

ADVICE FROM MR THEO SIMOS QC

ABORIGINAL DEVELOPMENT COMMISSION

MEMORANDUM

A. The Reference to the Committee of Privileges

1. On 3 November, 1988, the Senate referred the following matters to the Committee of Privileges:

Whether any of the following actions constituted a contempt of the Senate in that they involved an improper interference with witnesses:

- (a) the resolution of the Aboriginal Development Commission of 23 May, 1988 relating to public statements by members or officers of the Commission;
- (b) the resolution of the Commission of 14 October, 1988 relating to the presentation of papers and submissions to parliamentary committees;
- (c) the resolution of no confidence in Mrs. S. McPherson passed by the Commission on 10 October, 1988; and
- (d) the transfer of Mr. M. O'Brien from the position of General Manager of the Commission.

That, in inquiring into those matters, the Committee have regard to any relevant material, including the report of the Select Committee on the Administration of Aboriginal Affairs relating to the protection of witnesses.

That, in inquiring into those matters, the Committee of Privileges have power to send for persons, papers and records, to move from place to place, and to meet notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, and that a daily Hansard be published of such proceedings of the Committee as take place in public.

B. The Circumstances Leading to the Reference to the Committee of Privileges

1. The circumstances leading to the reference to the Committee of Privileges are described in the Report of the Senate Select Committee on the Administration of Aboriginal Affairs entitled Protection of Witnesses.
2. That Report referred to Section 12(2) of the Parliamentary Privileges Act, 1987, which makes it an offence to

... inflict any penalty or injury upon, or deprive of any benefit, another person on account of -(a) the giving or proposed giving of any evidence ...

3. The Report also referred to the motion of no confidence in Mrs. McPherson passed during the meeting of the Aboriginal Development Commission held on 10 to 14 October, 1988 and to the transfer of Mr. O'Brien to another position and stated that those events had raised the question of whether Mrs. McPherson and Mr. O'Brien had been penalised by the Commission for having given evidence to the Select Committee.
4. The Report also referred to the resolution of the Aboriginal Development Commission of 23 May, 1988 which was in the following terms:

That no public statements are to be made by Commissioners or officers of the Commission without prior approval of the Board of Commissioners.
5. In respect of that resolution the Report expressed the view that the requirement for prior approval by the Board of Commissioners might be a reasonable requirement were it limited to statements by Commissioners and officers acting in an official capacity, but that it could also be interpreted as enabling the Board of Commissioners to interfere with the rights of individuals to appear before Parliament and its committees and consequently might constitute "... an improper interference with the free exercise by a House or committee of its authority or functions" (Parliamentary Privileges Act, 1987, s.4).
6. In this connection it appears that the Committee of Privileges has been satisfied that the resolution of 23 May, 1988 was intended to be limited to statements by Commissioners and officers acting in an official capacity, that is, purporting to speak on behalf of the Commission, and has determined that the passage of that resolution did not give rise to any contempt of the Senate (see below).
7. However, the Senate Select Committee in its Report concluded that whether or not the terms of the resolution of no confidence in Mrs. McPherson constituted a penalty or injury upon or to a witness in the terms of the Parliamentary Privileges Act, 1987, that resolution when read together with the resolution of 23 May, 1988 might constitute an attempt to interfere with Mrs. McPherson's right to appear as a witness before the Committee.
8. The Senate Select Committee concluded in its Report that the resolution of 23 May, 1988 and the resolution of no confidence and associated papers should be referred to the Privileges Committee for further investigation. The Select Committee further recommended that in considering the matter the Privileges Committee should take into account the resolution of the Aboriginal Development Commission of 20 October, 1988.
9. In relation to the transfer of Mr. O'Brien the Report of the Select Committee stated that concern had been raised that Mr. O'Brien's transfer might have been influenced in part by his appearance before the Select Committee.
10. The Select Committee also stated that there was no direct evidence to link the decision of the ADC Board concerning Mr. O'Brien's transfer with his appearance as a witness before the Committee.

11. Nevertheless the Select Committee was of the view that the unsatisfactory nature of the ADC's explanation of the transfer of Mr. O'Brien was such that it was not in a position to determine whether Mr. O'Brien's transfer was punitive and was influenced in part by his appearance before the Select Committee.
12. The Select Committee concluded in its Report that the transfer of Mr. O'Brien should be referred to the Privileges Committee for further investigation.

C. The Resolution of the Aboriginal Development Commission of 23 May, 1988 Relating to Public Statements by Members or Officers of the Commission

1. This resolution of the Aboriginal Development Commission was in the following terms:-

"That no public statements are to be made by Commissioners or officers of the Commission without prior approval of the Board of Commissioners."
2. The Committee has investigated the circumstances relating to the passage of this resolution and, it appears, is satisfied that it should be read as limited to public statements purporting to be made in an official capacity or on behalf of the Commission.
3. Having regard to that matter, inter alia, the Committee has determined that the circumstances relating to the passage of the resolution of 23 May, 1988 do not give rise to any contempt of the Senate.

D. The Resolution of the Commission of 14 October, 1988 Relating to the Presentation of Papers and Submissions to Parliamentary Committees

1. This resolution of the Aboriginal Development Commission, which it appears was passed on 10 October, 1988, was in the following terms:-

That papers and submissions of whatever kind shall not be presented to any Parliamentary Committee or other body without prior approval of the Commission.
2. In respect of this resolution, there is material before the Committee upon the basis of which it could conclude that the resolution was intended to be limited to papers and submissions purporting to be presented on behalf of the Commission.
3. If the Committee so concluded, it would then be open to the Committee to determine that this was a reasonable requirement which was not intended to interfere with the rights of individuals to appear before Parliament and its committees and therefore did not constitute "an improper interference with the free exercise by a House or committee of its authority or functions".
4. Such a conclusion, if reached by the Committee, would be consistent with the conclusion of the Committee in relation to the resolution of the Aboriginal Development Commission of 23 May, 1988 and would justify the Committee in determining that the circumstances

relating to the passage of the resolution of 10 October, 1988 did not give rise to any contempt of the Senate.

