Charles

PARLIAMENTARY COMMISSION OF INQUIRY

OUTLINE OF ARGUMENT BY COUNSEL ASSISTING AS TO THE MEANING OF "MISBEHAVIOUR"

For hearing - Tuesday 22 July, 1986

1. It is submitted that each of the twelve allegations so far delivered would, if proved, constitute misbehaviour within the meaning of section 72 of the Constitution.

2. Misbehaviour neither has, nor had in 1900, a technical meaning.

3. An office held quamdiu se bene gesserit meant and means no more than that the office holder could not be removed so long as he conducts himself well in his office; that being decided, in the first instance, by the grantor:
Harcourt v Fox 1 Show. 46, 506, 536; 89 ER 680, 720, 750.

4. Whether a person conducts himself well in his office must, of course, depend on the office. Wilful non-attendance would not be misconduct where the duties of the office are for example

delegable: it would of course now be misconduct in the case of a judge.
Earl of Shrewsbury's case (1610) 9 Co. Rep. 42a, 50a; 77 ER 793, 804.

5. Similarly, in relation to matters not involving the duties of the office, the question is whether the office holder has so misbehaved as to warrant removal from the office. Regard must be had to the nature of the office: campaigning for a political party may not be misbehaviour in a public servant holding office under the Public Service Act 1922 but would be in a judge.

6. It is submitted that conduct seriously or persistently contrary to accepted standards of judicial behaviour constitutes misbehaviour within the meaning of section 72.

7. The proposition that misbehaviour requires conviction for infamous offence, derives, in point of judicial authority, solely from the decision of Lord Mansfield in Rex v Richardson (1758) 1 Burr 517; 97 ER 426.

8. The question for decision in Richardson's case was whether the Corporation of Ipswich had power to

amove certain aldermen for not attending a Court. The decision centred on the implied powers of corporations to remove officers. It is not possible to equate the position of a judge of the High Court of Australia with that of an alderman of a municipal corporation: behaviour which might make a judge "infamous" or render him unfit to hold office might not have the same result for an alderman. Neither is it possible to equate the powers of the Houses of Parliament and of the Governor-General in Council under the Constitution with the position of a municipal corporation.

9. Richardson's case was not expressed to contain a definition of "misbehaviour". Neither is it clear that Lord Mansfield used the word "offence" as meaning a crime.

10. It is apparent from the argument for the petitioner in Barrington's case which is set out at page 859 of Todd's Parliamentary Government in England that the patent of a judge could be repealed in England for misconduct not extending to a legal misdemeanour.

11. Absurdities could well arise if a criminal conviction were necessary before an address could

be made arising from behaviour not including the duties of an office. The absurdities include where the office holder had been tried for a serious criminal offence and acquitted but then boasted that he was in fact guilty of the offence: because he had not given sworn evidence at his trial, he could not be charged with perjury. Similarly, if an office holder were tried for a serious offence and convicted but the conviction were quashed for some technical reason such as a limitation period having expired. Another example would be where the office holder had been tried for a serious offence involving dishonesty but the Court, having found him guilty, did not proceed to conviction.

12. There would also be absurdities if, although a conviction was not necessary to constitute misbehaviour, criminal conduct was. On that view, a judge who had campaigned publicly for the election of a particular political party could not be removed. An office holder who engaged in discussions with others to commit a crime but in circumstances falling short of establishing a conspiracy would, on this view, be immune. Similarly, a judge who habitually consorted with known criminals in a jurisdiction where the offence of consorting had been abolished could not

be the subject of an address. Another example would be where a judge deliberately avoided paying his just debts until proceedings were taken against him by his creditors.

13. Alternatively, it is submitted that if misbehaviour in respect of an office had, in 1900, a technical meaning, that meaning was not carried forward into section 72 of the Constitution.

14. On this argument it is accepted that misbehaviour in relation to the removal of judges was limited to firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty or non-attendance; and thirdly, conviction for any infamous offence by which, although not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. (See the Opinion of the Victorian Law Officers: Votes and Proceedings of the Legislative Assembly, Victoria, 1864-5 Vol 2 p 10).

15. The procedures available were either outside the Parliament, by a writ of scire facias or information or indictment, or within Parliament by impeachment or by way of address by both Houses.

In the latter case the Houses were not limited to grounds which might constitute an offence.

16. It is submitted that in investing each of the Houses of Parliament with the power to determine the question of whether or not there had been misbehaviour, it was intended by section 72 to make Parliament the judge and to free it from any technical meaning of "misbehaviour". It is submitted that in deciding that Parliamentary proceedings were to be the sole procedure it was not intended to limit the application of the procedure to circumstances which would have justified removal by the Crown apart from an address.

17. The independence of the judiciary is protected by the role of the Courts in determining in a given case whether specified conduct could not amount to misbehaviour. In other words, the meaning of "misbehaviour" is justiciable and in a case where there was no behaviour which could constitute misbehaviour any attempt by the Houses to make an address could be challenged in the High Court. Alternatively, any attempt by the Executive to act on such an address could be challenged.

18. It is also the case that section 72 protects the judge as office holder from interference by the grantor, the Crown. The power of the grantor to remove cannot be exercised except upon fulfilment of the condition of an address by each House. In other words, it is not a mere breach of condition that exposes a judge to removal but a breach proved in the Parliament and upon which the Parliament has decided to act. It would seem also that the Governor-General in Council retains a discretion as to whether he should act on the address. If advised not to act by his Ministers then he could not do so.

RE THE HONOURABLE LIONEL KEITH MURPHY

Gyles

"PROVED MISBEHAVIOUR" - SECTION 72 CONSTITUTION

OUTLINE OF ARGUMENT by Gyles

1. It is important to distinguish between the grounds for removal of a judge and the procedure for removal of a judge. Prior to 1900, a judge who held office during good behaviour could be removed by the Crown for breach of that condition of tenure, as with any other office holder from the Crown upon that tenure, by the writ of scire facias, or, by virtue of the Act of Settlement, 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 the present purposes. It should also be noted that many judges did not hold office during good behaviour but rather during pleasure (including colonial judges).

Todd - Parliamentary Government in England, volume 1, pages 188-198 (see also the various authorities to be referred to below).

2. Thus, the Constitution takes an established procedure for removal (address from both Houses of Parliament) and makes it the sole procedure, but limits the application of the procedure to those grounds which would have justified the removal of the Judge by the Crown without an address. So that to remove a Federal judge, there are two requirements - the first is that there must be agreement between each House of the Legislature and the Executive, and the second is that there must be circumstances or grounds "proved" which amount to a breach of the

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condition of tenure of good behaviour.

3. Reference to the Convention debates 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 beyond that of even the judges of the High Court in England, because of the central role that it plays in upholding the Constitution (in particular in deciding issues between Commonwealth and States), a role not played by the common law or colonial courts.

4. A judge is appointed to a public office of the same character as other public offices.

VICTORIAN LAW OFFICERS (INFRA)

Halsbury - Laws of England, 4th edition, Constitutional Law, volume 8 para. 1107.

Marks v. Commonwealth (1964) 111 CLR 549 at 586-9.

Terrell v. Secretary of State (1953) 2 QB 482, 498-9 (see also as to "office" Attorney General v. Perpetual Trustee (1954) 92 CLR 113, 118-121; Miles v.Wakefield Council (1985) 1 WLR 822; Marks v. Commonwealth, supra, at 567-572).

5. Loss of tenure of office by reason of misbehaviour in office has always been a well-recognised concept. It only relates to matters occurring during office and with the necessary connection with office.

Earl of Shrewsbury's Case (1610) 9 Co. Rep. 42, 50; 77 ER 793, 804.

Coke 4 Inst. 117

Cruise's Digest, volume 3 "Offices" paras. 98-111.

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Comyn's Digest, volume 5 "Officer" pages 152-7.
Bacon's Abridgment, volume 6 "Offices and Officers" pages 41-6.
Harcourt v. Fox 1 Shower 506, 519, 534-6.
R. v. The Mayor etc. of Doncaster 2 Ld. Raym 1565; 92 ER 513.

6. The only extension of this concept was to include conviction of an infamous offence during office.

Rex v. Richardson 1 Burrow 539.

There is no authority for the proposition that "conduct unbecoming" or any such concept has been a ground for removal of a public office holder. There was even a question as to whether misbehaviour connected with office, which is also a crime, requires conviction to be proved.

Bagg's case 11 Co. Rep. 93B 98A
R. v. Hutchinson 8 Mod. 99; 88 ER 77.

The distinction is well illustrated by the case of Montagu v. Van Dieman's Land 6 Moore 489; 13 ER 773. The first ground argued to justify amoval was clearly appropriate, the second ground was not.

7. These principles have always been held to apply to judges as well as other office holders, and the framers of the Constitution, and the Legislature which passed the Constitution, must be taken to have been aware of them. Indeed, Mr. Isaacs (as he then was) read the relevant portion of Todd to the Convention. Windeyer J. in Capital TV and Appliances Pty. Limited v. Falconer (1970-71) 125 CLR 591 at 611-2 said:-

"...the tenure of office of judges of the

that

> High Court and of other Federal Courts but 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."

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 pages 731-2.

Zelman Cohen and David Derham - The Independence of Judges 26 ALJ 462, particularly at 463 (see also 26 ALJ 582).

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 para. 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.

Vol 2

Anson - The 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.

Maitland - The Constitutional History of England 313.

Hood Phillips - Constitutional and Administrative Law 6th ed. 382-2.

8. It should be noted that tenure for a term defeasible upon misbehaviour, or tenure during good behaviour (which

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amount to the same thing) is a common feature of offices created by the Federal Parliament. Whilst some of these offices are judicial or quasi judicial, the great majority are not - they are administrative or commercial. A list will be provided at the hearing. It is perfectly obvious that the well-known principles which apply to removal from office are applicable in relation to these office holders, as the word "misbehaviour" would be given the normal meaning attributed to misbehaviour in office. The position of a judge is no different.

9. It is also to be noted that disqualification of Members of Parliament and Aldermen of Councils depends upon conviction.

Constitution ss 44, 45.
Erskine May - Law etc. of Parliament, 18th edition, page 39.
Constitution Act (NSW) s 19.
Local Government Act (NSW) s 30.
In re Trautwein (1940) 40 SR (NSW) 371.

10. Office holders who have a tenure during good behaviour stand in sharp contrast to office holders at pleasure, and to servants. They are given that tenure in order to secure independence in the conduct of the office, for the benefit not only of the office holder, but of the public generally. If an office holder is liable to be removed for conduct not connected with office otherwise than by conviction in the courts of the land, because of "conduct unbecoming the office" then independence is diminished. The opportunity for direct and indirect pressure from disaffected litigants, political crusaders, politicians, the executive and even other

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judges upon a judge making unpopular decisions is greatly increased. There are no criteria by which to judge the conduct. The evil is particularly obvious when (as is often the case) the one political party controls both Houses of Parliament. It is not a necessary incident of judicial office.

Shetreet - Judicial Accountability

11. The effect of a submission to the contrary of the foregoing is to render nugatory the obvious intent of s.72. If "proven misbehaviour" simply means "any conduct which Parliament considers to be inconsistent with the holding of office" or "any conduct which Parliament considers unbecoming a judge", then it is the equivalent of the pre 1900 position under the Act of Settlement where Parliament could address the Crown for removal for any cause. At least in the case of conduct not connected with office, "proved" must mean "proved by conviction".

12. The role which the Houses of Parliament have in relation to misbehaviour not in office is to judge whether the conviction is of an offence sufficient to warrant removal.

APPENDIX 6 (ii)

IN THE MATTER OF

SECTION 72 OF THE CONSTITUTION

OPINION

1. I am asked the meaning of "misbehaviour" in section 72 of the Constitution, and, in particular, whether misbehaviour for this purpose is limited to matters pertaining to the judicial office in question and conviction for a serious offence which renders the person concerned unfit to exercise the office.

