that the Third Defendant's views had been published in the Adelaide Advertiser of February 24, 1984. This article is annexed hereto and marked with the letter "B". the article to which the Third Defendant appears to have been referring was published in the Adelaide Advertiser of the previous day. This article is annexed hereto and marked with the letter "C".

5.
On the Plaintiff's instructions, Senior Counsel raised the matter before the Parliamentary Commission of Inquiry at its next hearing on June 23, 1986 when objection was taken to the Third Defendant's continuation as Commissioner on the Inquiry. In answer to a question from the Third Defendant at that hearing, Senior Counsel for the Plaintiff invited the Third Defendant to supply us with a full copy of the remarks in question.

6.
At the Commission's hearing on June 24, 1986 the Third Defendant announced that he would continue to sit as a Commissioner. Annexed hereto and marked with the letter "D" is a transcript of that announcement. The Third Defendant has not supplied a full version of his remarks.

SWORN on the day
hereinbefore mentioned

.....

Before me

.....
Solicitor/Sydney.

Murphy: doubts over SA judge

CANBERRA: The Attorney-General, Mr Bowen, has been asked to respond to suggestions in the Senate that one of the commissioners inquiring into Justice Lionel Murphy's High Court position should be disqualified

Senator Ruth Coleman (ALP, WA) queried yesterday the suitability of former South Australian judge Andrew Wells, on the basis of the "extreme terms" in which he allegedly spoke on a closely related subject in February 1984.

Mr Wells is one of three former judges appointed by Parliament to decide whether Justice Murphy, recently acquitted of the remaining criminal charge against him, is nevertheless guilty of misbehaviour warranting dismissal under the Constitution.

Senator Coleman's Senate question related to remarks by Justice Michael Kirby, who in 1984 was chairman of the Australian Law Reform Commission, about the role judges sometimes played in the appointment of public officials.

Her question said Justice Kirby's remarks were about alleged conduct by Justice Murphy over the appointment of a person to public office in NSW

Mr Wells, then sitting on the Bench in an unrelated case, had taken particular exception to Justice Kirby's reported suggestion that judicial intervention in Public Service appointments was part of a "netherworld" of the legal field inherited from Britain.

He had said these remarks implied that judges "corruptly and wilfully intermeddled" in Public Service appointments at all levels.

"On behalf of all South Australian judges, as well as on my own behalf, I express my deep resentment of this calumny," he had said. "It cannot be too soon or too emphatically denied."

Justice Kirby later pointed out that his remarks did not imply corruption, but merely drew attention to the fact that it was common practice for Governments to consult judges, among others, about proposed statutory appointments.

Senator Gareth Evans, representing Mr Bowen in the Senate, agreed yesterday to refer Senator Coleman's question to Mr Bowen for "such reply as he may care to make".

However, Senator Evans noted that the comments of the then Justice Wells did not "squarely or expressly" refer to Justice Murphy or to the NSW Public Service appointment raised by Senator Coleman.

This is Annexure A referred to in the affidavit of Steve Gregory Masselos, sworn 25 June 1986.

Judicial 'job meddling' claims rejected

A Supreme Court judge yesterday denied claims by the chairman of the Australian Law Reform Commission, Mr Justice Michael Kirby, that judges intervened in Public Service appointments.

In yesterday's *Advertiser* Mark Bruer reported from Sydney that Justice Kirby had said the intervention of judges in Public Service appointments was part of the "motherworld" of the legal arena and had explained that it was a practice inherited from Britain.

Mr Justice Wells, during an unconnected trial in the Supreme Court yesterday, said the statements were "irresponsible" and without the "slightest foundation."

He said he was speaking on behalf of present and former SA judges.

The implication of two paragraphs in the article, "more especially of the emotive word 'motherworld,' is that judges ... corruptly and wilfully intermeddle in the appointment of officers of all ranks, presumably up to the highest rank in the Public Service ...

"Not only does that impute corruption to us, but implies that we are from time to time willing to act in flagrant defiance of constitutional principles governing the separation of powers," Mr Justice Wells said.

He said no judge of his acquaintance "would ever dream of doing such a thing."

He comprehensively rejected what had been asserted and stated that it was "utterly false."

"On behalf of all SA judges, as well as on my own behalf, I express my deep resentment of this calumny. It cannot be too soon or too emphatically denied," he said.

In SYDNEY last night Mr Justice Kirby said it was common practice for governments to consult a number of people, including judges, about statutory appointments.

His remarks had not been intended to imply that this practice was unique to judges or that it was corrupt.

"I have been contacted at times when I have had some knowledge of the qualities of someone, and in those circumstances I feel I was doing my duty."

This is Annexure B referred to in the affidavit

of Steve Gregory Masselos, sworn 25 June 1986

Attached hereto is Annexure C referred to in the affidavit of Steve Gregory Masselos sworn 25 June 1986.

ADELAIDE ADVERTISER 23/2

Murky waters clouding Bottom issue

MARK BRUER reports from Sydney on a furore that threatens to engulf Federal Parliament when it resumes next week.

The row, that has been brewing in the NSW Parliament and is set to erupt at Federal level, concerns the Bottom Tapes.

The tapes purport to show questionable activities by a Sydney solicitor and judge and raise the spectre of illegal phone taps.

NSW Premier Mr Wran believes the issue has been politically orchestrated to embarrass his Government.

But, if the Opposition decides to name the people whose conversations are said to have been recorded, it could well be accused of slandering those who have committed no criminal offence. For both sides, the matter is fraught with peril.