5. The existing conclusion of the Committee in relation to the resolution of 23 May, 1988 appears to recognise a distinction between public statements made by Commissioners or officers of the Commission in their official capacity or purporting to be made on behalf of the Commission, on the one hand, and such statements made by Commissioners or officers of the Commission in their private capacity, on the other hand. The Committee appears to have regarded it as reasonable and not constituting any contempt of the Senate for the Commission to take steps, such as the passing of the resolution of 23 May, 1988, to ensure that public statements made by members or officers of the Commission in their official capacity or purporting to be made on behalf of the Commission should not be made without prior approval of the Board of Commissioners. Different considerations, of course, would arise in relation to public statements made by members or officers of the Commission in their private capacity and not purporting to be made on behalf of the Commission. .
6. In relation to the resolution of the Aboriginal Development Commission of 10 October, 1988 the material before the Committee upon the basis of which it could conclude that that resolution was intended to be limited to papers and submissions purporting to be presented on behalf of the Commission includes, inter alia, the following:
 - (a) The minutes of the meeting of the Aboriginal Development Commission of 10 October, 1988, which record, on pages 10-15, the discussions which preceded the passing of the resolution of 10 October, 1988.
 - (b) Those discussions as recorded in the minutes appear to indicate a concern that a written submission dated 13 July, 1988, signed by Mr. O'Brien was lodged with the Senate Select Committee on the Administration of Aboriginal Affairs, the first sentence of which stated: "This submission is made by the Aboriginal Affairs Commission", without the submission first having been approved by members of the Commission.
 - (c) This concern appears from the following passages, inter alia, contained in those minutes:
 - (i) "A/g Commissioner Perkins stated his objection to the submission, in that it was from the Commission, not just from the General Manager. The first sentence said it is from the Commission, which should not have sent anything to the Committee without authorisation from the Board. It is unorthodox that the General Manager represents the Board before the Committee; the Chairman should have been present at the hearing, rather than being out of town, opening buildings. It appears that the General Manager went before the Committee with a paper prepared by the Chairman without the knowledge of the Board. The A/g Commissioner said that he did not receive a copy of the attachments to the paper presented to the Committee, and asked that he be provided with a total set."

- (ii) "A/g Deputy Chairman Dodson stated that he did not like the way the submission was done, apparently over the top of Commissioners. He said that his concern was that, for such a large organisation as the ADC, something like the submission to the Committee could have been forwarded to the Commissioners so that they could have seen it before its presentation to the Committee. Even though it supposedly presented the sequence of events up to the point of the dismissal of the previous Commission, the way in which it was done was not correct.

There is still nothing in the submission as to the reason behind the decision of the previous Commissioners to put up the Alternative Strategy. The Commission cannot operate as an effective body if documentation and information is not forthcoming. We should operate in a co-operative environment, which is not happening when a submissions is put forward by the General Manager without the support of the Commission."

- (iii) "A/g Commissioner Perkins said that neither the Chairman nor the General Manager communicates with him regarding what is being done, and queried why he is never consulted."
- (iv) "A/g Commissioner O'Shane stated that he is very suspicious of what is going on in the Commission, as he feels that he is not receiving the information that should be forwarded. The Senate Select Committee should be informed that the Board is now in full support of ATSIC, a fact which has not been evidenced in any documentation regarding the Board's current standing."
- (v) "A/g Commissioner Perkins moved that the Senate Select Committee be requested to return the submission and all its annexures as provided by the General Manager to the Committee, in order that those papers can be brought before the Commission, for approval by the Board, before re-submission to the Committee. A/g Commissioner Dodson Seconded the Motion. Motion Carried by a majority vote."
- (vi) "The General Manager advised that ... The Committee asked for information and the Chairman approved the submission, which went to the Committee over his signature in the Chairman's absence. The matters covered in the submission were facts and events which occurred before this current Board took up their responsibilities. A/g Commissioner Yu stated that current Commissioners should have input as we are now the Board."
- (vii) "A/g Commissioner Yu said that there is not enough communication with the Commissioners by Head Office; there is no reason why the telephone or fax machines cannot be used to keep Commissioners informed, and

request their help. The lack of communication is the basis of the problem, and the reason for the mistrust which has developed."

- (viii) "A/g Commissioner Perkins stated that the General Manager should not have appeared before the Committee, the Chairman should have. The Commissioners should be notified, by phone, as to what is being planned before it happens, not after"
 - (ix) "A/g Commissioner Perkins advised that it is the policy of the ADC to give support to the concept of ATSIC and its early implementation. He said that the Chairman had, through press statements, said that the Commission had made a resolution that it did not support ATSIC."
 - (x) "The Chairman suggested that a Working Group come to the next Meeting with a draft of a submission to the Senate Select Committee, and that the document would be refined at the Meeting for submission."
 - (xi) "A/g Commissioner Perkins Moved that no submissions are to go to the Senate Select Committee without the full approval of the Board of Commissioners; A/g Commissioner Carroll Seconded the Motion. Motion Carried."
- (d) The transcript of parts of the recorded discussion at the meeting of 10 October, 1988. That transcript is generally consistent with the minutes of the meeting and includes the following remarks, inter alia:
- (i) "Charles Perkins: "That's what it says ... 'This submission is made by the Aboriginal Development Commission' ... You should never have sent anything forward under your own steam without authorisation from the authority of the Commissioners, regardless of the short time space or whatever. It should not have been done ... I find it most unbelievable that, that we should have had a representation or presentation before the Senate Committee, by this Commission without going through the Commissioners ... It appears that Mr. O'Brien went before the Committee on a paper prepared under the direction of the Chairperson without the knowledge of the rest of us Commissioners and it's not a paper done recalling the events in chronological order, it's more than that ... it's caused lots of repercussions all over the place and quite an embarrassment to all of us here. Secondly, it's the attachments that went with it ... I mean who's got them? I've never seen them. I received my paper some days after, but where are these attachments, are they with the Senate Committee?"
 - (ii) "? Terry O'Shane: "... I think that the Senate Select Committee should have been made fully aware of the resolution that we agreed in support of that. I could find no resolution by the previous board about anybody condemning in total the proposal, ATSIC and things like that. It hasn't been done ... that

was my immediate concern. In actual fact the real story, the full story was not going to be told to the Senate Select Committee...".