2. So far as relevant, section 72 provides -

> 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:

3. Clearly the ambit of the grounds for removal from office embraced by section 72 is limited by comparison with the position of judges under English law. Section 72 gives conscious effect to the principle that the judiciary in our Federal system should be secure in their independence from the legislature and the executive. This was a matter which considerably exercised attention in debates during the drafting processes leading to its final formulation. Quite deliberately, the conventional grounds for termination of judicial tenure were narrowed.

4. The English position is that judges hold office during good behaviour or until removed upon address to the Crown by both Houses of Parliament.

5. Coke described the grant as creating office for life determinable upon breach of condition: Co. Litt. 42a. Now tenure is until retiring age. A judge may be removed by the Crown for misbehaviour (or want of good behaviour) without any address from Parliament. The position as to su misbehaviour is conveniently summarised by Todd, Parliamentary Government in England, ii, at 857-8 -

> 'The legal effect of the grant of an office during "good behaviour" is the creation of an estate for life in the office.' Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour But "like any other conditional estate, it may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity. Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and, thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. In the case of official misconduct, the decision of the question whether there be misbehaviour rests with the grantor, subject, of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury.

6. The contrasting Parliamentary jurisdiction to address for removal is described by Todd (at 860) as an additional power unrelated to breach of condition which -

> ... the constitution has appropriately conferred upon the two Houses of Parliament - in the exercise

> the proceedings against offending judges, the importance to the interests of the commonwealth, of preserving the independence of the judges, should forbid either House from entertaining an application against a judge unless such grave misconduct were imputed to him as would warrant, or rather compel, the concurrence of both Houses in an address to the crown for his removal from the bench. 'Anything short of this might properly be left to public opinion, which holds a salutary check over judicial conduct, and over the conduct of public functionaries of all kinds, which it might not be convenient to make the subject of parlimentary enquiry.'

9. Under our Constitution Parliamentary address is the only method for judicial removal. The reason sufficiently is summarised by Quick and Garran, The Annotated Constitution of the Australian Commonwealth, 733-4, under the heading "Reasons for Security of Judicial Tenure":

> The peculiar stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of the federal nature of the Constitution, and the necessity for protecting those who interpret it from the danger of political interference. The Federal Executive has a certain amount of control over the Federal Courts by its power of appointing Justices; the Federal Executive and Parliament jointly have a further amount of control by their power of removing such Justices for specified causes; but otherwise the independence of the Judiciary from interference by the other departments of the Government is complete. And both the Executive and the Parliament, in the exercise of their constitutional powers, are bound to respect the spirit of the Constitution, and to avoid any wanton interference with the independence of the Judiciary. "Complaints to Parliament in respect to the conduct of the judiciary, or the decisions of courts of justice, should not be lightly entertained ... Parliament should abstain from all interference with the judiciary, except in cases of such gross perversion of the law, either by intention, corruption, or incapacity, as make it necessary for the House to exercise the power vested in it of advising the Crown for the removal of the Judge". (Todd, Parl. Gov. in Eng., i. 574.)

Hence the structure of the Constitution itself explains this direct limitation upon the power of judicial removal. The desire is to protect the judiciary as the interpreters of the Constitution.

10. Clearly section 72 excludes all modes of removal other than the one mentioned. This deliberate limitation, apparent from the terms of the section, is emphasised by permissible consideration of legislative history. To paraphrase what Stephen J. said in Seamen's Union of Australia v. Utah Development Co., (1978) 144 C.L.R. 120, 142-4, it is from the successive drafts of the Bills which ultimately became our Constitution that the true role of section 72 emerges; its history and origins cast light upon meaning, the precise effect of which may otherwise be subject to some obscurity.

11. The first draft of the Commonwealth Bill of 1891 departed from English and colonial precedent and tied revocation of office held during good behaviour to address from both Houses. At Adelaide, in the 1897 Bill, this intention was made clear. In committee, tenure was further secured by resolution to limit parliamentary power of intervention to cases of misbehaviour or incapacity. The clause read:

> 72. The Justices of the High Court and of the other courts created by the Parliament:
>
> (i) Shall hold their offices during good behaviour:
>
> (ii) Shall be appointed by the Governor-General in Council:

(iii) Shall not be removed except for misbehaviour or incapacity, and then only by the Governor-General in Council, upon an Address from both Houses of the Parliament in the same Session praying for such removal.

In the Melbourne session on the 31st January 1898 Mr Barton successfully moved that tenure be further secured by providing that a parliamentary address must pray for removal "upon the grounds of proved misbehaviour or incapacity".

12. Although their Honours regarded it as unnecessary then to consider the extent to which the Debates may be regarded in the construction of the Constitution, in Re Pearson; Ex parte Sipka, (1983) 57 A.L.J.R. 225, 227, Gibbs C.J., Mason and Wilson JJ. accepted Griffith C.J.'s dictum in The Municipal Council of Sydney v. Commonwealth, (1904) 1 C.L.R. 208, 213-214, that it is permissible to have regard to Convention Debates, "for the purpose of seeing ... what was the evil to be remedied". Perusal of the Adela and Melbourne Convention Debates confirms the extent to whic the delegates desired to deal with the need adequately to safeguard the independence of the judiciary as an essential feature of the separation of powers in the Federal system. Todd's summary of the English position (set out in paragraph 5 above), which was read by Mr. Isaacs at Adelaide on 20th April 1897 (Convention Debates 948-9), was the received meaning of misbehaviour. Each of the successive amendments to the draft clause was intended further to limit, for the purpose of the

Constitution, the power of removal to a single specific and narrow basis related solely to the established ground of removal for breach of condition for good behaviour. The general discretionary power of Parliament to address for removal on grounds other than misbehaviour, in the technical sense understood by the delegates, was eliminated; with the function of finding such misbehaviour vested in the Parliament rather than in the Executive.

13. What then is proved misbehaviour or incapacity? Incapacity is easily dealt with: it extends to incapacity for mental or physical infirmity, which always has been held to justify termination of office: see Todd, at 857. The addition of the word "incapacity" does not alter the nature of the tenure during good behaviour; it merely defines it more accurately: see Quick and Garran, at 732.

14. As noted in paragraph 5 above, Todd, at 857-8, purported exhaustively to define misbehaviour as breach of the condition for judicial office held "during good behaviour" as including -

(1) the improper exercise of judicial functions;

(2) wilful neglect of duty or non-attendance; and

(3) the conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise.

Todd's commentary, at 858, was that the decision of whether the first category of misbehaviour is constituted rests

with the Crown. However in the case of the third category, misconduct outside the duties of office, he stipulated misbehaviour must be established by previous conviction by a jury. Similarly Halsbury's Laws of England, 4th ed, viii, para. 1107, which accepts Coke's statement that "behaviour" means behaviour in matters concerning the office and also the exceptional case of conviction upon indictment for any infamous offence of such a nature as to render the person unfit to exercise the office. Much might be said as to the received meaning of infamous offence. It is discussed in R. v. Richardson (1758) 1 Burr. 517, in the context of removal from office. Bacon's Abridgement, 7th ed., iii, 211 regarded such offences as embracing convictions for treason, felony, piracy, praemunire, perjury, forgery, and the like, together with crimes with penalty "to stand in the pillory, or to be whipped or branded". All this is somewhat archaic for contemporary definition. Maxwell J. in In re Trautwein, (1940) 40 S.R. (N.S.W.) 371, warned against exhaustive definition, and adopted the sensible approach of having regard to the nature and essence of a proved offence without attempting a definition or enumeration of the crimes which fall within the expression. To his Honour (at 380) infamous crime was one properly described as "contrary to the faith credit and trust of mankind". Such ambulatory approach seems appropriate to give continuing content to any limitation expressed by reference to infamous offence, although it certainly does not close the otherwise open texture of meaning.

15. However defined, Todd's third category of breach of condition for office held during good behaviour requires conviction for offence. Hence it is curious that, without comment, Quick and Garran (at 731) accept Todd's three categories as defining misbehaviour for the purposes of section 72. However a definition requiring conviction for offence in misbehaviour not pertaining to office does not rest easily with Quick and Garran's clear recognition of the essential limitation of section 72 requiring address of Parliament upon the proved ground of misbehaviour as the sole basis for removal (at 731) -

> The substantial distinction between the ordinary tenure of British Judges and the tenure established by this Constitution is that the ordinary tenure is determinable on two conditions; either (1) misbehaviour or (2) an address from both Houses; whilst under this Constitution the tenure is only determinable on one condition - that of misbehaviour or incapacity - and the address from both Houses is prescribed as the only method by which forfeiture for breach of the condition may be ascertained.

Obviously "proved misbehaviour" is to be established to the Parliament and, whatever the offence, such proof is not predicated upon anterior conviction in a court of law.

16. The ultimate requirement of section 72 is for address upon "proved misbehaviour". Quick and Garran's views (at 732) are -

> No mode is prescribed for the proof of misbehaviour or incapacity, and the Parliament is therefore free to prescribe its own procedure. Seeing, however, that proof of definite legal breaches of the conditions of tenure is required, and that the enquiry is therefore in its nature more strictly judicial than in England, it is conceived that the procedure ought to partake as far as possible of the formal nature of a criminal trial; that the charges should be definitely formulated, the accused allowed full

opportunities of defence, and the proof established by evidence taken at the Bar of each House.

Odgers, Australian Senate Practice, 4th ed., 598, suggests, without discussion, that the probable procedure would be by way of joint select committee, with the accused being allowed full opportunities to defend himself. However it is difficult to see how Parliament adequately could discharge its obligation to address upon "proved" misbehaviour if the trial function were to be delegated (cf. FAI Insurances Ltd. v. Winneke (1982) 41 A.L.R. 1, 17 per Mason J., discussing delegation of enquiry by Governor-in-Council). Todd, ii, 860-875, requires "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" such as a select committee.

17. Inasmuch as the Convention Debates reveal mischief intended to be dealt with, clearly it was contemplated that Parliament could fix its own procedures: see Convention Debates, 20th April 1897, 952, (Mr Isaacs and Mr Barton) and 959-960 (Mr Kingston). At the Melbourne Convention it was made clear that the judge would be entitled to notice and to be heard: (see Convention Debates, 31st January 1898, 315, (Mr Barton)). Hence Parliamentary discretion as to mode in which power should be exercised is in the context of obligation that charges be formulated, and full opportunities for defence be furnished, before

18. Quick and Garran reject any analogy between the Parliamentary discretion to address on grounds which do not constitute a legal breach of the condition on which office is held and the position which obtains under section 72. After reciting Todd's summary of the discretion in Parliament and in particular his conclusion that Parliament is "limited by no restraints except such as may be self-imposed" (set out in paragraph 6 above), the authors note (at 731) -

> These words are quite inapplicable to the provisions of this Constitution. Parliament is "limited by restraints" which require the proof of definite charges; the liability to removal is not "a qualification of, or exception from, the words creating a tenure," but only arises when the conditions of the tenure are broken; and though the procedure and mode of proof are left entirely to the Parliament, it would seem that, inasmuch as proof is expressly required, the duty of Parliament is practically indistinguishable from a strictly judicial duty.

19. The conferring of exceptional function to find proved misbehaviour is not equated to vesting discretion in Parliament to define misbehaviour constituting breach of condition of office. The general power of a Parliament to address for removal where there is not technical misbehaviour is negated by section 72. The power is limited to address only upon proof of misbehaviour, and neither House is at large to define and recognize misbehaviour as it pleases. Misbehaviour, as a breach of condition of office in matters not pertaining to the office, has a meaning related to offences against the general law of the requisite seriousness to be described as infamous. To this extent it has an ascertainable

meaning, even if content varies in particular circumstances In consideration of the issue of proved misbehaviour Parliament is obliged to apply this meaning.