NSW Premier Mr Wran

THE SHADOW of police tapes and transcripts will loom large over Federal Parliament when it resumes next week.

Already the resumption of NSW Parliament this week has been marked by heated exchanges over what have become known as the Bottom Tapes, and there is little reason to expect the Federal arena to be any different.

It is not easy to see just how the Federal Opposition will use the tapes to attack the Government, or how the Government will respond. For both sides, the matter is fraught with peril.

If the Opposition decides to name the people whose conversations were recorded it could well be accused of slandering people who have committed no criminal offence, as has been the conclusion of two interim police reports handed to the Federal Government.

If the Government moves to establish a judicial enquiry, it will be doing so on information obtained illegally, thereby creating a dangerous precedent. If it does not establish such an enquiry, it will be accused of inactivity and even concealment.

Police phone-tapping — producing scandals ranging from the resignation of NSW Corrective Services Minister Rex Jackson last year to this more recent exposure of the activities of a Sydney solicitor and a judge — seems to have become the bete noire of the Labor Governments in Sydney and Canberra.

The National Times first published allegations arising from the tapes on November 25 last year, although the issues raised seemed to escape the attention of the public and politicians alike.

THEN in January, Sydney crime investigator Mr Bob Bottom — who ironically once worked for the NSW Government — handed hundreds of pages of transcripts and several cassettes of tape to *The Age* in Melbourne.

The Age used scientific equipment to test the tapes and, finding they had not been edited, published a three-part series early this month expanding on the material already used by *The National Times*.

This time both the existence of the tapes and the conversations they had recorded between a Federal judge and a Sydney solicitor, and the solicitor and his contacts (including a crime figure) caused a furore.

The authenticity of the tapes was challenged, the actions of the newspapers in publishing the contents and then refusing to hand over the tapes to the NSW Government were challenged, and the credibility of Mr Bottom — already damaged by his admission to a NSW enquiry that allegations be made against a magistrate were unfounded — was questioned.

Eventually, *The Age* handed the tapes and transcripts to Federal and NSW Attorneys-General, and both governments are now conducting police enquiries.

Caught up in this tangle of tapes and transcripts are two issues — the method by which they were obtained, and their contents.

IT IS hard to know which aspect is more important, although there seems to be agreement on which is the more legally errant.

Under no circumstances are State police empowered to tap telephone lines, an activity reserved for Federal police, and then only in extreme cases and with official approval.

The NSW Listening Devices Act limits the eavesdropping scope of its State police to bugs under coffee tables, that sort of thing. Any information passing over a telecommunications system cannot legally be intercepted.

And yet NSW police, apparently without seeking the permission of the Police Commissioner (who would not have been able to give it anyway), went ahead and tapped phone lines, made tape-recordings and used the information so gleaned to pursue investigations by more orthodox means.

The phone taps were placed on the solicitor's business and home lines by the Electronics Division of the Crime Intelligence Unit in 1979 as part of a four-year exercise that had begun in 1976.

It is understood the police officers did all the tapping and listening themselves, and that Telecom was not involved — as it would normally be under a Federal police investigation.

The solicitor was, at this time, under separate investigations by NSW and Federal Police.

The Federal Attorney-General, Senator Gareth Evans, has said that both a preliminary police report given to him and a legal opinion from Mr Ian Temby QC, who is heading the investigation into the tapes, had concluded that the tapes breached the Commonwealth Telecommunications (Interception) Act.

He has not said whether any members of the old Crime Intelligence Unit — now known as the Bureau of Crime Intelligence — would be prosecuted.

Perhaps the NSW Premier, Mr Wran, reflected the feelings of most people when he expressed his anger at the illegal invasion of privacy evidenced by the tapes.

"It must make the public wonder how sacrosanct their private conversations are," he said.

However, while Senator Evans has decided that the actual taping was illegal, he has also decided that the conduct of the Federal judge was not, and that the judge's actions will not be investigated.

This opinion has been echoed in other legal quarters, and indeed was also voiced by *The National Times* when it published sections of the transcripts.

If the judge's activities were not illegal, and did not constitute the "misbehavior" under which he could be dismissed, then they were at least questionable.

According to the transcripts the judge and the solicitor had 15 telephone conversations that were intercepted. Five of these conversations had been initiated by the judge, including one call the judge had made to the solicitor's home.

Clearly the two men had a close association, although this in itself cannot be considered improper unless it can be proved that the judge was aware of the solicitor's association with a crime figure.

This knowledge is not forthcoming from the transcripts.

According to the police summary of one conversation, the solicitor told the judge that a Liberal Party politician was paying him back some money in a way that involved defrauding the Tax Department.

The solicitor told the judge he was going to threaten to reveal the politician's financial activities unless he curtailed the anti-crime attacks being made by the then NSW Opposition Leader, Mr John Mason.

THE JUDGE, when informed of this proposed blackmail, merely warned the solicitor against discussing such things on the telephone.

A few weeks later, the judge discussed the personal habits of a former senior politician and an alderman whom the solicitor wanted to discredit.

The judge on one occasion chided the solicitor for having done nothing to denigrate the alderman, whom, he said, was vulnerable because he frequented "one of those gay restaurants where all the homos hang out."

As for the senior politician, the judge suggested starting an action for malicious prosecution against him. Investigators would be able to get plenty of damaging material on the former politician, the judge said.

In March, 1979, the solicitor and the judge discussed the appointment of a contact of the solicitor to a high position in the NSW Public Service. The position was closely related to the solicitor's activities being investigated by Federal Police, although there is no evidence that the appointee actually did favors for the solicitor.