- (iii) "Charles Perkins (to Mr. O'Brien): "You were in there for some time and I haven't seen the transcript." Mick O'Brien: "No, the transcript will be out, they said, middle of next week" Charles Perkins: "We don't know what Mick said on our behalf..." (underlining supplied). Charles Perkins (to Mr. Bailey): "... we're talking about what you and Mick gave in terms of those papers there, unauthorised by the Commissioners. And we'd like them back..." Charles Perkins: "... And what we have before that Senate Committee has got to be authorised by the Commissioners."
- (iv) "Mick O'Brien: "The other thing Commissioners, between meetings the Chairman has the responsibility to make judgments about things that ... that's a responsibility. If the Chairman is happy with it, then I felt that it was probably a submission from the ADC. When I got to the Committee, they had Pat's letter and they put it to me whether or not I would be prepared to have it come forward from me as General Manager (underlining supplied). Before I had signed it, the Chairman had read it and was happy with it and authorised the despatch of it. And I said 'yes', I was happy to do that', because I didn't express any opinions of my own in there. Charles Perkins: "... Anyone should understand from that, that anything that has been done on behalf of the Commission (underlining supplied) we as individuals would like to have a look at in order to agree or disagree with it. We might disagree".
- (e) The minutes of the meeting of 10 October, 1988 and the transcript of the recorded discussion at that meeting also indicate that a resolution was passed limiting General Delegation, which apparently stated, in effect, that between meetings, the General Manager could exercise the powers of the Commission and also giving certain powers to the Chairman. That resolution was as follows:-

"This delegation is only exercisable by the Chairman in circumstances where there is not a General Manager of the Commission or no person is temporarily performing the duties of that office. The delegate, being the General Manager or Chairman, is not empowered to circulate ADC documents or pre-empt Commission views on policies and objectives until prior clearance is obtained from a majority of the 10 Commissioners" (underlining supplied).

It would be open to the Committee to consider that this resolution also indicated that the concern of members of the Commission was that the General Manager and the Chairman should not without prior clearance purport to act or make statements on behalf of the Commission, and that they were not concerned with the conduct of those officers in some private capacity.

- (f) A further resolution was apparently also passed at the 62nd meeting on 10 October, 1988 relating to this matter in which it appears that the words "on behalf of the Commission" were expressly used. That resolution was in the following terms:
- "That the Deputy Chairman be responsible for co-ordinating the preparation of submissions to be made by the Commission to the Senate Select Committee on the Administration of Aboriginal Affairs and that the Commission again moves that no submission on behalf of the Aboriginal Development Commission is to go to that Committee without the approval of the Board of Commissioners. A minute embodying this resolution is to be immediately circulated to all staff..."
- (g) The letter dated 19 July, 1988 from the Acting Deputy Manager, Mr. Dodson, to Mr. O'Brien in which Mr. Dodson states, inter alia, that: "It is quite unacceptable to me that the Submission states that it is made by the Aboriginal Development Commission... It was ... very misleading to represent the document as the Commission's Submission. You must have known that the material it deals with is most sensitive and warranted the clearance of the Commission as a whole ... I would like you to take all steps available to disassociate the present Submission from the Aboriginal Development Commission."
7. As stated above, the Committee may consider that this material indicates that the concern of the members of the Commission as expressed at the meeting of 10-14 October, 1988, was that no papers or submissions purporting to be on behalf of the Commission should be presented to any Parliamentary Committee or other body without prior approval of the Commission even though the resolution of 10 October, 1988 did not include the words "on behalf of the Commission".
8. If the Committee formed this view, it would seem to follow that the Committee would also conclude that the passing of the resolution of 10 October, 1988 did not involve any contempt of the Senate.
9. It is true that after the written submission of 13 July, 1988 stating: "This submission is made by the Aboriginal Development Commission" was lodged with the Senate Select Committee and before Mr. O'Brien gave evidence before the Select Committee on 19 July, 1988, the Select Committee had been informed by letter dated 18 July, 1988 from Mr. O'Brien "that the full Board of Commissioners have not cleared the submission". That letter however, went on to say that "The Commission's Chairman, Mrs. Shirley McPherson, has read the submission and authorised its release to the Committee in its present form".
10. The Committee may consider that even after receipt of that letter the Select Committee might have considered that the submission had the authority of Mrs. McPherson in her official capacity as Chairman of the Commission and, to that extent, was to be regarded as a submission on behalf of the Commission.

11. It is also true, as appears from the Hansard Report of the evidence given by Mr. O'Brien before the Select Committee on 19 July, 1988, that at the beginning of his evidence the Chairman of the Select Committee asked Mr. O'Brien (page 68): "Is this, in fact, a submission made by the Aboriginal Development Commission?" and that Mr. O'Brien replied: "To the extent that it has been formally cleared by the full Board of the Commission no, it is not ... The Chairman of the Commission, Mrs. Shirley McPherson, has carefully read the document and has authorised its submission to the Committee as a factual and objective account of those events. That is the status that it has." The Chairman then said to Mr. O'Brien: "It just may be that it would best be formally considered ... as a submission from you, that it is not the submission of the Aboriginal Development Commission, it is Mr. O'Brien's submission...". Mr. O'Brien replied: "I would be happy about that because it does not contain any of my personal opinions or views... I am quite happy for those to be provided to the Committee under my name as General Manager of the Commission" (underlining supplied). The Chairman later stated that the submission would be "incorporated in Hansard as a submission from Mr. O'Brien, who is the General Manager of the Aboriginal Development Commission, but it is his personal submission".
12. It appears from the minutes of the meeting of 10 October, 1988 that a copy of the Hansard of 19 July, 1988 was not available at that meeting although a copy of Mr. O'Brien's letter of 18 July, 1988 may have been.
13. The Committee may consider that the contents of that letter conveyed that the submission was in some sense a submission on behalf of the Commission, in that it stated that, although "the full Board of Commissioners have not cleared the submission", nevertheless "The Commission's Chairman, Mrs. Shirley McPherson, has read the submission and authorised its release to the Committee in its present form".
14. Be that as it may, the Committee may consider that the extracts from the minutes and from the transcript of the recorded discussion of the meeting of 10 October, 1988 set out above, indicate that the concern of the members of the Commission was with papers and submissions purporting to be written or made on behalf of the Commission, and that they were not concerned with papers or submissions written or made by the General Manager or the Chairman in some private capacity. The Committee may consider that the material reveals that the members of the Commission were concerned that the submission of 13 July, 1988, stating that it was the submission of the Aboriginal Development Commission, had been lodged without prior notice to them, and that even Mr. O'Brien's letter of 18 July, 1988 had not made it clear that it was not, to some extent, a submission on behalf of the Commission. The Committee may also consider that the whole of the relevant discussion at the meeting of 10 October, 1988 was directed to the position of the Commission as such, and made no mention, so it would appear, of any concept of Mr. O'Brien, or any other person, giving evidence in some private capacity. Notwithstanding that that was the ultimate basis upon which Mr. O'Brien's evidence was received by the Select Committee, that aspect of the matter does not appear to have received any attention at all at the meeting of 10 October, 1988.
15. The Committee may consider that the above matters support the correctness of the explanation of the resolution of 10 October, 1988 given by the Board of Commissioners to