20. The inquiry is whether the offence is of such nature as to render the person unfit to exercise the office, although it is not committed in connection with the office. The notion that private behaviour may affect performance of official duty was expressed by Burbury C.J. in Henry v. Ryan, (1963) Tas. S.R. 90, 91:

> ... misconduct in his private life by a person discharging public or professional duties may be destructive of his authority and influence and thus unfit him to continue in his office or profession.

Sir Garfield Barwick, in opinion of 18th November 1957 on clauses of the Reserve Bank, Commonwealth Bank and Banking Bills of 1957, dealing with office held "subject to good behaviour", wrote -

> Good behaviour ... refers to the conduct of the incumbent of the office in matters touching and concerning the office and its due execution, though the commission of an offence against the general law of such a nature as to warrant the conclusion that the incumbent is unfit to exercise the office would be a breach of the condition of good behaviour even though the offence itself was unrelated to the duties and functions of the office ...
>
> There is, in my opinion, no significant difference between a condition of good behaviour and a condition against misbehaviour. Indeed, in the older books the word "misbehaviour" is often used as synonymous with a breach of good behaviour. Thus, the "misbehaviour" in the Bill will be held to refer to conduct touching and concerning the duties of the member in relation to the office, but will also include acts in breach of the general law of such a quality as to indicate that the member is unfit for office.

I concur with this opinion. It represents a contemporary statement of the quality of offence not pertaining to office which may constitute misbehaviour. As discussed in paragraph 14 above, the content of offence so expressed is much the same as what may now be understood as embraced by infamous offence.

21. It follows that the terms of section 72 dictate meaning for "proved misbehaviour". The fundamental principle of maintaining judicial independence is recognized by excluding all modes of removal other than for misbehaviour as a breach of condition of office. In matters not pertaining to office, the requirement is not conviction for offence in a court of law. Inasmuch as Parliament considers the matter, the question is whether there is proved offence against the general law "of such a nature as to warrant the conclusion that the incumbent is unfit to exercise the office". Parliament is not at large to define proved misbehaviour by reference to its own standards or views of suitability for office or moral or social character or conduct. The Parliamentary enquiry is whether commission of an offence of the requisite quality and seriousness is proved. Parliament would act beyond power if it sought to apply wider definition or criteria for misbehaviour than the recognized meaning of misbehaviour not pertaining to office.

22. Parliament has, of course, a residual discretion not to address for removal, even if proved misbehaviour is found.

23. Accordingly the question asked in paragraph 1 is answered -

Misbehaviour is limited in meaning in section 72 of the Constitution to matters pertaining to -

(1) judicial office, including non-attendance, neglect of or refusal to perform duties; and

(2) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office.

Misbehaviour is defined as breach of condition to hold office during good behaviour. It is not limited to conviction in a court of law. A matter pertaining to office or a breach of the general law of the requisite seriousness in a matter not pertaining to office may be found by proof, in appropriate manner, to the Parliament in proceedings where the offender has been given proper notice and opportunity to defend himself.

SOLICITOR-GENERAL

CANBERRA

24th February 1984.

APPENDIX 4

OPINION OF MR C.W. PINCUS, Q.C.

The first problem is the legal question of the meaning of "misbehaviour" in s.72 of the Constitution which reads, in part, as follows:

> "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".

The suggestion has been made that "misbehaviour" has a technical meaning which significantly limits the power of removal. This view is adequately summarised in an opinion from the Solicitor General of 24th February 1984 with which I am briefed:

> "The conferring of exceptional jurisdiction to find proved misbehaviour is not equated to vesting jurisdiction in Parliament to define misbehaviour constituting breach of condition of office. The general power for Parliament to address for removal where there is not technical misbehaviour is negated by Section 72. ... Misbehaviour, as a breach of condition of office in matters not pertaining to the office, has a meaning relating to offences against the general law of the requisite seriousness to be described as infamous..." (para. 19)

> "In matters not pertaining to office, the requirement is not conviction for offence in a court of law. Inasmuch as Parliament considers the matter, the question is whether there is proved offence against the general law 'of such a nature as to warrant the conclusion that the encumbent is unfit to exercise the office'. Parliament is not at large to define proved misbehaviour by reference to its own standards or views of suitability for office or moral social character or conduct. The Parliamentary enquiry is whether commission of an offence is of the requisite quality and seriousness is proved". (Para. 21).

Since, as will appear, I do not agree with the Solicitor General, it will be necessary to examine in detail the authorities on which he relies. Before I come to do so it is convenient to mention briefly the position with respect to removal of judges under the United States Constitution.

UNITED STATES.

In many respects the Australian Constitution was modelled upon that

of the United States. As to the removal of Federal judges, however, the language used here departed significantly from that which had, by 1900, produced a number of removals of judges in the U.S. Under Article III, Section 1, of their Constitution, judges hold office during good behaviour. The power to remove is by a process of impeachment on the ground of "Treason, Bribery and other High Crimes and Misdemeanours". When our Constitution was framed, there was at least an arguable view in the U.S. that the expressi "High Crimes and Misdemeanours" required proof of indictable offences: see in particular the work, written in 1891, by H.L. Carson: "The Supreme Court of the United States - Its History". If it had been intended, by our draftsme to require the commission of a defined offence against the law of the land, one might have expected the use of the American phrase "Treason, Bribery and other High Crimes and Misdemeanours" or some adaptation of it. Instead, the simple word "misbehaviour" was used - a word which does not, to the mind innocent of any "technical" meaning, suggest the necessity of proof of an offence.

It is significant, also, that in this century it seems to have beco accepted in the United States that in no case is proof of a specific violatio of a statute necessary for removal. In 1972 there was published by the Congressional Research Service of the Library of Congress a work "The Constitution of the U.S. - Analysis and History". At p.578 the (unknown) author suggest that the Constitution allows -

> "... the removal of judges who have engaged in serious questionable conduct although no specific universal statute

This point is elaborated by W. Wrisley Brown in a useful note in Vol.26 of the Harvard Law Review at p.684; he points out that the process of impeachment, which is that used to remove Federal judges (and Presidents) was taken over from an ancient English parliamentary process, the scope of which was not confined to crimes against the ordinary law of the land. An example (not referred to by Wrisley Brown) of the use of this process in England was the attempted impeachment of Warren Hastings for "high crimes and misdemeanours". As to the type of behaviour enlivening the Senate's jurisdiction the author says at p.692:

> "An act or a course of misbehaviour which renders scandalous the personal life of a public officer shakes the confidence of the people in his administration of the public affairs, and this impairs his official usefulness, although it may not directly affect his official integrity or otherwise incapacitate him properly to perform his ascribed function. Such an offence, therefore, may be characterised as a high crime or misdemeanour, although it may not fall within the prohibitory letter of any penal statute. Furthermore, an act which is not intrinsically wrong may constitute an impeachable offence solely because it is committed by a public officer... For example, a judge must be held to a more strict accountability for his conduct than should be required of a marshal of his court...".

This exposition appears to me persuasive.

I refer also to the note in 51 Harvard Law Review p.335 to the effect that the words "Treason Bribery and other High Crimes and Misdemeanours" apply to matters other than indictable offences, relying on the decision in Ritter v. U.S., noted in 300 U.S. 668. It will be observed that the Supreme Court refused to entertain an appeal from Judge Ritter, who complained that the broad view of the meaning of "High Crimes and Misdemeanours" to which I have referred was applied against him by the Court of Claims.

Insofar as the American law provides any help, then, it gives no support to the view expressed by the Solicitor General. Of much more importance, however, are the law and practice in England and its colonies prior to 1900, and to those subjects I now turn.

ENGLAND.

Two hundred years before our Constitution was enacted, it had be the law in England (established by the Act of Settlement 1700) that judges held office during good behaviour "but upon the address of both Houses of Parliament it may be lawful to remove them". See Wade & Phillips "Constitutional Law" 8th Ed. (1970) pp. 8, 9. The effect of this enactment was, in my opinion, to permit removal of a judge in respect of matters done in his private capacity and not necessarily constituting an offence. The plainest case is that of Judge Kenrick referred to by Shimon Shetreet in his work "Judges on Trial" at p.143. In 1826 the judge was charged with prosecuting a poor man for theft in order that he might get possession of his house and then trying to persuade the man to plead guilty, promising to ask for leniency. Shetreet says:

> "The important principle established in this case was that 'by the Act of Settlement it was the duty of the House to examine the conduct of the judges, if notoriously improper, even on matters that affected their private character'. Although it was generally agreed that misconduct of a judge in his private life may justify an address for removal, in the absence of clear evidence of corrupt motives, the House refused to interfere".

Just as importantly, there appears to be no trace, in the removal cases after the Act of Settlement, of the notion that in such questions the

constituted "good behaviour". If the draftsmen of our Constitution knew of the practice of the English Parliament with respect to removal of judges, and intended to depart from it so significantly, it is remarkable that they made that intention so unclear.

Dr. Griffith Q.C. refers to Halsbury's Laws of England 4th Ed. Vol.8 para. 1107 and the acceptance there of the passage in Ch.12 of Volume 4 of Coke's Institutes, p.117 -

> "The Chief Baron is created by letters patent, and the office is granted to him quandiu se bene gesserit, wherein he has a more fixed estate (it being an estate for life) than the justices of either bench, who have their offices but atwill: and quamdiu se bene gesserit must be intended in matters concerning his office, and is no more than the law would have implied, if the office had been granted for life and in like manner are the rest of the barons of the Exchequer constituted, and the patents of the Attorney General, and solicitor are also quamdiu se bene gesserit".

If this passage was intended, in the 17th century when it was written, to convey that a judge might misbehave as scandalously as he pleased in matters not concerning his office, without risking that office, it is hard to believe that it could be correct. Coke does not say anything about offences committed by a judge in such matters. However it came to be accepted that an office held during good behaviour (quamdiu se bene gesserit) could be terminated in respect of matters not concerning office and the leading case which established that was R. v. Richardson in 1758 reported in 1 Burrow 517. The officer whose conduct was in question in that case was a "postman" of the town of Ipswich - what we would call today an alderman. In view of the weight which this decision must carry if the view against which I argue is to be held correct, it is worth quoting the relevant part of Lord Mansfield's judgment in full:

> "There are three sorts of offences for which an officer or corporator may be discharged.
>
> 1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.
>
> 2d. Such as are only against his oath, and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.
>
> 3d. The third sort of offence for which an officer or corporator may be displaced, is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law.
>
> The distinction here taken, by my Lord Coke's report of this second resolution, seems to go to the power of trial, and not the power of amotion: and he seems to lay down, 'that where the corporation has power by charter or prescription, they may try, as well as remove; but where they have no such power, there must be a previous conviction upon an indictment'. So that after an indictment and conviction at common law, this authority admits, 'that the power of amotion is incident to every corporation'.
>
> But it is now established, 'that though a corporation has express power of amotion, yet, for the first sort of offences, there must be a previous indictment and conviction'.

By the date of R. v. Richardson the removal of judges was governed by the Act of Settlement referred to above and not by the general law with respect to removal of officials set out in R. v. Richardson. The case therefore had no bearing upon the removal of English judges. Further, the judgment of Lord Mansfield did not purport to be an interpretation of the expression "misbehaviour", which is not to be found in the report; nor, indeed, is "good behaviour" mentioned; the case is really about the inherent power of a corporation to dismiss its officers. It does not appear to me to follow, logically, from anything said in Richardson's case that the power of Parliament to remove judges is restricted in any such fashion as there laid down. Further, the case has never (as far as I have been able to ascertain), been regarded in England as having anything to do with the removal of judges, in the more than 200 years since it was decided.

Looking at the matter more b-

fathers of our Constitution intended to make the relatively simple language of s.72 able to be construed only by reference to such ancient English texts. It should be kept in mind that what the delegates were confronted with was the task of making a constitution for a new nation. I do not understand why it should be thought that they intended what they said to be read down by reference to what was said by Lord Coke about the tenure of the Barons of the Exchequer in 1628. It is more probable that what our constitutional draftsmen had in mind, as to the law about removal of judges, was English practice, or that with respect to colonial judges, in the 19th century.