The solicitor asked the judge to lobby the senior politician who would make the appointment, and the judge replied that he would.

Later he rang the solicitor back to tell him that the solicitor's contact had been appointed to the position by the politician, although it is not made clear whether this was as a result of the judge's intervention.

Interestingly, the chairman of the Australian Law Reform Commission, Mr Justice Michael Kirby, has said this sort of thing goes on all the time in judicial circles. It had simply not been made public knowledge before the publication of the transcripts.

He said the intervention of judges in Public Service appointments was part of the "netherworld" of the legal arena, and explained that it was a practice inherited from Britain.

On one occasion the judge rang the solicitor's home and told the solicitor's wife that the solicitor "has to get both the State and Federal matters settled ..." indicating that the judge was aware of the enquiries into the solicitor's activities.

This raises a question as to the propriety of a judge's having contact with a solicitor whom he knows to be under investigation for allegedly "fixing" court cases.

The judge also suggested that the solicitor should get a NSW Parliamentarian to say that he had made enquiries about the solicitor and he had come up "smelling like a rose."

The activities of the solicitor are clearly more improper than those of the judge.

For example, the solicitor asked a man who had held a senior position in the NSW magistracy to intervene on his behalf in an inquest into a fire.

HE ASKED the man to talk to the magistrate conducting the inquest and to tell him that some of the evidence to be brought forward was just part of an attempt by an insurance company to get out of paying out money.

In another conversation, the solicitor told a bistro owner that everything had been fixed up regarding the inquest — and that it would cost the bistro owner a bottle of scotch.

In another episode, the solicitor was involved in a scheme in which a Chinese restaurant owner paid $80,000 to a senior NSW public servant in return for a casino licence. At the time the NSW Government was considering the legalisation of casinos, although it eventually decided against this.

During the negotiations over the deal it became clear that the solicitor had intimate knowledge of decisions taken by State Cabinet even before they had been publicly announced.

Perhaps it is this aspect that has compelled Mr Wran to be very defensive about the tapes.

His responses have ranged from that of being personally injured, to outrage, and to accusations that the publication of the transcripts was politically motivated.

"At times I felt like giving the whole thing away," he told a sympathetic meeting of the NSW Trades and Labor Council last week.

It was, he said, "no coincidence that as soon as every allegation has been fully and properly investigated, and exposed as a malicious furphy, the pedlars of filth have dredged up another."

NOR WAS it any coincidence that the transcripts had been published at the same time as the NSW Liberal Party had launched an advertising campaign in anticipation of this year's State election.

This week, Mr Wran announced that the NSW Police Commissioner, Mr Cec Abbott, had advised him the transcripts were not the work of the Bureau of Crime Intelligence (BCI).

This conclusion seems to be based on the fact that the stationery on which the transcripts had been typed was not BCI stationery.

With a logic that was at best dubious, Mr Wran said the transcripts were therefore fake, and added that this put a new ingredient into what had been a sinister and seedy affair.

It supported, he said, his belief that the whole thing had been politically orchestrated to embarrass his Government.

However, Mr Wran must have been aware that the fact that the transcripts were apparently not prepared on CUI or BCI stationery does not necessarily mean that they do not come from the NSW Police Force.

Nor does it mean that they must be, to use his word, "phoney."

By using such a description, it must be assumed Mr Wran is simply trying to discredit the transcripts by exploiting the confusion about their authorship.

In a confused business such as this, it is probably a very effective ploy.

ATCHISON

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g Bottom

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Attached hereto is Annexure D referred to in the affidavit of Steve Gregory Masselos, sworn 25 June 1986.

SIR G. LUSH: I invite Mr Wells to say anything he may care to say about the point concerning his position which was raised yesterday.

HON A. WELLS: I am in no way embarrassed in discharging my duty as commissioner by what I said in the South Australian Supreme Court on 23 February 1984, nor in my opinion is there any reason why I should be.

What moved me to say what I did were remarks to which my attention had been directed by another Supreme Court judge, which were reported to have been made by Mr Justice Kirby, who was then presiding over the Australian Law Reform Commission. Mr Justice Kirby had said, according to the report, that the intervention of judges in public service appointments was part of the "nether world" of the legal arena and that it was a practice inherited from Britain.

Those remarks seemed to me to apply to me as a Supreme Court judge in Australia. The occasion for Mr Justice Kirby's remarks was immaterial. I shall therefore continue to act and sit as a commissioner.

THE HON. L.K. MURPHY v.
SIR GEORGE LUSH AND ORS.

OUTLINE OF SUBMISSIONS FOR THE FOURTH DEFENDANT
(THE ATTORNEY-GENERAL FOR THE COMMONWEALTH)

(A) CONSTRUCTION OF THE ACT

1. The Commission has two complementary functions under the Act:

   (i) to inquire;

   (ii) to advise

      (a) as to its factual conclusions;

      (b) as to its opinion whether any conduct which it finds occurred constitutes "misbehaviour" within the meaning of section 72 of the Constitution.

   See sub-sections 5(1) and 8(1).

2. The reference to "proved" misbehaviour in the Act is awkward but obviously cannot mean "proved" to the Houses of Parliament. Compare sub-section 6(1), which refers merely to misbehaviour.

3. Proved must mean "proved" in the opinion of the Commission: see the references to "findings" in sub-sections 6(2) and 8(1) and (3).

4. The Commission's first function is to "inquire" a word of wide import. In the course of its inquiries of specific allegations are framed the Commission will consider evidence. This must be legally admissible (sub-section 6(2)) for the purpose of making findings (para. 8(1)(a)). See also sections 14 (hearings) and 11 (witnesses), which must be read subject to sub-section 6(1).