the President of the Senate which was tabled in the Senate on 20 October, 1988. That explanation was by way of a resolution of the ADC as follows:-

"In relation to the resolution passed at the 62nd Commission meeting concerning the presentation of papers and submissions, the Board of Commissioners wishes to inform the Senate that this resolution:

1. was not intended to in any way encroach upon or limit the powers of the Senate or any Parliamentary Committee;
2. was not intended to prevent or in any way affect the right of individuals to appear before the Senate or such Committees;
3. was a purely administrative mechanism designed to ensure that papers and submissions presented on behalf of the ADC contained information that was accurate and reflected the view of the Commission;

and that the Board regrets any misunderstanding that may have occurred as a result of the passage of this resolution."

16. This explanation has been reiterated in effect in the submission to the Privileges Committee on behalf of certain Commissioners (not including Mr. Perkins) on page 22 where it is stated that "the resolution concerning the presentation of papers and submissions was concerned only with those presented or purported to be presented on behalf of the Commission".
17. The explanation was also reiterated in the submission dated 22 February, 1989 on behalf of Mr. Charles Perkins in paragraph 53 where it is set out in full and in paragraph 54 where it is stated that "Mr. Perkins stands by the explanation already given by the Commission, including the explanation in paragraph 2 of the resolution, that it was not intended to prevent or affect the rights of individuals to appear before Senate Committees".
18. Having regard to all these matters, and notwithstanding the submissions made to the Committee on behalf of Mrs. McPherson and Mr. O'Brien, it appears that there is ample material before the Committee upon the basis of which it could conclude that the resolution of 10 October, 1988 was intended to be limited to papers and submissions purporting to be presented on behalf of the Commission and that, accordingly, the passing of that resolution did not involve any contempt of the Senate.

E. The Transfer of Mr. O'Brien from his Position of General Manager of the Commission

1. The relevant resolution relating to Mr. O'Brien was apparently passed at the meeting No. 62 of the Aboriginal Development Commission held on 10-14 October, 1988 and was in the following terms:-

"In accordance with the Minister's S.11 Direction of 27 April, 1988 requiring the ADC to co-operate with the Minister and portfolio bodies in effecting the transition to ATSIC and pursuant to the Commission having set aside funds to facilitate the negotiation of a Treaty, the Commission directs that:

1. a temporary position is established equivalent to that at SES Level 3. This position will have responsibility for liaising with the ATSIC Task Force and generally overseeing the smooth transition to ATSIC as well as responsibility for managing and controlling all aspects of the treaty consultations as well as other duties as directed;
 2. the current General Manager, Mr. M. O'Brien, be placed in the above created position forthwith;
 3. Mr. Cedric Wyatt be transferred to the position of acting General Manager;
 4. the decision to create a temporary SES Level 2 position taken at the Townsville meeting be revoked; that appropriate job statement for Level 3 position be drafted and that the Department of Industrial Relations be informed of this revocation and their approval sought for the new position as a matter of urgency."
2. According to the original submission of Mrs. McPherson and Mr. O'Brien to the Privileges Committee (pages 16 and following) this resolution was first produced by Mr. Perkins at the meeting of the Aboriginal Development Commission on 10 October, 1988 during an in-camera session at which "no record of discussions was taken and all staff vacated the room". The submission further states that: "Mr. Perkins produced from his briefcase a set of eight (8) typed motions and a number of photocopies. The motions related to the removal of the General Manager, the resignation of the Chairman, the restriction on the provision of material to Parliamentary Committees and the limiting of roles of the Chairman and General Manager. The Chairman saw the documents for the first time when Mr. Perkins produced them and she briefly read through them. The General Manager had at that time been excluded from the meeting with the rest of the staff ... The meeting first dealt with the removal of the General Manager. No specific reasons were given for this proposal to remove him from his position to a newly created position. It was indicated by Mr. Perkins that the new General Manager would be Mr. Cedric Wyatt ... The Chairman dissented from the motion with Commissioners Martin and O'Shane but the matter was carried purporting to remove Mr. O'Brien and replace him with Mr. Wyatt. The General Manager was asked to attend the in-camera session to discuss the motion as put. An account of the matters relating to his experiences is set out in a statement Attachment 32."
3. **Attachment 32** is a "**STATEMENT OF RELEVANT EVENTS FROM 7 OCTOBER - 14 OCTOBER, 1988**" by Mr. O'Brien including such knowledge as he had of the events relating to the passage of the resolution relating to his transfer from the position of General Manager. It does not appear from his statement that Mr. O'Brien was told of any particular

reasons for the resolution. Certainly, according to that statement, no reference was made to his having given evidence to the Select Committee and what was said, according to Mr. O'Brien, would appear to be consistent with the reasons for the transfer conveyed to the Chairman of the Select Committee (see below).

