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

ADELAIDE

g Bottom

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

intimate knowledge of decis
taken by State Cabinet even
fore they had been publicly
nounced.

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

His responses have ranged f
that of being personally inju
to outrage, and to accusat
that the publication of the tr
cripts was politically motiva

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

It was, he said, "no coincide
that as soon as every allega
has been fully and properly in
tigated, and exposed as a m
cious furphy, the pedlars of

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