5. In carrying out that phase of its inquiry, there are matters

which the Commission must consider and matters which it may not consider: see sub-secs. 5(3) and (4). Compare ss. 6(2).

6. None of those restrictions can sensibly be related to material which is received or collected by the Commission as a preliminary to its consideration of the evidence for the purpose of making its findings.

7. That preliminary phase, which itself forms part of the inquiry, is intended to result in the formulation by the Commission of specific allegations in precise terms: sub-sec. 5(2). (Note the reference to the "whole" of the inquiry in sub-sec. 7(1)).

8. Those specific allegations are the "matters before the Commission" (sub-sections 6(1) and 7(2)), which it may consider in the course of its inquiry for the purpose of making findings of fact (subject to sub-sections 5(3), (4) and 6(2)).

9. "Consideration" for the purposes of s. 5(2) does not involve the preliminary step of receiving and collecting material which may form the basis for specific allegations in precise terms.

10. Once it can be seen that there is no basis for the contention that the material collected or received by the Commission must itself contain "only specific allegations made in precise terms", there can be no objection to the Commission pursuing lines of inquiry suggested by such material and obtaining other material which may be used, inter alia, in the formulation of the specific allegations to be considered: see also sections 12 and 13. This view is supported by ss. 5(3) and 13(1) which require and authorize the Commission to have

regard to and obtain materials which could form the basis of a specific allegation in precise terms, notwithstanding that no person outside the Commission may have come forward to make an allegation in those terms.

11. There can also be no objection to the Commission pursuing lines of inquiry suggested by material otherwise than at hearings. Section 14 authorizes hearings ("the Commission may hold hearings") but does not require them. It is necessary to begin with the prima facie presumption that permissive or facultative expressions operate according to their ordinary natural meaning: Ward v. Williams (1955) 92 C.L.R. 505.

12. Once the breadth of the Commission's function is understood, such adjectival matters as the role of counsel assisting and the appointment of staff and the performance of duties by them slip easily into place: see sections 15 and 20.

THE HON. L.K. MURPHY v.
SIR GEORGE LUSH AND ORS.

OUTLINE OF SUBMISSIONS FOR THE FOURTH DEFENDANT
(THE ATTORNEY-GENERAL FOR THE COMMONWEALTH)

(B) VALIDITY OF THE ACT

13. Section 72 of the Constitution empowers the Houses of Parliament, by addresses from each in the same session, to petition the Governor-General in Council to remove a justice of the High Court from office on the ground of proved misbehaviour.

14. The Act is a law made by the Parliament in exercise of its power under Section 51(xxxix) of the Constitution, being a law with respect to matters incidental to the execution of powers vested by the Constitution,

(a) in each House of Parliament, and, further and in the alternative,

(b) in the Government of the Commonwealth viz the Governor-General in Council.

The Houses of Parliament (paras. 15-22).

15. (a) For the purpose of the exercise of its power to petition the Governor-General in Council under section 72, each House of Parliament must have a power to decide what, if any, conduct by a judge is proved; i.e., proved to it.

(b) It is is for each House of Parliament to decide what procedures it will follow and on what materials it may rely as instituting "proof". The Houses of Parliament are not confined to legally admissible evidence. Todd

on Parliamentary Government in England, 2nd Ed., Vol. 2, pp. 860, 867.

16. The Commission has no function of determining any issue for the purpose of section 72. The Houses of Parliament are free to act upon the advice of the Commission in whole or in part or to reject the advice in its entirety. No question of delegation of the powers of the Houses of Parliament arises. In any event, the presentation of an address pursuant to s. 72(ii) is not a law-making function.

17. (a) Such legislation is incidental to the Houses of Parliament's power to determine whether conduct by the Judge is proved.

(b) The Act establishes a procedure which will result in advice and information being given each House of Parliament on a matter which relates directly to the power vested in it by s. 72.

(c) Section 51(xxxix) authorizes Parliament to make a law to create such a procedure because the law makes "such provisions as are incidental to the effectuation of the purpose described by the express words of the power": Federated Iron Workers' Association of Australia v. The Commonwealth (1951) 84 C.L.R. 265 at p. 277, approved in Gazzo v. Comptroller of Stamps (Vic.) (1981) 149 C.L.R. 227 at p. 235 by Gibbs C.J. See also R. v. Richards; ex parte Fitzpatrick and Browne (1955) 92 C.L.R. 157 at p. 164.

(d) The reference i s. 51(xxxix) to "any power vested by this Constitution in the Parliament or in either House thereof ..." encompasses a power vested in both Houses.

(e) Alternatively, the power in section 72 is a separate power of address given each, but required to be exercised in the same Session.

18. The power of address in question is, within the meaning of Section 51(xxxix), vested by the Constitution in the Houses of Parliament by Section 72(ii) as a self-contained grant of power, or by the general power to present addresses (which is vested by Section 49) in conjunction with the specific requirements of Section 72(ii).

19. It will be open to a House of Parliament to adopt the Commission's advice and/or the material before the Commission and its views as to credibility or other reasons for its advice in making its own decision whether the judge's conduct is proved. See sub-sec. 8(3).

20. Alternatively, such advice and material provides an appropriate basis for a determination by the Houses of Parliament whether or not it should itself receive and consider "evidence" to decide whether conduct by the judge is proved.

21. (a) The inquiry is merely the investigation and collection of evidence on behalf of the Houses of Parliament, and legislation to authorize such a course is indisputably incidental to Parliament's power to decide what conduct by the judge is proved by that and any other evidence before the Houses of Parliament.