4. Mrs. McPherson's statement concerning the resolution transferring Mr. O'Brien is contained in Attachment 33 to the joint submission of Mrs. McPherson and Mr. O'Brien. It includes the following material some of which apparently relates to discussions when Mr. O'Brien was not present:

"A lengthy discussion followed where Charles Perkins and Peter Yu in particular, kept saying they couldn't 'trust him' he doesn't communicate with the Board (which is quite incorrect) in many cases he's 'pulled the wool over my eyes' and its time he went.

Mick O'Brien was called in and they explained what they wanted him to do - that is, vacate the General Manager's position and be in effect on 'special duties'. Mick O'Brien responded that he thought an Aboriginal officer would be more appropriate for the position they had in mind. During the discussion, Mr. Perkins said they had confidence in Mick O'Brien and he was being transferred because they wanted him for the new position. Mick O'Brien asked if he could have more time to consider their recommendation which they granted, namely the length of time it took to go through the other motions, about 2-2.5 hours ...

The following morning, Mick O'Brien was called back into another 'in-camera' session when he told the Board of Commissioners that it was obvious to all concerned that it was time for him to depart as General Manager of the ADC because the Board, on numerous occasions, expressed their concerns about his exercise of delegation and lack of rapport with Commissioners. All he asked was, would the Commissioners assist him to become on the unattached Public Service list at his SES Level 3. The Commissioners said no - the offer is as the resolution. Mick O'Brien said 'fine, it seems that I've no alternative than to say I won't accept your offer and will now need to seek advice as to my legal rights and entitlements and could you supply me with a copy of the reasons why I'm put on special duties in the same time as you gave me to decide about my future (i.e. 2 hours)....!'"

5. According to Mrs. McPherson's statement some reasons were given for Mr. O'Brien's transfer but none relating to his having given evidence before the Select Committee, with the possible exception of the reference to his statement that "the Board, on numerous occasions, expressed their concerns about his exercise of delegation...". It is possible that Mr. O'Brien had intended to include in this description his appearance before the Select Committee. Nevertheless, this was not a matter raised by Mr. O'Brien and was not a reason stated by any of the Commissioners. In any event, as the material under paragraph D above indicates, the question of exercise of delegation in that context, only arose in connection with question of the presentation of papers and submissions to Parliamentary Committees and other bodies which the Committee may consider did not give rise to any contempt of the Senate.

6. On this material, it seems that it would be open to the Committee to find that the transfer of Mr. O'Brien from his position as General Manager was not relevantly related to his having given evidence before the Senate Select Committee and, accordingly, did not give rise to any contempt of the Senate.
7. The Committee may consider that the above material is consistent with the reasons for the transfer given by the Commission to the Chairman of the Select Committee in the Commission's letter of 20 October, 1988 which stated, inter alia, as follows:-

"Members of the Board regard Mr. O'Brien as being the most suitably qualified ADC officer to discharge effectively the duties of the newly-created position. This placement was considered by Members of the Board as a show of confidence in Mr. O'Brien. (Minutes in preparation so relevant extract not provided.) In two separate meetings with Members of the Board, Mr. O'Brien was given the opportunity to respond to the proposal."

The submission on behalf of Mr. Perkins dated 22 February, 1989 stated in paragraph 61 that the above response by the Chairman was brought to the notice of individual members of the Commission on an informal basis and was not discussed at a formal Commission meeting.

8. At the very least the Committee might consider that, even if it had some doubt as to whether this explanation was a fully comprehensive and accurate statement of all of the reasons for the transfer of Mr. O'Brien, it could nevertheless be satisfied that those reasons did not relevantly include the fact that Mr. O'Brien gave evidence before the Select Committee.
9. In this connection it may be noted that the submission on behalf of Mr. Perkins states in paragraph 63 thereof that Mr. Perkins was of opinion that the reply should have been more comprehensive although accurate as far as it went. That submission then goes on in paragraphs 64 to 84 to give a more comprehensive account of the relevant circumstances, inter alia, referring (in paragraph 74), to the letter dated 19 July, 1988 from the acting Deputy Chairman, Mr. Dodson, to Mr. O'Brien complaining, inter alia, that "It was quite unacceptable ... that the Submission states that it 'is made by the Aboriginal Development Commission'" and that: "It was ... very misleading to represent the document as the Commission's Submission". These statements, the Committee may consider, indicate a concern with the fact that the submission in form purported to be on behalf of the Commission rather than any concern with the fact that ultimately Mr. O'Brien gave evidence in some private capacity. (See also the Submission on behalf of certain of the other Commissioners, especially at pages 7 to 12 and 23 to 25.) The Committee may also consider it relevant that, notwithstanding a specific invitation by the Committee to do so, as contained in the, letter dated 6 April, 1989 to the solicitors for Mrs. McPherson and Mr. O'Brien, Mr. O'Brien has not particularised any particular conversations or conduct on the part of any Commissioners which would result in a contrary view.

WENTWORTH CHAMBER.
2nd May, 1989

(signed) T. Simos, Q.C.

RE ABORIGINAL DEVELOPMENT COMMISSION

SUPPLEMENTARY MEMORANDUM

F. The Resolution of No Confidence in Mrs. McPherson Passed by the Commission on 10 October, 1988

1. This resolution of the Aboriginal Development Commission was in the following terms:-

"The Commission hereby expresses its lack of confidence in the Chairman of the Commission in that:

- (a) the Chairman has lost the confidence of the Aboriginal Housing Associations in Queensland as evidenced by the passing of a motion of no confidence in the Chairman at the ADC Housing Conference in Rockhampton on 15-16 September, 1988;
- (b) the Chairman has persistently failed to communicate, (both verbally and in writing) with Commissioners on matters of importance affecting the Commission;
- (c) the Chairman gave directions for a submission to be tendered on behalf of the ADC to the Senate Select Committee on Aboriginal Affairs without clearance from the Commission; and
- (d) notwithstanding a motion passed by the Commission on 23 May, 1988, requiring Commissioners to notify the Commission prior to making public statements, the Chairman appeared before the Senate Committee on 2 September, 1988 and delivered a speech to the Young Labor Lawyers Conference without notifying the Commission;
- (e) the Chairman allowed the lodging of the explanatory notes 1988/89 with the Senate Estimates without having submitted them to the Commission for approval;

and as a consequence the Commission hereby calls upon the Chairman to resign her position forthwith."