THE PRIVY COUNCIL - COLONIAL JUDGES

There is a number of reported instances of removal or attempted removal of colonial judicial officers. Of these two went from Australia to the Privy Council in the middle of the 19th century.

The first case was Willis v. Gipps in 1846, reported in Volume 5 of Moore P.C. 379 (13 E.R. 536). That was decided under the statute of 22 Geo.III c.75, Section 2 of which gave a power of removal expressed, so far as relevant, in these terms:

> "And... if any person or persons holding such office shall be wilfully absent from the colony or plantation wherein the same is or ought to be exercised, without a reasonable cause to be allowed by the governor and council for the time being of such colony or plantation, or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such governor and council to amove such person or persons from every or any such office...".

Although the statute did not say so, the Privy Council held that the "amoval" could not lawfully be effected without giving the judge in question an

I have advised (above) that the power under s.72 cannot, as a matter of l be exercised ex parte but only after affording such an opportunity. The other, perhaps lesser, importance of the case is in the interposition of Baron Parke at p.391 of the report, which appears to be founded on the view that the law as to removal at common law was relevant under the stat

In the second of these cases, Montague v. Lieutenant Governor an Executive Council of Van Diemen's Land (1849) 6 Moore P.C. 489, 13 E.R. 7 the same statute was in question, with respect to a Tasmanian judge. One the complaints made about him was that he incurred indebtedness and frustr attempts to recover, on the part of the creditor, by misuse of his judicia office. At p.493 it is said that the Colonial Secretary wrote to the judg informing him that the matters in question "seriously affected his charact and standing as a judge of the Supreme Court". This, to my mind, suggests a broader and less technical view of the basis of removal of a judge than that based on R. v. Richardson (above). Sir F. Thesiger Q.C., who appeared against the judge, explained to the Board:

> "The chief grounds of complaint against him are, first obstructing the recovery of a debt, justly due by himself; and secondly, the general state of pecuniary embarrassment in which he was found to be in".

~~There is no trace, here, of the judge's position being~~ protected, as to ~~matters outside the exercise of his duties, by any requirement that an offe be proved;~~ it was not an offence to get into debt, however heavily. Counse also said that the behaviour complained of "tended to bring into distrust and disrepute the judicial office in the Colony". The judge's removal was upheld, despite the presence of an irregularity; the proceeding brought

against him had been expressed to be with a view of a suspension, not removal.

Although no reasons other than formal ones were given, it is noteworthy that no-one appears to have thought that there was a difficulty in accusing the judge of being in a "general state of pecuniary embarrassment". The statute said "neglect the duty of such office, or otherwise misbehave therein", words suggestive of the law as laid down by Coke. Yet it appeared to be accepted in the Privy Council that any sort of misbehaviour might suffice to justify removal. The Montague case tends against the applicability of Coke's view, in modern times, and against the notion that R. v. Richardson applies to the interpretation of our s.72.

In the same volume of Moore there is an Appendix consisting in a memorandum of members of the Privy Council on the removal of colonial judges. (See 16 E.R. 828). Again, the "technical" doctrine I am attacking is not reflected in it:

> "When a judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions, ... it would be extremely improper that he continue in the exercise of judicial functions...".

The expression "gross personal immorality" is surely not intended to be confined to commission of offences. To take a simple example, one would be confident that the authors of the memorandum would have regarded it as ground for removal if it were found that a judge had been conducting a brothel, whether or not his doing so was prohibited by statute in the place in which he held office. There is reference to moral misbehaviour, also, in Lord Chelmsford's observations on the memorandum which are to be found at

of the Appendix, referring to his view that certain matters should be decided in the first instance by the Privy Council:

> "These observations do not apply to grave charge of judicial delinquency, such as corruption; or to cases of immorality, or criminal misconduct".

In these expressions, the word "immorality" refers to conduct which is no of a judicial character and which is not criminal.

CONVENTION DEBATES

Having read the relevant parts of the debates in Adelaide in 1 and Melbourne in 1898, I am somewhat doubtful of the usefulness of the r made by the delegates, as a guide to the proper construction of s.72. Th discussion was sometimes a little confused, the delegates' notions as to likely effect of the proposed provisions were not by any means all the sa and it is unsafe to assume that those who did not speak out necessarily a with those who troubled to voice their opinions. All that having been sa in my view it is impossible to extract from the records evidence that any single delegate believed that the operation of s.72 would be limited in t fashion suggested by the learned Solicitor-General. The closest approac such an expression of view which I have been able to find was the speech Mr. Isaacs (later Isaacs J.) on 20th April 1897 (pp. 948-9) which is also referred to by the Solicitor-General. At one stage in this address (in t left-hand column of p.948) Isaacs implied that the word "misbehaviour" in this context is absolutely confined to misbehaviour as a judge, but he di not say that he favoured limiting the power of removal to that narrow gro He seemed to commend to the other delegates a

the then Victorian Constitution, which he summarised as follows:

> "So that a judge holds office subject to removal for two reasons - first, if he is guilty of misbehaviour, and, secondly, if the Parliament thinks there is good cause to remove him, when they may petition the Crown to do so".

He then quoted the passage from Todd set out in paragraph 5 of the Solicitor-General's opinion. It has been observed by another, and I agree, that the critical sentence in Todd commencing "Misbehaviour includes" is hardly suggestive of an exhaustive definition. At p.949 Isaacs quoted further from Todd:

> "But, in addition to these methods of procedure, the Constitution has appropriately conferred upon the two Houses of Parliament - in the exercise of that super-intendence over the proceedings of the courts of justice which is one of their most important functions - a right to appeal to the Crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of its judicial office.... This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held".

Note that the word "misbehaviour", where last used, plainly refers to misbehaviour other than that which would at common law have operated to put an end to an office held during good behaviour. Reading the remarks of Isaacs as a whole, there seems to me no solid ground for saying that he thought that the use of the word "misbehaviour" in the Constitution would confine the power of removal in the way suggested by the Solicitor-General - even if it were legitimate to infer that all the other delegates had the same view as did Isaacs.

I have noted, also, as additional evidence that Isaacs did not regard the use of the word "misbehaviour" in the then Clause 72 as [illegible]

any precise technical significance, the fact that he, like others, used the word "misconduct" in debate as synonymous with misbehaviour - see for example p.312 of the record of the Melbourne Convention, 31st January 1898.

I disagree, then, with the view of the Solicitor-General that s.7 in referring to misbehaviour used the word "in the technical sense understc by the delegates" - p.12. I think this is based upon a misreading of the debates and upon the misapprehension that at the end of the 19th century the notion of judicial misbehaviour justifying removal from office had some received technical meaning. The contrary is so; the Privy Council had long before made clear that such misbehaviour could consist in a variety of reprehensible action or inaction, including mere immorality, or commercial misconduct not amounting to the commission of an offence at all. I note that Mr. Wise, at p.945 and p.946 of the Adelaide debates, referred to colonial removal cases in terms which showed he was alive to the point that no crimin conduct is necessary to justify removal.

GENERAL

In my opinion, too much has been made of Todd's statement as to what misbehaviour "includes". Further, there has been drawn too readily the conclusion that the use of the word "misbehaviour" was intended to incorporat the law as to removal of judges in England prior to the Act of Settlement 170 An interesting example of this is to be found in the opening passage of Quick & Garron's "Annotated Constitution of the Australian Commonwealth" para. 297, in which the learned authors quote part of the passage from Coke

on p. 6 above. Notice that the authors quote, as if it laid down Australian law, Coke's view that "quamdiu se bene gesserit must be intended in matters concerning his office", implying that misbehaviour in non-judicial life cannot be relevant - a view which they immediately contradict by quoting Todd.

In my opinion, a safer course is to come to the Constitution unaided by any authority, in the first place, and see if there is an ambiguity. Is the word "misbehaviour" obscure? One is assisted, in construing it, by the fact that it is the justices of the High Court and of other courts who are being spoken of. It is, when one keeps the subject matter in mind, unlikely that it was intended to make judges who are guilty of outrageous public behaviour, outside the duties of their office, irremovable. I suggest an example suggested by an American impeachment case: Suppose a High Court judge took office as Patron of a political party, used the prestige of his office in making public addresses urging people to vote for that party, and openly engaged in election campaigns as a speaker, promoting the party's policies and attacking those of the other side. Although such conduct would be by no means an offence and would, indeed, be free from blame if done by anyone other than a judge, surely it would justify removal. I do not say that Parliament would be <u>obliged</u> to remove such a judge - merely that that would constitute misbehaviour giving rise to a discretion to remove him. It would be misbehaviour in a High Court judge, though not in an ordinary man, because it must lead to utter destruction of public confidence in the judge's ability properly to decide matters before him having a political flavour.

Argument against my view is based on the fact that the attachr to an office held for life, of a condition of good behaviour has been h not to put an end to the holding of the office, as to conduct outside official duties, in the absence of proof of a conviction. The reasons f my believing that that doctrine should not be held to govern the use of word "misbehaviour" in s.72 may be summarised as follows:

1. As to the judiciary, both in England and the Colonies it had become clear before 1900 that the power to remove for judicial misconduct was not so confined.
2. The law with respect to non-judicial removals, as to conduct outside office, required a conviction; the language of s.72 at least makes it clear that that is not necessary.
3. As a matter of practicality, it would have been foolish to leave Parliament powerless to remove a judge guilty of misbehaviour outside his duties, as long as an offence could not be proved; that remark applies particularly to the High Court, which was to occupy a position at the pinnacle of the Australian Court system, and to exercise a delicate function in supervising compliance with the requirements of the Constitution on the part of legislatures.

I note that the opinion of Sir Garfield Barwick, quoted by the Solicitor-General, is inapplicable to the construction of s.72 for two rea

firstly, because it relates to the construction of a condition as to good behaviour, which is not to be found in s.72; secondly, it has not to do with removal of judges under s.72 or at all, but to the security of tenure of bank officers. Lastly, I record the comments of the delegates at p.952 of the Adelaide convention, as casting doubt on the theory that there was an intention to limit the plain words of s.72 by ancient technical rules:

> "Mr. Isaacs: Who would be the judges of misbehaviour in case of removal of a judge?
>
> Hon.Members: The Parliament.
>
> Mr. Barton: The two Houses of Parliament.
>
> Mr. Isaacs: Would they be the judge of the misbehaviour?
>
> Mr. Barton: Unquestionably.
>
> Mr. Isaacs: If that is so it is all I contend for."

SUMMARY OF OPINION

As a matter of law, I differ from the view which has previously been expressed as to the meaning of s.72. I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no "technical" relevant meaning of misbehaviour and in particular it is not necessary, in order for the jurisdiction under s.72 to be enlivened, that an offence be proved.

C.W. PINCUS

14th May 1984

Government will be building on its proud record of sound economic management and progressive social reform which was established by last year's Budget and consolidated during the Autumn sittings this year.

This government has had to tackle, during its seventeen months in government, economic and social problems of a kind not seen in this country for over 50 years. Our program should be seen in this light.

Our major objective this sitting will be to provide sufficient fiscal stimulus to maintain the momentum of private sector expansion, including by direct support for business; to provide further improvements in pensions and other welfare payments, to provide tax cuts which will support the accord, boost family income and stimulate consumer spending - all this while achieving a significant reduction in the Budget deficit.

In addition to the key Budget Bills already introduced on Budget night we intend introducing further Bills to amend the Income Tax Assessment Act, the Income Tax (International Agreements) Act and the Bank Account Debits Tax Administration Act to implement measures announced in or before the Budget. We intend to continue our fight against tax avoidance with Bills to counter trust stripping schemes.