(b) Similarly, it is incidental to the power of the Houses of Parliament to decide what evidence proves to have appropriate advice on that subject.

(c) Similarly, it is incidental to the power of the Houses of Parliament to decide whether conduct is misbehaviour

to have appropriate advice on that question. Todd on Parliamentary Government in England, 2nd Ed., Vol. 2, pp. 860-75, as quoted in Quick & Garran at p. 731.

22. The power of the Commissioners to inquire and report is not divorced from the power of the Houses to which it is appended merely because some of the matters inquired into by the Commission may result in a negative answer in their report. Further, where there are two associated issues, one of fact, the other of law, there is no requirement that to come within the incidental power the law in question must address the questions separately.

The Governor-General in Council (paras. 23-25).

23. As submitted in para. 14 above, the matters provided for in the Act are incidental to the execution by the Governor-General in Council of the power of removal described in Section 72(ii).

24. The Government of the Commonwealth in Section 51(xxxix) means the Governor-General in Council. The exercise of the power is subjected to satisfaction of a condition precedent viz the presentation of an address as described in Section 72(ii).

25. A law with respect to the consultative and advisory procedures taken by both Houses before deciding to present an address is a law with respect to matters incidental to the execution of the power to remove upon tender of that address.

"Misbehaviour" (para. 26-30).

26. The absence from the Act of any definition of "misbehaviour" does not invalidate the Act because the Commission is asked to advise the Parliament as to whether the conduct proved to the Commission to have occurred amounts to "misbehaviour" within the meaning of the s. 72. That is, the word

"misbehaviour" in the Act bears the same meaning as the word "misbehaviour" in s. 72. Parliament is not obliged to do other than to use the same word as appears in s. 72 of the Constitution in setting down the terms of reference of the Commission. The Parliament may accept or reject the advice given by the Commission concerning whether proved conduct amounts to "misbehaviour".

27. So far as concerns what is "misbehaviour" for the purposes of section 72 other than misbehaviour in the exercise of judicial functions, there are a number of possibilities related to the time at which the conduct occurred, the nature of the conduct, and whether it has resulted in a conviction.

28. For example, the narrowest view of such misbehaviour which seems to have been expressed is that it is conduct which has resulted in a criminal conviction. There is no suggestion of that in the present case, so that it is unnecessary to pursue further possible refinements such as whether that conduct must occur during a particular period or the offence to which the conviction relates must be of a particular character.

Further questions may arise, perhaps involving a degree of overlap.

Another possible view may be that the conduct must involve moral impropriety, perhaps to a degree involving a substantial departure from contemporary standards sufficient to demonstrate an unfitness for judicial office.

Overlaying many of these questions is the further issue whether the conduct must have occurred at a particular time; for example, during the period of judicial office.

29. The Attorney's submission is that it is premature to deal with such questions, at least in advance of the formulation of the

specific allegations to be considered, except for the question whether there can be misbehaviour without a conviction. In the absence of specific allegations in precise terms the Court would be answering a question which is both hypothetical and abstract without the assistance of actual circumstances to give shape to the controversy.

30. As to the exception referred to in para. 29 above, it is accepted that the Judge has not been convicted, but the Attorney's submission is that there may be misbehaviour without a conviction.

OUTLINE OF SUBMISSIONS FOR THE FOURTH DEFENDANT
(THE ATTORNEY-GENERAL FOR THE COMMONWEALTH)

(C) APPREHENDED BIAS

31. The principles as to what may constitute bias on the part of a judge exercising his judicial functions are well settled by the decisions of the Court:

R. v. Watson; ex parte Armstrong (1976) 136 C.L.R. 248;

Livesey v. New South Wales Bar Association (1983) 151 C.L.R. 288;

R. v. Lusink ex parte Shaw (1980) 32 A.L.R. 47.

32. The statement attributed to Mr. Wells was to the effect that any imputation that judges acted corruptly or in defiance of constitutional principles was rejected. Such a statement could not found any reasonable apprehension of bias.

33. The fact that a person has thought about the subject or formed views on it is not enough to make out a case of bias against a judicial or quasi-judicial officer.

R. v. Aust. Stevedoring Industry Board (1953) 88 C.L.R. 100 at p. 116.

PROVED MISBEHAVIOUR - SECTION 72

1. The Justices of the High Court hold office during good behaviour.

Waterside Workers' Federation of Australia v. J.W. Alexander Limited (1918) 25 CLR 435, 442, 447, 457-8, 468-9, cf 473-4. Capital TV and Appliances Pty. Limited v. Falconer (1970-71) 125 CLR 591 per Windeyer J. at 611-2.

It is an estate either for a term defeasible upon misbehaviour or for life defeasible upon misbehaviour, depending upon the date of appointment.

2. Section 72 of the Constitution departs from the tenure provisions which applied to judges in 1900 whether in England or the colonies.

For relevant purposes, a judge who held office during good behaviour could be removed by the Crown for breach of that condition of tenure by the writ of sciere facias, or could be removed by the Crown upon address from both Houses of Parliament for any cause (whether or not a breach of the condition of good behaviour). There was also the possibility of impeachment which may be put aside for present purposes.
(See the authorities to be referred to later.)

3. Thus, the Constitution takes an established procedure, and makes it the sole procedure, but limits the application of the procedure to those circumstances which would have justified the removal of the judge by the Crown. In other words there are two safeguards to the independence of the Federal Judiciary - the first is that there must be agreement between each House of the Legislature and the Executive, and there must be a

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breach of the condition of tenure before there may be removal.