2. The Senate Select Committee expressed the view in its report entitled "Protection of Witnesses" that the resolution of no confidence taken together with the resolution of 23 May, 1988 may constitute an attempt to restrict Mrs. McPherson's right to appear as a witness before the Committee.
3. It appears from paragraphs 11 to 15 of that Report that the Select Committee had in mind the distinction between the making of statements (or the giving of evidence to Parliamentary committees) by Commissioners or officers acting in an official capacity on the one hand, and the rights of such persons as individuals (not acting in an official

capacity) to make such statements (or give such evidence) on the other hand. It also appears that the Select Committee may have had in mind that the resolution of 23 May, 1988 may have related to public statements by Commissioners or officers purporting to be made in an official capacity or on behalf of the Commission, whereas the evidence given by Mrs. McPherson to the Senate Select Committee was stated by her to be given as an individual.

4. Having regard to these matters, it might be said that Mrs. McPherson, in giving evidence to the Senate Select Committee as an individual, could not have been in breach of the requirement of the resolution of 23 May, 1988 which was limited to the making of public statements in an official capacity or on behalf of the Commission.'
5. On this view, the resolution of no confidence in Mrs. McPherson, insofar as it was, in part, stated to be based upon her having given evidence to the Senate Select Committee, might be seen to have been based, in part, upon her having given that evidence as an individual and to have constituted the infliction of a penalty or injury upon her as a consequence of her having given that evidence as an individual.
6. Put more directly and simply, on this view, the motion of no confidence in Mrs. McPherson might be seen to have inflicted a penalty or injury upon her, in part because she gave evidence as an individual, that is, in a private capacity, without notifying the Commission, as was, apparently, thought to be required by the resolution of 23 May, 1988
7. In this connection, however, it is necessary for the Committee to review the relevant facts relating to the passing of the resolution of no confidence, to ascertain what was the perception of those who passed the resolution as to what they were doing in this regard, and in particular, to ascertain whether they intended that the resolution should be, in part, the infliction of a penalty or injury upon Mrs. McPherson as a consequence of her having given evidence as a private individual without first notifying the Commission.
8. Upon the assumption that the members of the Commission who voted in favour of the motion of no confidence recognised that the resolution of 23 May, 1988 was limited to public statements purporting to have been made in an official capacity or on behalf of the Commission, paragraph (d) of the resolution of no confidence is explicable only upon the basis that they regarded Mrs. McPherson as having given her evidence in an official capacity. If that were so, the Committee might consider that the passing of the motion of no confidence did not involve any contempt of the Senate.
9. The Committee may consider that it is reasonable to assume that those who voted in favour of the motion of no confidence were aware that the resolution of 23 May, 1988 was intended to be limited to public statements made by Members or officers of the Commission in an official capacity or which statements purported to have been made on behalf of the Commission. The Committee may consider that such an assumption would be justified having regard to the general approach taken by or on behalf of the relevant Commissioners, not only in relation to the resolution of 23 May, 1988, but also in relation to the resolution relating to the presentation of papers and submissions to Parliamentary committees dealt with in section D of the Memorandum of 2 May, 1989.

10. The Committee may consider that what is less clear is whether those members of the Commission who voted in favour of the motion of no confidence regarded Mrs. McPherson as having given her evidence in some sense in an official capacity, so as to fall within the terms of the resolution of 23 May, 1988, rather than in a private capacity as was in fact the case.
11. If the relevant members of the Commission were aware that the resolution of 23 May, 1988 was intended to be limited to public statements made in an official capacity or purporting to be made on behalf of the Commission, but also knew that Mrs. McPherson gave her evidence to the Select Committee in a private capacity, the Committee might consider that, notwithstanding the reference to the resolution of 23 May, 1988, the motion was in part based upon the fact that Mrs. McPherson had given evidence in a private capacity without first notifying the Commission.
12. On this approach, the Committee would first need to consider whether a requirement that a Commissioner first notify the Commission before making a public statement in a private capacity to a Parliamentary committee would, prima facie constitute "an improper interference with the free exercise by a House or a committee of its authority or functions", perhaps upon the basis that such a requirement might have the effect of, at least, discouraging a prospective witness from giving such evidence.
13. If the Committee did form the view that a requirement of prior notification in relation to the giving of evidence in a private capacity to a Parliamentary committee did constitute, prima facie, such an improper interference, the Committee might consider it appropriate to determine, after a consideration of the relevant facts, whether any Commissioners who voted in favour of the motion of the no confidence did so, at least in part, upon the basis that Mrs. McPherson had given evidence in a private capacity to the Select Committee without first notifying the Commission and by reason thereof were also involved prima facie in a contempt of the Senate in relation to the imposition of a penalty (the no confidence motion) as a result of the giving of evidence.
14. If the Committee found this to be the prima facie position, the Committee might consider that, prima facie, a contempt of the Senate was involved. The Committee might consider that it should then determine whether those who committed the relevant act "knowingly committed that act".
15. Such a determination would seem to be required by resolution 3 of the resolutions relating to parliamentary privilege which were agreed to by the Senate on 25 February, 1988 and which "requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it ...
 - (c) whether a person who committed any act which may be held to be a contempt:
 - (i) knowingly committed that act...". (and see generally Resolution 3).
16. It remains to consider what material is available in relation to the passing of the no confidence motion which the Committee might consider could establish that the

Commissioners or any of them voted in favour of the no confidence motion, at least in part, upon the basis that Mrs. McPherson had given evidence to the Senate Select Committee in a private capacity without first notifying the Commission and that this had been done knowingly. This involves, inter alia, a consideration of the circumstances in which the resolution was passed as related by Mrs. McPherson and of the explanation thereof appearing in the submissions of certain of the Commissioners and of Mr. Perkins.