In addition to revising the Medicare levy threshold and ceiling we will introduce a Bill to amend the National Health Act and the Health Insurance Act which will, among other things:

alter drug pricing arrangements; and

encourage provision of respite care in nursing homes.

We will introduce a Bill to implement a new Commonwealth State Housing Agreement which will launch a ten year assault on housing-related poverty. In addition to a further social security and repatriation legislation amendment Bill we intend if time permits to introduce a supported accommodation assistance program to provide support for those in crisis situations and for the chronically homeless.

(The home and community care part of the aged care package is to be introduced in the Autumn sittings next year.)

We intend to amend the Trade Practices Act by repealing sections 45D and 45E and will be amending the Conciliation and Arbitration Act to provide a mechanism whereby secondary boycott disputes can be dealt with by the Conciliation and Arbitration Commission.

We also intend to introduce a Bill to bring about a major consolidation of all existing veterans' entitlement legislation.

The Government will be embarking on major industry restructuring and assistance measures all of which have already been announced and some extensively canvassed. Briefly these will include legislation to:

establish an automotive industry authority as part of the revised assistance to the industry. Associated with this initiative will be the introduction of measures to provide support for the design and development of motor vehicles;

revise industry arrangements for the retail marketing of petrol;

amend the Petroleum (Submerged Lands) Act to facilitate and encourage off-shore petroleum exploration and development activity, and to give effect to the area to be avoided by ships around the Bass Strait petroleum production facilities;

introduce a package of Bills to restructure the wheat marketing and pricing arrangements;

revise arrangements for the fishing industry to introduce a new management policy and further assistance measures;

amend the export inspection charge provisions for meat, dairy products and eggs following review of these procedures;

revise arrangements for the canned fruits marketing industry.

The Government also intends to introduce, if time permits, a package of Bills to reorganise the dairy marketing industry. These will not be passed during the Budget sittings but will provide the opportunity for detailed public debate to take place on a more informed basis.

As already announced by the Minister for Education and Youth Affairs the Government will introduce a major item of legislation to revise the system of grants to the States and the Northern Territory for schools assistance. This will be introduced together with States Grants Bills for tertiary education, as well as Bills to adjust grant levels in line with cost supplementation arrangements.

In line with an announcement made last April the Government intends introducing a Bill to amend various electoral, health, social security and education Acts to bring arrangements for Christmas Island broadly into line with the rest of Australia.

Bills will also be introduced to:

enhance the role, jurisdiction and enforcement powers of the Human Rights Commission;

introduce changes to the supplementary licence scheme for broadcasting and television in preparation for its early commencement;

guarantee borrowings raised by Qantas to purchase Boeing 767 aircraft;

enhance the Commonwealth's ability to collect air navigation charges and introduce separate airport charges;

enable the *Empress of Australia* to be replaced, thereby ensuring the survival of the Bass Strait sea passenger service;

replenish Australia's contribution to the International Development Fund;

restrict the use of Australian passports to Australian citizens and remove the distinction between immigrants who are British subjects and those who are not;

implement the report of the remuneration tribunal in respect of salaries and allowances following the 1984 general review.

In addition the usual Statute Law (Miscellaneous Provisions) Bill will include a number of matters of minor significance.

We will of course be proceeding with Bills before the Parliament, including:

The Constitution Alteration Bills;

Defence and Repatriation Bills;

Conciliation and Arbitration; and

the six Export Inspection Charge Bills

As always, unforeseen circumstances may give rise to additional legislation and pressure on parliamentary debating time as well as on the Parliamentary Counsel's time and resources may not enable all of the legislation forecast to come forward as soon as we would like. In addition, the Government may still consider other measures which could result in legislation in the current sittings. However, the program I have outlined continues the direction of reform established by the Government thus far.

I commend the Government's program and look forward to the assistance of honourable senators in its implementation.

SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

Ministerial Statement and Notices of Motion

Senator GARETH EVANS (Victoria—Attorney-General) - by leave - I wish to make a statement on the Government's response to the report of the Senate Select Committee on the Conduct of a Judge. The issues confronting the Government and the Senate arising out of the report of the Senate Select Committee on the Conduct of a Judge are about as serious as could possibly be imagined. An allegation has been made against a very senior Federal judge that, if substantiated, would amount to the commission by that judge of the criminal offence of attempting to pervert the course of justice. The evidence in support of that allegation has failed to convince the Senate Committee as a whole that there is a prima facie case against the judge, but equally it has failed to convince all members of the Committee that there is not.

The decisions that are taken on this report will have major consequences for the independence and the integrity of the Federal judiciary and the whole balance of power between the courts, the Executive Government, and each House of Parliament. Also, they obviously will have the most important consequences for the Federal judge concerned, Mr Justice Lionel Murphy, who has served on the High Court since 1975. He is now the most senior judge on the High Court, after the Chief Justice and Sir Anthony Mason, and, as occasion requires, presides over that court.

The matters to be dealt with must therefore not be approached lightly or dismissively, or in any partisan spirit. It is particularly important that the decisions we make in this matter—either on the part of Government or on the part of the Senate—not be a hothouse reaction to passing pressures that ignore the deeper issues and values that are involved. What we do now transcends the particular case. It will set the pattern for how our institutions respond in future to grave allegations of judicial misconduct without jeopardising the independence and integrity of the judiciary.

Proper Approach to Section 72

The decisions we take need to be taken in the light of the proper procedure and criteria to be applied when a House of Parliament addresses a question of misbehaviour under section 72 of the Constitution. Section 72 provides that a Federal judge:

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 the removal on the ground of proved misbehaviour or incapacity.

Address for removal is the only action that Parliament can take.

The Government's position on the criteria and procedures that are available under section 72 has been clear from the outset. On 28 February, I tabled the opinion of the Solicitor-General, which I believed—and still believe now—to be the sound and the correct interpretation on this matter. It pays due regard to the role of the Houses of Parliament, and at the same time addresses the basic issues of the independence of the judiciary and the separation of powers. The Government does not accept the view of section 72 contained in the opinion of counsel to the Senate Committee, Mr Pincus, QC, insofar as it supports giving each House of Parliament more or less unfettered freedom to say what private misconduct constitutes misbehaviour. In this connection, Mr President, I now table a supplementary opinion by the Solicitor-General, which confirms his earlier opinion and explains in full the reasons why he, as does the Government, rejects Mr Pincus's approach. The Government's view, based on the authorities fully cited by the Solicitor-General——

Senator Chipp—Do you table that or incorporate it?

Senator GARETH EVANS—I am happy to incorporate it in *Hansard*, if I have leave to do so, at the conclusion of the statement.

Senator Chipp—That would be valuable, if the Attorney-General would not mind doing so.

The PRESIDENT—Will the Attorney-General seek leave to have the document incorporated in *Hansard* at the end of the statement?

Senator GARETH EVANS—I will, Mr President. The Government's view, based on the authorities fully cited by the Solicitor-General, is that the concept of 'proved misbehaviour' in section 72 has only two possible areas of application. The first area is misbehaviour in the exercise of judicial functions, including neglect or non-attendance. In the absence of any question of criminal or civil liability of a kind appropriately

proved in the courts, 'proof' here would have to be to the satisfaction of each House of the Parliament, following procedures established by Parliament.

The second area is misbehaviour involving a breach of the general law of such a quality as to indicate unfitness for office. Parliament would normally rely for 'proof' here on the outcome of ordinary court proceedings, but Parliament could also, should it choose to do so, prove the matter to its own satisfaction by properly established parliamentary procedures.

Counsel for the judge, Mr David Bennett, QC, has expressed the view that a conviction in court is necessary to establish 'proved misbehaviour', at least in relation to conduct not immediately pertaining to the duties of judicial office. The Government's view, as I have previously indicated to the Parliament, is not so limited. The traditional authorities, in particular Quick and Garran, in their *Annotated Constitution of the Commonwealth of Australia*, acknowledge a proper determining role for Parliament itself, although emphasising the very judicial way in which Parliament would need to act in such matters. Thus Quick and Garran say:

> No mode is prescribed for the proof of misbehaviour or incapacity, and the Parliament is therefore free to prescribe its own procedure. Seeing, however, that proof of definite legal breaches of the conditions of tenure is required, and that the enquiry is therefore in its nature more strictly judicial than in England, it is conceived that the procedure ought to partake as far as possible of the formal nature of a criminal trial; that the charges should be definitely formulated, the accused allowed full opportunities of defence, and the proof established by evidence taken at the Bar of each House.

The reference is to the 1901 edition, at page 732. While acknowledging a proper role for Parliament itself, as well as the courts, in establishing 'proved misbehaviour' for the purposes of section 72, the Government does not, however, accept that it would be constitutionally capable for the actual proof of misbehaviour to be vested in any other kind of body—for example, a royal commission, or a parliamentary commissioner or parliamentary commission purporting to exercise power delegated by one or both Houses. This follows, in our view, from the necessarily judicial character of the 'proving' process; it is a very long established principle in Australian constitutional law that Federal judicial power can be exercised only by courts either created or vested with jurisdiction under chapter III of the Constitution, and there could be few more sensitive tasks of a judicial character than determining proof of misbehaviour against a High Court judge. The only exception, as we see it, to the rule requiring judicial proof or court proof is that which enables proof to the satisfaction of Parliament itself, and that power is in turn vested in the Parliament by virtue of section 72 (ii)—itself part of chapter III of the Constitution which gives the legislature a central role in the removal process.

The most fundamental difficulty with Mr Pincus's interpretation of section 72—insofar as it would allow Parliament to range more or less at will in determining what constitutes 'proved misbehaviour' rather than being confined to the two categories I have identified above—is that it takes no account of the object or purpose of security of tenure given to judges by section 72. The Solicitor-General's original opinion points out that section 72 was intended to give 'conscious effect to the principle that the judiciary in our Federal system should be secure in their independence from the legislature and the executive'. The Pincus opinion just does not address the issues of judicial independence and separation of powers, and the consequences—for removal procedures under the Constitution—that flow from the emphasis given in the Constitution to those principles. Quick and Garran put the point very well at page 733 of their book quoting the relevant part of Todd's *Parliamentary Government in England*:

> The peculiar stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of the federal nature of the Constitution, and the necessity for protecting those who interpret it from the danger of political interference. The Federal Executive has a certain amount of control over the Federal Courts by its power of appointing Justices; the Federal Executive and Parliament jointly have a further amount of control by their power of removing such Justices for specified causes; but otherwise the independence of the Judiciary from interference by the other departments of the Government is complete. And both the Executive and the Parliament, in the exercise of their constitutional powers, are bound to respect the spirit of the Constitution, and to avoid any wanton interference with the independence of the Judiciary. Complaints to Parliament in respect to the conduct of the judiciary, or the decisions of courts of justice, should not be lightly entertained . . . . Parliament should abstain from all interference with the judiciary, except in cases of such gross perversion of the law, either by intention, corruption, or incapacity, as make it necessary for the House to exercise the power vested in it of advising the Crown for the removal of the Judge.

Some classes of 'misbehaviour' may not be subsumed by the approach of Quick and Garran—for example, partisan political activity or notorious private behaviour not directly related to, or affecting, the conduct of judicial office. So be it. What may be a cause for admonition by the Chief Justice of the court in question, peer group pressure and like forces, should not necessarily be regarded as grounds for dismissal. The separation of powers principle demands that the power of Parliament to remove a judge not extend to undefined residual areas of behaviour which are neither clearly illegal nor clearly related to the performance of judicial duties.