4. Reference to the Convention Debates (if that be necessary) shows that the framers of the Constitution were well familiar with the common law position, and made a deliberate choice to increase the independence of the Federal Judiciary because of the central part that played in upholding the Constitution, a role not played by the common law or colonial courts.

The insertion of the word "proved" in s.72 gives special force to this submission.

5. The primary meaning of "misbehaviour" in this context is misbehaviour in office -

> "However, the tenure of office of judges of the High Court and of other Federal courts that is assured by the Constitution is correctly regarded as of indefinite duration, that is to say for life, capable of being relinquished by the holder, and terminable, but only in the manner prescribed, for misbehaviour in office or incapacity." Per Windeyer J. Capital TV and Appliances Pty. Limited v. Falconer (supra).

See also Coke 4 Inst. 117.

This obviously means, inter alia, only during office as well as in office.

6. This was extended to include conviction of an infamous offence.

Todd - Parliamentary Government in England volume I pp 188-198, particularly 191-2.

Earl of Shrewsbury's Case (1610) 9 Co. Rep 42a at 50a 77 ER 793 at 804.

Harcourt v. Fox 1 Shower 426, 506, 536.

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Re v. Richardson 1 Burrow 539.

Opinion of the Victorian Law Officers 1864 (Votes and Proceedings of the Legislative Assembly, Victoria 1864-5 volume II c2 page 11).

Quick and Garran - The Annotated Constitution of Australian Commonwealth para. 297 page 731-2.

Zelman Cohen and David Derham - The Independence of Judges 26 ALJ 462, particularly at 463.

Wheeler - The Removal of Judges from Office In Western Australia, Western Australian Law Review 305, particularly at 306-7.

Halsbury's Laws of England 4th edition - Constitutional Law volume VIII paras. 1107 (which is in identical terms, so far as is relevant, to the first edition of Halsbury on the same point, the authorship of which is attributed to Holdsworth).

Shetreet - Judges on Trial 88-89.

Anson - Law and Custom of the Constitution Part I 222-223 (2nd ed. 1907).

Renfree - The Federal Judicial System of Australia p 118.

Hearn - The Government of England (1867) 82.

In re Trautwein (1940) 40 SR (NSW) 371.

Maitland - The Constitutional History of England 313.

Hood Phillips - Constitutional and Administrative Law 6th ed. 382-3.

7. This unanimous and unbroken line of authority was well established in 1900, was well known to those involved in drafting the Constitution (indeed the relevant position of Todd was read to the Convention by Mr. Isaacs), and has never been departed from since.

8. In the present case it is conceded that there is no suggestion of any conviction of any offence, infamous or not, so that the only relevant field of inquiry

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within s.72 is conduct in and during office as a Justice.

Submissions concerning disqualification of Mr Commissioner Wells

1. The test for disqualification for bias is whether the parties or the public entertain a reasonable apprehension that the adjudicator might not bring an impartial and unprejudiced mind to the resolution of the matters before him.

R. v. Watson; ex parte Armstrong (1976) 136 C.L.R. 248
Livesey v. New South Wales Bar Association (1983) 151 C.L.R. 288;
Re Morling; ex parte AMIEU & Ors 22nd November 1985 (unreported p. 6 Dawson J.)

2. Mere expression of an apprehension of bias does not establish that this is reasonably held. It is a matter which must be determined objectively.

R. v. Simpson; ex parte Morrison (1984) C.L.R. 101, 104 per Gibbs C.J.

3. Furthermore, whether or not there is bias within the application of principles of natural justice depends upon a consideration of all the circumstances of the case relevant to the fairness of the procedure.

Mobil Oil Australia Pty. Ltd. v. Commissioner of Taxation (1963) 113 C.L.R. 475, 504
R. v. Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group (1969) 122 C.L.R. 546, 552-3
R. v. Magistrates' Court at Lilydale; ex parte Ciccone (1973) V.R. 122, at 134-5
Norwest Holst Ltd. v. Secretary of State for Trade (1978) Ch 201, 228-9

4. The contents of the rules of natural justice, including the rules concerning disqualification of an adjudicator for pre-judgement, are not fixed or inflexible. They depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

Russell -v- Duke of Norfolk (1949) 1 All E.R. 109, 118 per Tucker L.J.
R. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 C.L.R. 546, 552-3
Mobil Oil Australia Pty. Ltd. v. Commissioner of Taxation (1963) 113 C.L.R. 475, 504
National Companies and Securities Commission v. News Ltd. (1984) 52 A.L.R. 417, 427-8

5. In ascertaining the requirements of the rules and their application to a member of this Commission, it is necessary to consider the whole of the circumstances in the field of the inquiry, the nature of the jurisdiction exercised and the statutory provisions governing its exercise.

R. v. Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group (1969) 122 C.L.R. 546, 552-3
Mobil Oil Australia Pty. Ltd. v. Commissioner of Taxation (1963) 113 C.L.R. 475, 504
National Companies and Securities Commission v. News Ltd. (1984) 52 A.L.R. 417, 427-8

6. In this particular case the evidence before the Parliamentary Commission of Inquiry includes reference to a suggestion that the plaintiff brought influence to bear on the New South Wales Government to secure the appointment of a man named Jegorow to the position of Deputy Chairman of The Ethnic Affairs Commission of NSW.

7. The evidence also reveals that other suggestions that the plaintiff brought influence to bear on the New South Wales Premier (with whom it is said he maintained friendly relations) to have decisions made in favour of various persons or lines of action.