17. Mrs. McPherson's account of the passing of this resolution is contained in Attachment 33 (entitled "STATEMENT BY MRS. SHIRLEY ANNE McPHERSON") to the joint submission of Mrs. McPherson and Mr. O'Brien dated 2 December, 1988. In the body of the Joint Submission it is stated that this resolution was first produced by Mr. Perkins at the meeting of the Aboriginal Development Commission on 10 October, 1988 during an in-camera session at which "no record of discussions was taken and all staff vacated the room". The submission further states that: "Mr. Perkins produced from his briefcase a set of eight (8) typed motions and a number of photocopies. The motions related to the removal of the General Manager, the resignation of the Chairman, the restriction on the provision of material to Parliamentary Committees and the limiting of the roles of the Chairman and General Manager. The Chairman saw the documents for the first time when Mr. Perkins produced them. The General Manager had at that time been excluded from the meeting with the rest of the staff ... The motion calling for the resignation of the Chairman was discussed at length and the Chairman rebutted each of the reasons proffered in the motion of no-confidence and calling for her resignation. An account of the Chairman's experiences is set out in Attachment 33".
18. Attachment 33 includes the following material: "... I went through point by point and explained the circumstances behind each of their reasons why they had no confidence in me and that I should resign, I argued that their reasons were very weak and petty, particularly about the motion of no-confidence in me as Chairman, which was passed at the ADC Housing Conference held in Rockhampton... The Commissioners conceded that I may have some good points in the area of financial management but they believed that they couldn't 'trust me' particularly because of my appearance before the Senate Select Committee and they found that they couldn't tolerate the current situation any longer. I said that I'd consider the motion and let them know my decision... The Board then voted for the motion with two abstaining - Zona Martin and Getano Lui. Pat Dodson moved the resolution and Peter Yu seconded it. The following morning ... I informed the Commissioners that I wasn't going to resign and I felt I'd briefed the Commissioners fully the previous day over their list of accusations" (underlining supplied).
19. In relation to this account, the Committee may consider it relevant that the letter dated 6 April, 1989 from the Committee to the solicitors for Mrs. McPherson and Mr. O'Brien quoted a portion of that account, including the portion underlined in the preceding paragraph hereof, and inquired whether Mrs. McPherson could particularise any facts or circumstances, including conversations, which, in effect, might link the resolution of no confidence to the fact of Mrs. McPherson having given evidence to the Select Committee, and that, apparently, no such conversations or conduct of the Commissioners has been particularised.

20. So far as concerns the submissions made on behalf of Mr. Perkins and on behalf of certain of the other Commissioners, that of Mr. Perkins deals with the no confidence resolution in paragraphs 85 to 95 thereof.

21. These submissions, of course, speak for themselves, but their relevant substance can perhaps be stated in the following propositions:-

- (a) "The reason given in paragraph (d) is that the Chairman disregarded a motion of the Commission dated 23 May, 1988 requiring Commissioners to notify the Commission before making public statements. The Committee of Privileges having decided that the resolution of 23 May, 1988 was not a breach of privilege, we submit a more limited privilege requiring only notification cannot amount to a breach of privilege ... to require the Chairman to notify the Commission of an appearance cannot constitute 'improper interference' within the meaning of section 4 of the Privileges Act."

[Comment: If the resolution of 23 May, 1988 is regarded as having been intended to be limited to public statements purporting to be made on behalf of the Commission, it had no relevant application to Mrs. McPherson in respect of her having given evidence to the Select Committee in her private capacity.

Further, if, as seems to be the position so far as this submission is concerned, the resolution of 23 May, 1988 is to be regarded as concerning a requirement of notification before giving evidence to a Parliamentary committee in a private capacity, the Committee may consider, as stated above, that such a requirement constitutes "an improper interference with the free exercise by a House or a committee of its authority or functions", upon the basis that such a requirement might have the effect of, at least, discouraging a prospective witness from giving evidence, and thus constitute a contempt of the Senate, contrary to the submission in paragraph 92 of the submission.]

- (b) "... the passage of a resolution of itself only requiring notification cannot amount to a penalty or injury, or deprivation of benefit within the meaning of section 12(2) of the Privileges Act."

[Comment: The Committee may consider that in some circumstances such a resolution could amount to such a penalty or injury, for example, if such a resolution requiring (future) notification was first passed after a particular witness had given evidence before a Parliamentary committee without notifying the relevant body..

In any event, the subject of this part of the submission is not the passing of the resolution of 23 May, 1988 but the passing of the no confidence motion which, the Committee might consider did constitute such a penalty.]

- (c) "... it is quite inconsistent with her fiduciary obligation for a statutory office holder, particularly the Chairman of a Commission, to appear in her official capacity and at the same time give evidence critical of the Commission as a private individual ... Irrespective of the reference to the motion of 23 May, 1988 the

Chairman had a duty to inform the Commission of an intention to appear before a Committee, such as the Select Committee, in relation to matters falling within the ambit of the Commission and directly involving herself as Chairman. This duty arises by virtue of the fiduciary relationship existing between the Commission and its Chairman and exists independently of any motion such as that of 23 May."

[Comment: Expressing a purely legal opinion, it is by no means clear that the conduct described, that is, appearing before a Select Committee to give evidence in a private capacity without first notifying your employer, would be held in law by the Courts to constitute a breach of the fiduciary duty owed by an employee to an employer.

Nevertheless, even on the assumption that such conduct did constitute a breach of such fiduciary duty, the Committee might consider that that did not justify conduct by the employer that would constitute a breach of parliamentary privilege. This is made clear in the letter dated 6 March, 1989 from the Clerk of the Senate to the Committee.]