The 'Age' Tapes and the Briese Allegation

It is well to recall that the Senate Committee was established to inquire into and report upon the conduct of the judge as revealed by the *Age* tapes and transcripts. The Committee's findings on this question could not be more clear-cut. They were, first, that it was unable to conclude that these materials relating to the conduct of a judge were authentic or genuine except to the limited extent that limited acknowledgements had been made. Secondly, as to the tape recordings, there is nothing contained therein which could amount to or provide evidence of misbehaviour of the judge, whatever interpretation of section 72 of the Constitution is accepted. As to the transcripts, the Committee reported that no facts had been established in respect of conduct revealed by them which constituted misbehaviour under section 72, whatever interpretation of misbehaviour is accepted. Well may David Solomon say in the *Australian Financial Review* of 28 August that the *Age* 'did not come out covered in glory from the Senate investigation' and that:

> . . . it is quite extraordinary that a paper which is generally concerned about proprieties should have carried such a thin report of the Committee's conclusions about material which the *Age* itself had published so prominently.

I say no more on that aspect.

The nub of the Committee's report clearly concerns the allegation made to it in the course of its inquiry by Mr Clarrie Briese, Chief Stipendiary Magistrate of New South Wales. The criminal nature of the allegation appears to have been downgraded by some commentators, but I point out that the Committee agreed, in paragraph 79 of its report, that the allegation of Mr Briese, if sustained by the evidence, was that Mr Justice Murphy had engaged in conduct which constituted the offence of attempting to pervert the course of justice. The Committee specifically referred to the offence to that effect created by section 43 of the Commonwealth Crimes Act. That is a very grave charge. The Committee did not seek to rule as a court on this charge but specifically limited itself to considering whether the evidence by Mr Briese could constitute the offence of attempting to pervert the course of justice. There was a difference of views on the Committee, as all know. Senators Tate, Crowley and Bolkus did not believe that the evidence of Mr Briese was of sufficient strength to establish a prima facie case of misbehaviour by the judge. Senator Durack and Senator Lewis, without finding that the judge had been guilty of misbehaviour, concluded that there was a prima facie case against the judge. Senator Chipp, for reasons he carefully explained in his dissenting report and in his statement to the Senate on 24 August, felt unable to express a conclusion on this matter.

The seriousness of this offence and the clear division of opinion in the Committee have led the Government to conclude that further action of some kind needs to be taken to clear the air, and to remove the cloud hanging over the judge and the High Court. The question is what. So far as misbehaviour occurring otherwise than in the exercise of judicial functions is concerned, there are simply no precedents to bind or guide us, except that during the term of my immediate predecessor, Senator Durack, a serious criminal charge involving conduct not pertaining to judicial office was brought against a member of the Family Court of Australia and the judge was acquitted. Apparently that was regarded as the end of the matter. On that occasion, certainly, the matter was not raised in the Senate by Senator Durack or, so far as I am aware, by any other senator. Certainly, the situation in relation to investigations by Senate committees on matters of routine legislative inquiry provides no precedent as to the course that the present Committee should have followed, or that we in the Senate should now follow or authorise, in relation to the interrogation of the judge in the context of the possible application of section 72 of the Constitution.

Possible Approaches for Resolution of the Matter

The Government has therefore given most serious consideration as to how this situation should be dealt with. One approach would be to consider the institution of criminal proceedings, having regard to the essentially criminal nature of the allegation that has been made. A second approach would be to confine further consideration of the matter to the Parliament, in particular by reconstituting the Senate Committee and directing it to conduct on this occasion a judicial examination of the issues relating to Mr Briese's allegation. A third general approach that has been carefully considered is whether the resolution of these matters might most appropriately be

achieved by a person or body, other than a criminal court, outside the political and parliamentary arena.

Approach I—Criminal Proceedings

In the Government's view, the proper course to adopt at this stage is to exhaust the criminal prosecution option before considering any other approach. This is justified by:

the nature and seriousness of the allegation, which has been made on oath and tested by parliamentary committee examination;

the belief by two Committee members that a prima facie case has been made out, with a third member not persuaded to the contrary; and

the likely inability of non-court and non-parliamentary procedures, including a royal commission or parliamentary commissioner, so called, to satisfy the technical 'proved misbehaviour' requirement in section 72 of the Constitution.

If it can be established that Mr Justice Murphy used the words 'and what about my little mate?', and did so with the intention of influencing the course of the committal proceedings involving Morgan Ryan, then the character of this conduct is criminal. If he did not use those words, or used them without that intent, then the conduct is innocuous. There is no middle ground in relation to that conduct. At this stage there is no evidence at all available to the Government to enable it to form a view on this question. All the Government has is the Senate Select Committee's summary of what Mr Briese has said in sworn evidence to the Committee. That, of course, is classic hearsay.

Since the tabling of the report in Parliament on 24 August 1984 Mr Briese has indicated to the Australian Federal Police, on an approach initiated by me, that:

(a) he did not propose to be interviewed at this stage;

(b) he did not intend to make a formal complaint; and

(c) he will decide his future conduct in the light of the decisions, if any, taken by the Parliament.

According to the Committee summary, Mr Briese gave evidence of a conversation which occurred when the judge telephoned Mr Briese and said he had discussed the question of the independence of the magistracy in New South Wales with the New South Wales Attorney-General and the Government was going ahead with legislation to give effect to it. Mr Briese states that the judge then said to him: 'And now what about my little mate?'. The Senate Select Committee report then makes the following observations on this evidence:

> In evidence Mr Briese was unsure of the exact opening words of the inquiry ('and' or 'now' or 'and now') but was adamant that the question was asked with such emphasis as to suggest a link between the inquiry and the preceeding conversation
>
> The Judge's recollection is that he did not use the expression 'my little mate'.

The description I have just given of the relevant events is based upon Appendix 5 of the Committee's report. Essentially what emerges is two materially different versions of the events—Mr Briese's version and the judge's version.

Assuming the judge did make the statement 'and now what about my little mate?' with the intention of influencing the course of the Morgan Ryan committal proceedings, there are three provisions of Commonwealth criminal law which may be relevant:

(a) section 33 of the Crimes Act 1914, which deals with official corruption and provides for an indictable offence with a maximum penalty of 10 years imprisonment;

(b) section 43 of the Crimes Act 1914, which deals with attempting to pervert justice with a maximum penalty of 2 years imprisonment; and

(c) section 7A of the Crimes Act 1914, which deals with inciting to or urging the commission of offences with a penalty of $2,000 or imprisonment for 12 months.

The 'Prosecution Policy of the Commonwealth,' tabled in the Parliament on behalf of the then Attorney-General, Senator Durack, in December 1982, lays down three principles which must be satisfied before prosecutions should be brought—

(a) the evidence must establish a prima facie case against the defendant;

(b) a prosecution should not normally proceed unless there is a reasonable prospect of conviction. It should be rather more likely than not that the prosecution will result in conviction—the so-called 51 per cent rule;

(c) whether in the light of provable facts and the whole of the surrounding circumstances, the public interest requires the institution of the prosecution.

(a) Prima facie case. The purpose of this rule is to ensure that the evidence in support of the prosecution is sufficient to establish the commission of the offence on the criminal standard of beyond a reasonable doubt. This principle must be satisfied by the application of objective professional judgment. Failure to apply this standard would be contrary to processes of the law and may expose an initiator of the prosecution to action for malicious prosecution.

(b) The 51 per cent rule. There are precedents to support the proposition that in cases of this kind a prosecution should be brought to clear the air, notwithstanding that the available evidence may not satisfy the 51 per cent rule. Sir Thomas Hetherington, the English Director of Public Prosecutions, has recently said that the 51 per cent chance of conviction rule will not be applied in the case of allegations against police officers, whose public position requires the ventilation in court of allegations which amount to prima facie evidence of crimes.

(c) Public interest considerations. It is axiomatic that prosecutions should not be brought otherwise than in the public interest. The question which arises is whether, in the light of provable facts and the whole of the surrounding circumstances, the public interest requires that a prosecution be brought. Among the many considerations that may be relevant in this respect is the desirability, even in circumstances of a relatively weak *prima facie* case, of bringing a prosecution to clear the air. One New South Wales precedent comes to mind: In 1964 a member of the typing pool at Parliament House made allegations of criminal misconduct against the then Chief Secretary. The Solicitor-General, although unconvinced of the likelihood of a prosecution succeeding, deemed it in the public interest to lay charges, and to instruct the President of the New South Wales Bar Council, then John Kerr QC, to prosecute. After hearing evidence, the magistrate declined to commit.

There are three persons who could make a decision to prosecute: (a) Mr Briese—or for that matter any private persons; (b) the Attorney-General; or (c) the Director of Public Prosecutions.

Mr Briese may be put aside at the outset. Although this course is open to him at law, he has made it clear that he does not intend either bringing proceedings, or making a complaint at this stage.

The Attorney-General could take the initiative in the matter. Notwithstanding the existence of the DPP it would be open to me to consider criminal proceedings, and institute them if I saw fit. I refer to section 10 of the Director of Public Prosecutions Act 1983. However, I have decided not to do so in this case. In reaching this decision I have had regard to the following matters:

(a) The Government has recently established the office of DPP to revitalise, and bring greater independence to, the prosecution of offences against the laws of the Commonwealth. I do not consider that I should bypass the proper function of the DPP in this matter. I envisage doing so only in the most exceptional circumstances.

(b) Much of the debate in this matter has been in the political arena. Should I decide not to prosecute or should I decide to prosecute and the prosecution fails, the criticism may well be made that these processes lacked independence. The DPP has been established to provide the degree of independence which is required.

This leaves only the DPP, and the Government has decided that he is the appropriate person to make any decision whether or not to prosecute. I accordingly foreshadow that I shall be moving at the appropriate time in the following terms:

That the Senate—

(1) refer—

(a) all evidence given before the Senate Select Committee on the Conduct of a Judge; and

(b) all documentary or other material furnished to the Committee,

relevant to the Briese allegation, to the Director of Public Prosecutions for consideration by him whether a prosecution should be brought against the judge, and

(2) request the Director of Public Prosecutions, should he conclude that a prosecution not be brought, to furnish a report to it on the reasons for reaching that conclusion.

If criminal proceedings are brought and determined only two consequences can follow: If the judge is convicted—presumably of attempt to pervert the course of justice under section 43 of the Crimes Act—the precondition of 'proved misbehaviour' under section 72 would appear to be clearly established, and an address could proceed without further Committee deliberation; if the judge is acquitted there would be no apparent remaining basis, so far as the particular Briese allegation was concerned, for any suggestion of some lesser form of section 72 misbehaviour.

Approach II—Further Parliamentary Procedures

Further consideration by the Parliament of the issues involved in an option which is certainly technically available on the views expressed on

section 72 of the Constitution by the Solicitor-General and by me. However, the Government's view is that further consideration by Parliament should only proceed after exhaustion of the criminal prosecution option, as already outlined. There are a number of reasons why a further parliamentary procedure is not appropriate or desirable at this stage, but should only be a matter—if at all—of last resort.

First, given that the Committee was evenly divided on the question as to whether it should proceed from its initial investigative phase to a more formal 'judicial' phase, there would seem to be a strong case for an independent expert assessment of the question of whether there is a prima facie case, such as to justify a full scale 'judicial' proceeding, before that course is embarked upon. Secondly, while there may not always be any alternative procedure available for the resolution of particular kinds of section 72 misbehaviour questions that may arise, when as here the allegation is of criminal conduct, the Senate should be very slow to proceed to try the issue itself rather than resorting to the ordinary criminal processes.

Thirdly, allegations of criminal conduct demand compliance with rigorous procedures, and the careful application of appropriate standards of proof, by persons who are both expert and detached. I imply no criticism of the Senate Committee or any of its members, but the fact remains—as they would readily concede—that its members are less well-equipped to resolve these questions than the established procedures and institutions of the criminal law. Fourthly, the fact that a High Court judge is involved here means, consistently with separation of powers principles, that Parliament should involve itself in the process when, and only when, it is necessary for it to do so. It is not necessary for it to do so now since 'proof' of misbehaviour may be sought by other means, namely the ordinary criminal processes, and that again would appear the proper avenue for resolving the matter in the first instance.