8. The third defendant's views on this type of behaviour are clear and extreme. In the context of the above matters, they represent a public pre-judgement on the propriety of such activity as is alleged against the plaintiff.

9. Although the Commission has been established for almost four weeks, no substantive progress has been made in the activities of the Commission under Section 5 of the Act.

10. Section 9(1) of the Act makes provision for the continuance of the Commission by two members if a third resigns his appointment.

11. Thus no prejudice to the functioning or continuance of the Commission will arise if the third defendant is required to withdraw.

MEMORANDUM

This memorandum deals with the question of the legislative power of the Commonwealth to enact the Parliamentary Commission of Inquiry Act 1986 ("the Act").

The Act establishes by section 4 a Commission consisting of three members appointed by resolution of the Senate and by resolution of the House of Representatives. A person is not to be appointed unless he is or has been a Judge. The functions of the Commission are to inquire, and advise the Parliament, whether any conduct of the Honourable Lionel Keith Murphy ("the Judge") has been such as to amount, in its opinion, to proved misbehaviour within the meaning of section 72 of the Constitution. By section 8, the Commission is to report to the President of the Senate and to the Speaker of the House of Representatives its findings of fact and its conclusions whether any conduct of the Judge has been such as to amount, in its opinion, to proved misbehaviour within the meaning of section 72 of the Constitution.

There is power granted to the Commission to require the Judge to give evidence where the Commission is of the

opinion that there is before it evidence of misbehaviour sufficient to require an answer and it has given the Judge particulars in writing of that evidence. There is also power granted to the Commission to summon a person to appear before the Commission to give evidence and to produce documents or things. By section 12 the Commission may issue a search warrant. Penalties are provided for failing to appear as a witness or for refusing or failing to produce a document or other thing.

The constitutional provisions central to the Act is section 72 which, so far as relevant, is in the following terms.

> 72. The justices of the High Court and of the other courts created by the Parliament -
>
> (i) Shall be appointed by the Governor-General in Council:
>
> (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:
>
> (iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

It will be seen that section 72 contains no grant of legislative power. Further, none of the grants of legislative power contained in Chapter III would appear to support the Act. That result would conform with the nature of the inquiry which is non-judicial. Even if the members of

the Commission were serving judges it appears that they would exercise powers as persona designata: see Hilton v Wells (1985) 59 ALJR 396. Put another way, there is no "matter" in respect of which Parliament might make laws.

One turns then to Chapter 1 of the Constitution.

Section 49 of the Constitution provides:

> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

There has been no relevant declaration by the Parliament of its powers and nothing need be said about that aspect of the section.

So far as concerns the powers, privileges and immunities of the Commons House of Parliament of the United Kingdom at the establishment of the Commonwealth, the address referred to in section 72 of the Constitution is not such a power, privilege or immunity. Section 49 relates only to those rights and privileges of the Houses, their members and committees necessary to maintain for each House its independence of action and the dignity of its position: see The Queen v Richards; ex parte Fitzpatrick and Browne (1955) 92 CLR 157; the matters listed in Quick and Garran at pages

501 to 502 and Halsbury 4th Edition Volume 34 paragraph 1479. It would follow that section 49 is not available to support the Act.

Since section 72 does not itself constitute a grant of legislative power it has no implied incidental power referable to it: the principle expressed in McCulloch v Maryland (1819) 4 Wheat 316 would not apply. The source of power must then be found in section 51 and the only relevant provision would appear to be section 51(xxxix).

That section reads

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:-
>
> ...
>
> (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or of the Federal Judicature, or in any department or officer of the Commonwealth.

This express incidental power would seem, on its face, in its reference to "any power vested by this Constitution in the Parliament or in either House thereof" to provide sufficient support for the Act: see Attorney-General for the Commonwealth v Colonial Sugar Refining Co Limited [1914] AC 237 and Colonial Sugar Refining Co Limited v Attorney General for the Commonwealth (1912) 15 CLR 182 and Lockwood

v The Commonwealth (1954) 90 CLR 177 at 182 to 184. The point of disagreement between the Privy Council and certain members of the High Court in the CSR case was not whether a power of inquiry was incidental to the execution of a power but whether the incidental power extended to support an inquiry with compulsive powers where the power to amend the Constitution was the only relevant head of power.

Two questions arise: first, whether the Act can be seen as a law with respect to matters incidental to the execution of a power to make an address to the Governor-General in Council under section 72(ii), including whether the making of an address involves a power. Secondly, there is the question of whether there are any relevant constitutional prohibitions to which the power in section 51(xxxix) is subject.

As to the first of these matters it might be thought that the Houses of the Parliament might always have had the capacity to make an address. An alternative way of viewing the same proposition would be to say that the power to make an address is not a power vested by the Constitution. Assuming this be so, nevertheless the capacity to make an address can be said to become a power in the absence of the exercise of which the Governor-General in Council himself has no power to remove a Justice of the High Court. It therefore can be seen that the Parliament, in exercising in this particular respect its capacity to make an address, is

itself executing a power. Further, the fact that the most frequent exercise of power by the Houses is legislative should not obscure the existence of the non-legislative powers belonging to them.

An alternative basis on which the matter could be put is that the Act is to be supported as incidental to the execution of the power vested by the Constitution in the Government of the Commonwealth. It is the executive which acts to remove a Justice (see sections 61 and 63) and it can be seen that a law to enable the execution of the prerequisite to the exercise of that executive power might be regarded as incidental to the execution of that power. That argument would be no assistance if the High Court did not see the Act as an exercise of the power to legislate with respect to matters incidental to the execution of the power vested in the Parliament by s72(ii). It might nevertheless provide an additional basis of validity.