22. In summary, the Committee may consider that notwithstanding the purported justifications for including paragraph (d) as a basis for the motion of no confidence, its inclusion did in fact constitute a contempt of the Senate in that the no confidence motion constituted the imposition of a penalty upon Mrs. McPherson, in part because she gave evidence to the Select Committee in a private capacity without first notifying the Commission.
23. The submission on behalf of certain of the other Commissioners, other than Mr. Perkins states, inter alia, as follows in relation to the no confidence motion (at page 21):-

"We were not concerned to prevent Mrs. McPherson from making statements as an individual ... What we resented and what we believed was destructive was the Chairperson's insistence on speaking for us contrary to our authority ... It did not occur to us that we had the power, let alone the right, to prevent her speaking as a private person. We believed, however, that when she did so in public concerning ADC matters, we should at least be notified. We believe this to be reasonable and we consider that it is consistent both with our position and with the privileges of the Parliament."
24. As with the submission on behalf of Mr. Perkins, so the position is taken in this submission that there can be no objection to a resolution requiring notification to the Commission prior to the giving of evidence in a private capacity to a Parliamentary committee. That the Committee may consider that such a requirement may involve a breach of Parliamentary privilege has been dealt with above.
25. If the Committee, after further consideration, did determine that a breach of Parliamentary privilege was, or might have been involved in the passing of the no confidence motion, it would then have to consider, in accordance with Resolution 3 of the Resolutions concerning Parliamentary privilege agreed to by the Senate on 25 February, 1988, whether those responsible knowingly committed the relevant breach when they voted in favour of the resolution. Whether or not this were so would no doubt be relevant to what action, if any, the Committee wished to take in relation thereto.

26. In this connection both submissions express the view that the requirement of notification did not involve any contempt of the Senate so that if the Committee were to accept that that was the view of the relevant Commissioners, including Mr. Perkins, it might conclude that if there was any contempt of the Senate committed, it was not committed knowingly. If the Committee so determined, it would then presumably determine what further action, if any, should be taken.
27. To recapitulate, the Committee may consider that all relevant Commissioners, including Mr. Perkins, were aware that Mrs. McPherson had given evidence in her private capacity, but nevertheless took the view (contrary, apparently, to the fact) that the resolution of 23 May, 1988 required her, even in that circumstance, to first notify the Commission before giving evidence to the Select Committee and that her failure to do so was a legitimate reason, among others, to justify the passing of a no confidence motion in her. The Committee may consider that this conduct nevertheless involved a contempt of the Senate and would then have to determine whether to accept the submission on behalf of the relevant Commissioners that in effect they believed this was legitimate and did not involve any contempt of the Senate.
28. The Committee may consider that the precise issues which it considers have been relevantly raised have not been sufficiently or precisely addressed on behalf of the relevant Commissioners. If the Committee took this view it could ask for further submissions from the Commissioners on the relevant matters. Alternatively, the Committee might consider that it has sufficient material before it to enable preliminary findings to be made. This course would seem to be envisaged by paragraph (10) of resolution 2 of the resolutions agreed to by the Senate on 25 February, 1988, which is in the following terms:-
- "(10) As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate."
29. This provision notwithstanding, the Committee may consider that at an earlier stage in the proceedings, if it considers that a prima facie case of contempt of the Senate has been made out on the material before it, that prima facie case should be put to the affected persons before determining the findings contemplated by paragraph (10) of resolution 2. This would be so more especially, but not only, if, in arriving at its view as to a prima facie case, the Committee had rejected submissions put before it on behalf of affected persons, particularly if those submissions were or involved submissions of fact. In that connection, the Committee might consider it justified in proceeding in the same way as if an allegation of contempt had been made by another party even though it appears that no such allegation has been or is proposed to be made by either Mrs. McPherson or Mr. O'Brien in the present case (see their final submissions and covering letter dated 14 April, 1989). On that basis the Committee might consider it appropriate to follow the procedure

laid down in paragraph (2) of Resolution 2 of 25 February, 1988 which relates, inter alia, to an allegation of contempt which is in the following terms:-

- "(2) The Committee shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:
- (a) making written submission to the Committee;
 - (b) giving evidence before the Committee;
 - (c) having other evidence placed before the Committee; and
 - (d) having witnesses examined before the Committee."

30. To recapitulate again, the Committee may consider that the matter should now proceed as follows:

- (a) (i) The Committee should consider whether or not it considers that a resolution purporting to impose a requirement of prior notification upon Commissioners or officers of the Commission prior to their making public statements by way of giving evidence in a private capacity to a parliamentary committee, would, prima facie, involve, or might involve, a contempt of the Senate in the circumstances of the present case, for the reasons set out above in paragraphs 12-15.

(ii) In this connection, although the Committee has already determined that the passage of the resolution of 23 May, 1988 did not involve any contempt, of the Senate, presumably upon the basis that it was intended to be "limited to public statements purporting to be made on behalf of the Commission, those who voted in favour of the resolution of no confidence would appear to have proceeded upon the basis that the resolution of 23 May 1988 was also applicable to the making public statements by way of giving evidence in a private capacity to the Senate Select Committee without prior notification to the Commission.

- (b) If the Committee were to determine that the requirements of prior notification in the resolution of 23 May 1988, as it was understood by the relevant commissioners at the time of passing the no confidence resolution, did, prima facie, constitute a contempt of the Senate, the Committee might think that it should then consider whether or not the passage of the resolution of no confidence, to the extent to which it was based, in part, upon that understanding of the resolution of 23 May 1988, also, prima facie, involved or might involve, a contempt of the Senate, in that it involved the infliction of a penalty upon a witness who had given evidence before the Senate Select committee in a private capacity without prior notification to the Commission;

- (c) If the Committee were to determine that the passage of the resolution of no confidence did, in that way, and to that extent, prima facie, involve those who voted in favour of it in a contempt of the Senate, the Committee might think that it should then go on to consider whether or not those persons who voted in favour

of the no confidence resolution did so knowingly, that is, knowingly that a contempt of the Senate was, or might be involved;

- (d) The Committee might then think that it should then consider whether its prima facie views as to these matters should be conveyed to those who voted in favour of the resolution of no confidence (by way of notifying their solicitors) with a view to giving them an opportunity to respond to those prima facie views in such a manner as they wished, and as the Committee considered appropriate, perhaps even to the extent of evidence being given before the Committee, even at that stage;
- (e) The Committee might think that it should then consider how to proceed further in the matter having regard, inter alia, to the question whether or not it was minded to accept any explanations which might be given by those concerned.

WENTWORTH CHAMBERS

3 May, 1989

(signed) T. Simos, Q.C.