None of these considerations weigh conclusively against any further consideration of this matter by a properly constituted—or reconstituted—parliamentary committee. I simply emphasise the desirability of matters of this kind, and gravity, being dealt with by ordinary criminal processes so far as is possible. In the event, however, that the DPP should advise that on the material presently available there is no basis on which a prosecution could or should proceed, it may be that the Parliament—the Senate—would wish to reconsider the question of some further Committee proceeding. Certainly, for reasons I shall shortly set out, there would appear to be no other appropriate machinery on which Parliament could properly rely for such further consideration.

If the Senate were to take the course of constituting or reconstituting a committee to conduct a further so-called 'judicial phase' inquiry, the appropriate course would appear to be to follow the general lines of the submission made by Mr Hughes, QC, on behalf of the judge -and endorsed in the report of Senators Durack and Lewis—by applying the principles of natural justice as follows:

(a) Taking any necessary evidence or further evidence in the presence of the judge and his counsel;

(b) permitting cross-examination of witnesses; and

(c) allowing the judge to then determine whether or not he would give sworn evidence and be subject to questioning by the Committee.

Approach III—Extra-parliamentary determination of issues (otherwise than through institution of criminal proceedings)

The Government has also considered other options for the determination of issues arising in this matter, in particular the following three possibilities which have each received a degree of public attention:

(a) An application by the Government, or possibly by the Senate through its President, to the High Court to resolve the questions both of law and fact that are raised by the Briese allegation;

(b) A royal commission specifically inquiring into the Briese evidence in relation to Mr Justice Murphy;

(c) A parliamentary commissioner or multi-member commission exercising delegated power from the Senate to determine the facts.

The Government has concluded, for reasons I shall now set out, that the problems with each of these courses are such as to warrant their exclusion from further consideration.

(a) APPLICATION BY GOVERNMENT OR THE SENATE TO THE HIGH COURT TO RESOLVE THE QUESTIONS OF BOTH FACT AND LAW

Although this approach would be a move to take the matter out of the political arena and to have all issues authoritatively decided, there is no obvious way of initiating proceedings in the High Court which the High Court would accept as both within its jurisdiction and within its duty to determine. I am not satisfied, in the absence of the kind of advisory opinions, jurisdiction that would have been available had a referendum proposal been put and passed on this occasion, that the High Court would have jurisdiction, and the Solicitor-General agrees. Moreover, it may be necessary for either the Senate or the Government to act as complainant and allege misbehaviour on the part of the judge in order to have standing to bring the matter before the Court. On the information available to it, the Government would not be prepared to take that course.

(b) ROYAL COMMISSION SPECIFICALLY INQUIRING INTO ALLEGATION OF MR BRIESE

The purpose of such a royal commission would be to establish a non-political impartial investigation by a body with coercive powers. However, there is an important question of principle whether that would be an appropriate step for the Executive Government to take, having regard to the independence of the judiciary.

Also, there must be a real doubt whether the Executive Government can, through a royal commission appointed by it, compel a Justice of the High Court to attend and answer questions relating to his possible removal. Clearly, there would be the possibility of a constitutional challenge.

The royal commission's report would not legally conclude anything. Its findings could not bind the Senate. In the final result, if the commissioner reported that the judge was guilty of the conduct complained of, parliamentary or criminal proceedings would need to be taken and the whole matter reheard. It is also relevant to mention here that evidence given by the judge before the commission would not be admissible against him in legal proceedings. Similar considerations apply in relation to a possible reference of the matter not to a royal commission but to the National Crime Authority; the only significant procedural difference between the Authority and a royal commission for present purposes being that while the evidence of the judge would be usable in subsequent proceedings, the excuse of self-incrimination would be available.

(c) PARLIAMENTARY COMMISSIONER OR COMMISSIONER EXERCISING DELEGATED POWERS FROM SENATE

There is no clear precedent for what has been proposed in relation to the appointment of a parliamentary commissioner with compulsive powers to conduct a hearing to determine the facts. Such nineteenth century English precedents as have been referred to appear to fall short of what is involved in the present case. It is not clear to extent power was claimed and exercised to compel witnesses to appear before the persons appointed in those cases to gather information or examine documents or accounts on behalf of the parliamentary committees in question.

The Senate in 1982, on a motion by me, directed Senators Chaney and Guilfoyle to deliver to Sir John Minogue, QC, a retired judge, papers relating to tax avoidance and evasion. This was done so that Sir John Minogue could be given the function of editing 'bottom of the harbour' legal opinions held by the then Government with a view to the documents in their edited form being tabled in the Senate. This too falls far short of what would be involved in setting up a parliamentary commissioner with powers to conduct a hearing and to make findings of fact.

It follows that there must be a doubt about the power of the Senate to compel the attendance of witnesses before a parliamentary commissioner. Legislation could be considered to deal with this deficiency. However, the enactment of legislation purporting to delegate the 'misbehaviour-proving' function to a commissioner, while removing one possible area of legal uncertainty, would nonetheless still not put beyond doubt the possibility of a constitutional challenge arguing that such 'proving' had to be, if not by a court, then by Parliament itself, or at least by a parliamentary committee.

As well as the uncertainty in relation to the power to compel testimony before the parliamentary commissioner, there would also be uncertainty as to the protection available to the commissioner and witnesses in relation to things said in the course of the hearing. Obviously a question would arise whether the proceedings before the commissioner could be regarded as 'proceedings in Parliament' within the meaning of the protection afforded by the freedom of speech and debate clause contained in Article 9 of the Bill of Rights as applied to the Senate by section 49 of the Constitution. It would be important for those taking part in the proceedings before the commissioner, and for the commissioner himself, or the commission members themselves that the same privileges and immunities be available as if the proceedings were before a committee of the Senate, and firm assurances on this matter could not be given in the absence of express legislation.

This leads to a further problem with this course, and that is the question of whether it

would be possible to find a suitable person or persons who would have the necessary qualities for the most serious and unprecedented role he, she or they would be asked to undertake, and who would be available and willing to undertake that role.

Finally I point out, in case there may be some misunderstanding on the point, that even if the Senate were to appoint a parliamentary commissioner he or she could not actually determine the question of misbehaviour. His or her findings could not constitutionally bind any member of the Senate. It would still be a matter for the Senate to decide whether the conduct amounted to 'misbehaviour' and a trial at the Bar of the Senate may, in the absence of a conviction by a court, be necessary for this purpose.

Conclusion

The course which the Government proposes is, in summary, that there be a reference of the matter in the first instance to the Director of Public Prosecutions in order that the criminal prosecution option may be fully considered, with any necessary further consideration—other than by the criminal courts—being by way of parliamentary rather than any extra-parliamentary process. The Government firmly believes that not only is this approach likely in the long run to prove the most expeditious, but that it is the only appropriate, responsible and constitutionally sound means of resolving such concerns as may continue to be felt following the tabling of the Senate Committee report.

What is abundantly clear is that the longer this matter lingers, the greater will be the damage caused to the reputation and prestige of the High Court and to the respect afforded to the institution of the judiciary generally. There is an enormous burden resting upon the Senate, and it is important that we discharge it quickly, conscientiously and honourably. I seek leave to incorporate in *Hansard* the text of the Solicitor-General's opinion.

Leave granted.

The opinion read as follows—

In the matter of Section 72 of the Constitution

SUPPLEMENTAL OPINION

1. In this matter, the conclusions of my opinion of 24th February 1984 were

> Misbehaviour is limited in meaning in section 72 of the Constitution to matters pertaining to –
>
> (1) judicial office, including non-attendance, neglect of or refusal to perform duties; and
>
> (2) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office.

Misbehaviour is defined as breach of condition to hold office during good behaviour. It is not limited to conviction in a court of law. A matter pertaining to office or a breach of the general law of the requisite seriousness in a matter not pertaining to office may be found by proof, in appropriate manner, to the Parliament in proceedings where the offender has been given proper notice and opportunity to defend himself.

2. An Opinion dated 14th May 1984 of C. W. Pincus Q.C., counsel assisting the Senate Select Committee on the Conduct of a Judge, is Appendix 4 to the Committee's Report tabled in the Senate on the 24th August 1984. (As the paragraphs of the Pincus Opinion are un-numbered, I refer to it by its pagination in the published Committee Report).

The Pincus Opinion [at 13] extracts parts of paragraphs 19 and 21 of my opinion. I correct the following errors of transcription of these parts

Paragraph 19—

line 1. 'function' not 'jurisdiction'
line 2. 'discretion' not 'jurisdiction'
line 4. 'of a' not 'for'
line 8. 'related' not 'relating'

Paragraph 21—

line 5. 'incumbent' not 'encumbent'
line 8. add 'or' after 'moral'
line 10. delete 'is'

The Pincus Opinion then states

> Since, as will appear, I do not agree with the Solicitor General, it will be necessary to examine in detail the authorities on which he relies

The conclusion of the Pincus Opinion [at 27], under the heading 'SUMMARY OF OPINION', is –

> As a matter of law, I differ from the view which has previously been expressed as to the meaning of s.72. I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no "Technical" relevant meaning of misbehaviour and in particular it is not necessary, in order for the jurisdiction under s.72 to be enlivened, that an offence be proved.

I am asked to reconsider my opinion in the light of the Pincus Opinion.

3. I find it difficult to respond to the Pincus Opinion in any structured way. The Opinion does not acknowledge the distinction, shortly stated by *Quick and Garran* at 731 (set out in paragraph 5 below), that the tenure of British judges is determinable upon two conditions, namely for misbehaviour or by address from both Houses. The essential matter is that, with the English position in mind, the draftsmen of section 72 consciously departed from it. The relevant exercise in determining the meaning of the section is to identify these points of departure and to establish the consequences. The Pincus Opinion omits squarely to address these issues of construction arising from the terms of the section itself. Although the Pincus Opinion engages that it will examine in detail the authorities upon which I relied in my opinion, the course of its discussion is fixed more by reference to its own English and colonial precedents. For that reason, it is necessary separately to consider the force and relevance of the authorities drawn upon by the Opinion, and the manner in which they are put as advancing contrary argument.

4. It is necessary first to identify the matters of disagreement. The Pincus Opinion does not dissent from my conclusion that misbehaviour may be determined by Parliament. Unfortunately, it does not separately discuss the position in respect of misbehaviour pertaining to office. Misbehaviour of this sort, namely the improper exercise of judicial functions or wilful neglect of duty or non-attendance, was accepted by me as a matter to be found by proof in appropriate manner to Parliament. By inference, the Pincus Opinion does not demur from my conclusion that matters of these sorts are not predicated upon proof of any contravention of the law. Hence the difference between the opinions is limited to conduct not pertaining to office. My view is that a Parliamentary inquiry is limited to whether there is a contravention of law of the requisite seriousness. The conclusion of the Pincus Opinion [at 27] is that contravention of the law is not a relevant inquiry, it being for Parliament to decide whether 'any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office'.

5. In paragraph 15 of my opinion I accepted the analysis of *Quick and Garran* (at 731)

> The substantial distinction between the ordinary tenure of British Judges and the tenure established by this Constitution is that the ordinary tenure is determinable on two conditions; either (1) misbehaviour, or (2) an address from both Houses; whilst under this Constitution the tenure is only determinable on one condition that of misbehaviour or incapacity- and the address from both Houses is prescribed as the only method by which forfeiture for breach of the condition may be ascertained.

Quick and Garran (at 733-4), explain the reason for this difference (set out in full in my paragraph 9), namely, that

> The peculiar stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of the federal nature of the Constitution, and the necessity for protecting those who interpret it from the danger of political interference.

For the reasons stated, I found that it was only misbehaviour falling within the first condition referred to by *Quick and Garran* which was embraced within the meaning of 'misbehaviour' in section 72. I also accepted that misbehaviour in this sense meant misbehaviour as a breach of condition of office held during good behaviour. Further, as noted above, I expressed the view that the improper exercise of judicial functions, and wilful neglect of duty or non-attendance, were matters which, if established, would constitute misbehaviour, and that for the purposes of section 72 such misbehaviour was not predicated upon proof of any contravention of the law. It was, and remains, my opinion that in matters of misbehaviour not pertaining to office, it is necessary for there to be proved a contravention of the law of the requisite seriousness.