The accepted test of whether or not a law is 'incidental' within section 51(xxxix) is the same as that applied in questions of implied incidental power: see Burton v Honan (1952) 86 CLR 169, 178. The incidental power extends to matters which are necessary for the reasonable fulfilment of the main power over the subject matter: in other words, all laws which are directed to the end of the main powers and which are reasonably incidental to their complete fulfilment

will be valid. Any argument that the Act is not valid gains its strength not from any lack of connection between the means prescribed and the power to make an address but from notions of constitutional prohibitions.

It might, and no doubt will, be argued that the Act constitutes either an impermissible delegation by the Parliament of its power to make an address or an impermissible trenching by the Parliament upon the judicial power.

As to the former, it is no doubt true to say (transcript at page 14) that the Commission is not a committee of the House or of the Houses. Nevertheless it is improbable that it is beyond the power of the Parliament to legislate to provide for the appointment of and to appoint persons to advise it. The contrary view would mean not only that the power of making an address could only be exercised by the Parliament itself exercising the power but also that, taken to its extreme, no person other than a member of Parliament could assist in that process or advise. It is plain that Parliament has not delegated its power to make an address; it has merely sought assistance in deciding whether or not to exercise that power. Quick and Garran at page 731 quote Todd's Parliamentary Government in England ii at pages 860 to 875 that

> "No address for the removal of a Judge ought to be adopted by either House of Parliament, except after the fullest and fairest enquiry into the matter of complaint, by the whole House, or a Committee of the whole House, at the Bar; notwithstanding that the same may have already undergone a thorough investigation before other tribunals".

Nevertheless, as the concluding clause expresses, the enquiry by the House at the Bar was not considered by Todd to be the exhaustive method of enquiry: Quick and Garran add after the quotation the words "such as a Royal Commission or a Select Committee".

It may be a question for a later day as to how the Parliament itself must proceed, but that does not affect the validity of the Act constituting the Parliamentary Commission.

Turning to the question of judicial power the problem is whether "proved misbehaviour" within the meaning of section 72 requires the misbehaviour to be established by the exercise of judicial power. This would not necessarily require that the process provided for by section 72 might only proceed on the basis of a criminal conviction but that acts which amount to misbehaviour or incapacity should be found by a court in proceedings to which the Judge is a party.

Be that view right or wrong, the task of inquiring and advising whether, in the opinion of the Commission, conduct amounts to misbehaviour would not seem to transgress any constitutional prohibition insofar as it is by no means the final act in the process. On the basis of the same reasoning which allows, as consistent with the separation of the judicial power and the executive power, that a Royal Commission may be validly appointed to inquire into the question whether any individual has committed an offence, so may the Parliament, rather than the Crown, validly appoint a Commission of Inquiry. There would appear to be no distinction between the separation of the judicial and the executive and the judicial and legislative powers. In the light of the decision of the High Court in Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25 this question ceases to have any independence from the question of the power of the Parliament itself earlier considered.

On a practical level, it can hardly be denied that it is for the High Court to interpret the meaning of the words "proved misbehaviour" in the Constitution and that whether or not it is for a court to find the facts which might constitute such behaviour. It is difficult to imagine that the High Court would say that the meaning of the word misbehaviour is not justiciable. As I have said it is not a question of the powers and immunities of the House or the Houses. The High

Court may of course decide that it is primarily a matter for the Houses to decide whether certain conduct constitutes misbehaviour, the High Court itself confining its role to pronouncements upon the procedures required by the Constitution and to declaring what conduct could not amount to misbehaviour within the meaning of section 72.

If it be right that there is no inconsistency between the Commission and the judicial power (and leaving aside whether the address might be made in the absence of facts curially established) it is likely that when, as seems probable, an application is made to the High Court in the course of the Parliamentary Commission of Inquiry for a determination of whether certain allegations could amount, in the opinion of the Commission, to misbehaviour, some indication might be given by the High Court of such a view i.e. whether as Quick and Garran suggest the facts considered proved by the Commission must be proved again at the Bar of the Houses or whether court proceedings be necessary.

Finally, I mention the argument put (transcript page 14) that the Commission

> "is not empowered by Parliament or by the Constitution to invite or receive any allegation which does not amount to an allegation of misbehaviour within section 72 of the Constitution."

So far as concerns that part of the argument which is founded upon the Act, there would appear to be no basis for it, either in the Act or in common sense. Section 5 refers to the opinion of the Commission. The same section of section 13 allows or provides for access by the Commission to certain records which could not contain exclusively allegations of misbehaviour. Sections 6 and 8 again refer to the opinion of the Commission. In addition a procedure could hardly be contemplated whereby an inquiry is debarred from enquiring into all matters except those upon which it bases its conclusion. In Lloyd v Costigan (1983) 53 ALR 402 the Full Court of the Federal Court rejected a similar contention. That Court said :

> The existence of probative material is relevant when the respondent is making findings and recommendations to the Government. But the exercise of the inquisitorial powers vested in the respondent does not require the presence of such material. Rather its existence can generally be determined only after the inquisitorial power has been exercised. A Royal Commissioner must, of course, always act in good faith within the terms of his commission.

As to the constitutional argument, again it would seem most unlikely that the Parliament would be debarred from inquiring into all matters except those in which it proposed to make an address. It would follow as a matter of logic that, to be constitutionally valid, the decision must have been made that misbehaviour existed before any inquiry could take place. That would only be practicable if the argument

earlier dealt with be right that proof must take place in a court.

A. ROBERTSON

Wentworth Chambers

10 June, 1986