6. As it does not address itself to the dichotomy between conduct pertaining to office and other conduct, much of the Pincus Opinion is directed to a false issue, namely, to establish that the word 'misbehaviour' in section 72 is not limited to 'proof of an offence'. The true differences seem to be first, that I regard 'misbehaviour' in section 72 as having a meaning limited to behaviour constituting a breach of condition of office held on good behaviour and, secondly, that in respect of misbehaviour not pertaining to office, my opinion is that such misbehaviour may be constituted only by a contravention of the law of the requisite seriousness. The relevant conclusion of the Pincus Opinion seems to be that for all categories of misbehaviour contravention of the law is not a relevant enquiry, and [at 27] that it is for Parliament to decide whether 'any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office'. Apparently Parliament is to be guided in the task of enquiry as to whether 'proved misbehaviour' is established by reference to expressions of the sort to be garnered from the Opinion. Including references in authorities cited with approval in the Opinion, these expressions include formulations such as 'notoriously improper', 'misbehave . . . scandalously'), 'get into debt', 'any sort of misbehaviour', 'gross personal immorality or misconduct', 'corruption', 'irregularity in pecuniary transactions', 'moral misbehaviour', 'immorality', 'misconduct', or, as more widely expressed, 'a variety of reprehensible action or inaction, including mere immorality, or commercial misconduct not amounting to the commission of an offence at all' and 'outrageous public behaviour, outside the duties of their office'.

7. I confirm in paragraph 5 above my acceptance of the analysis of Quick and Garran which identifies the differences, and the principal reason for the differences, between the tenure of British judges and of Federal judges under the Australian Constitution. My conclusion was that section 72 applies to exclude all modes of removal other than for misbehaviour as a breach of condition of office. Only Parliament may initiate removal by way of address upon the specified ground, namely 'proved misbehaviour'. My argument was not based upon the broad application of the English authorities, either ancient or contemporary. It was based upon the proper construction of the terms of the section itself, aided by what was put as permissible references to both legislative history and to the clear departure of its terms from the then recognised position in respect of the tenure of office of British judges. Hence in a very real sense the matters discussed in the Pincus Opinion under its various headings stand outside the course of the argument which they are intended to attack. In particular, the Opinion neither recognises nor discusses the distinction in British constitutional law between the power to remove for misbehaviour as a breach of condition of office held on good behaviour, and the open-textured ground for removal upon address of both Houses of Parliament. For this reason, it is bordering upon irrelevant to engage in a detailed rebuttal of many of the points sought to be made in the Opinion. However some criticisms and observations usefully may be made. I follow the order of the sub-headings of the Pincus Opinion.

8. UNITED STATES [13-16]. I do not read the Pincus Opinion as itself drawing strength from American law. As I neither referred to nor relied upon American doctrine, it is curious that the Opinion first discusses the United States Constitution, particularly as this leads to the conclusion [at 16] that 'it gives no support to the view expressed by the Solicitor General'. Neither does it support the Pincus Opinion.

9. The Opinion contrasts the phrase 'Treason, Bribery and other High Crimes and Misdemeanours' in Article II, section 4 of the United States Constitution with the word 'misbehaviour' in section 72, to suggest that this 'simple word' was intended to be used without technical meaning. In its context, this comment is impermissable. It is clear

that the word 'misbehaviour' as used in section 72 is derived from English constitutional law, and that it is not used in contrast with the terms of the American Constitution dealing with impeachment. Rather it is framed in conscious contrast with the law of judicial tenure in Britain. Secondly, and somewhat inconsistently with the first point, the Pincus Opinion also relies upon the alleged circumstance that the particular phrase in Article II has been read with a wider meaning than its terms suggest. If the Opinion here seeks to infer that if an equivalent to the American expression, such as 'treason, bribery, and other felonies and misdemeanours', appeared in section 72 it would be held to have a meaning wider than the commission of an offence, such a suggestion must be rejected out of hand. I comment also that the decision of Ritter v. U.S. referred to [at 15] has no relevance: the note at 300 U.S. 668 merely says that a petition for a writ of certiorari was denied, without reasons, and the report of the Court of Claims below, (1936) 84 Ct. Cls. 293, deals with the quite different point of whether proceedings in the Senate could be the subject of judicial review.

10. We are concerned with the meaning of 'proved misbehaviour' in section 72 of our Constitution. American constitutional law furnishes no relevant learning. This is more obviously so in respect of the construction of section 72 than in respect of other parts of the Constitution where there is less divergence, both in word and context, between the two Constitutions: see generally Attorney-General (Cth); Ex rel McKinlay v. Commonwealth (1975) 135 C.L.R. 1, 24, 47; Australian Conservation Foundation v. Commonwealth (1978-1980) 146 C.L.R. 493, 530 and Attorney-General (Vict.); Ex. rel. Black v. Commonwealth (1981) 146 C.L.R. 559, 578-9, 598-9, 603, 609 and 652. Hence I put the American authorities on one side. They are of no assistance.

11. ENGLAND [16-19]. As has already been said, the failure of the Pincus Opinion to recognise the distinction between removal in cases of breach of condition of office held during good behaviour and the power of Parliament to address upon grounds not necessarily arising from a breach of such condition destroys the relevance of the discussion of English law which leads to the general conclusion that no offence need be proved to establish misbehaviour. The cases of Judge Kenrick, [discussed at 16], concerned a judge facing charges of misconduct in the House of Commons. The two cases are not reported in the Law Reports, but in (1825) 13 Parl. Deb., 2nd Ser. and (1826) 14 Parl. Deb., 2nd Ser. The allegations clearly involved criminal offences, but as the matter was before Parliament a breach of the law was not required to be established. For this reason, the quotation from Shetreet, Judges on Trial (1976), 143, [at 16], which deals with whether misconduct of a judge in his private life justified the address for removal, is unexceptionable.

12. The Pincus Opinion [at 17] goes on to make one of its several references to the supposed intention of the founding fathers or the draftsmen of the section: 'If the draftsmen of our Constitution knew of the practice of the English Parliament with respect to removal of judges, and intended to depart from it so significantly, it is remarkable that they made that intention so unclear'. In other parts of his Opinion Pincus also seeks to draw strength from negative surmise of intention; for example, at 14, 18-19, 22, 25 and 26. With respect, it must be said that such references do not advance argument; they more stand in substitution for it. In this particular aspect, I comment that in drawing section 72 the draftsmen made intention abundantly clear. When the conditions for tenure in England, as they were understood by the founding fathers, are contrasted with the terms of section 72 the intention of the draftsmen is made quite clear by the specific departures from English law. First, the section excludes all modes of removal other than that for misbehaviour as a breach of condition of office and, secondly, it makes Parliament the sole repository of the power to address upon the ground of such misbehaviour. As a further limitation, the misbehaviour is required to be 'proved'. This is the distinction recognised and stated by Quick and Garran, (set out in paragraph 5 above). In this aspect, it is difficult to suggest that the terms of section 72 could be framed in a manner more directly to distance the Australian provision from the English position.

13. As I merely made passing reference in paragraph 14 of my opinion to R. v. Richardson, when discussing the meaning of the expression 'infamous offence', the Pincus Opinion [at 17-18 and 21] also addresses a false issue by seeking to establish that this case does not bear upon the removal of English judges. (My discussion of what is 'infamous offence' is taken up in paragraphs 19 and 20 to lead to my conclusion that the relevant quality of contravention of the general law in respect of misbehaviour not pertaining to office is whether it is 'of such a nature as to warrant the conclusion that the incumbent is unfit to exercise the office'. Discussion of Richardson in the Pincus Opinion does not touch upon this conclusion).

14. For the reason stated in paragraph 12 above, I agree with the Pincus Opinion [at 19] in its comment that when they framed section 72 what the founding fathers had in mind as to the law about the removal of judges was English practice in the 19th century. Where we differ is in our statement of the relevant law in respect of judicial tenure in England, and in our recognition of the effect of the clear departures from the English position which are embraced by the terms of the section.

15. The Privy Council-Colonial Judges [19-22]. Although the issue of the Privy Council and colonial judges is separately discussed by Pincus, there is little reason to suppose that the draftsmen of our Constitution had any particular regard to the position of colonial judges up to the mid-nineteenth century. The tenure of colonial judges, including the judges of the Australian colonies before responsible Government, was much less secure than for English judges. For this reason I doubt very much the relevance of the Opinion's consideration of the peculiar position of colonial judges before the 1850's.

16. Even if relevant, the discussion under this heading does not take the argument of the Pincus Opinion any distance; indeed to the contrary. The authorities referred to very much support the distinctions made in my opinion. Willis v. Gipps [at 19-20] is concerned with the requirement that a judge be given an opportunity to be heard before removal. Although the facts are not set out in Moore's Reports, the conduct of Willis as a judge in the District of Port Phillip are matters of common historical knowledge: see, for example, B. A. Keon-Cohen, John Walpole Willis: First Resident Judge in Victoria (1972) 8 M.U.L.R. 703 and A. C. Castles, An Australian Legal History (1982), 239-243. The allegations against Willis were very much in respect of conduct pertaining to office, and hence misbehaviour within the meaning of section 2 of Burke's Act. Upon this statutory ground, no contravention of the general law was required to be established.

The interjection of Parke B. [referred to at 20] is not relevant to the issue of whether misbehaviour not pertaining to office is predicated upon breach of the law.

17. The 1849 case of Montagu [discussed at 20-21] does not take matters any further. There always are dangers in seeking to establish a decision's authority by reference to successful counsel's argument. I contrast the comment of Deane J. in Hammond v. Commonwealth (1982) 42 A.L.R. 327, 341. What next follows after the quotation from Thesiger Q.C. [referred to by Pincus at 20] is a submission which makes it clear that his submission was that the case was one of misbehaviour pertaining to office—

> The Appellant having first put his lawful creditor in a situation which compelled him to sue for his debt in a Court of Justice, avails himself of his judicial station in that Court, being the only Court in which the action could be brought, to prevent the recovery of the debt, which he admitted to be due; this is an act impeding the administration, and thereby defeating the ends of justice, and was such a gross act of misbehaviour in his office, as amply to justify his removal. Secondly, it appears, from the evidence, that the various pecuniary embarrassments of the Appellant, while sitting as a Judge, in a Court composed of only two Judges, and necessarily requiring the presence of both, for the determination of all cases brought before it, were such as to be wholly inconsistent with the due and unsuspected administration of justice in that Court, and tended to bring into distrust and disrepute the judicial office in the Colony.

Hence each of the two grounds embraced by the quotation set out in the Pincus Opinion fairly is characterised as misbehaviour pertaining to office. On the underlying issue of misbehaviour, the decision was, in the judgment of Lord Brougham (at 499), that on 'the facts appearing before the Governor and Executive Council, as established before their Lordships, in that case, there were sufficient grounds for the motion of Mr. Montagu'. These facts are not set out in length in the report, but, as has been said, the submissions of Thesiger make it clear that they went to establish misbehaviour pertaining to office. As such, it did not, of course, require contravention of the law to constitute misbehaviour within section 2 of the Act.

18. The Memorandum of the Lords of the Council on the Removal of Colonial Judges, [constituting an appendix to 6 Moore N.S. and relied upon at 21-22] in no way supports the view that gross personal immorality is sufficient to justify removal as misbehaviour within the meaning of section 2 of the Act. What is clearly recognised in this Memorandum is the distinction between 'amotion' pursuant to the Act, upon which there was an appeal to the Queen in Council, and the separate and prerogative process whereby (whether with or without an order for suspension by the Colonial Governor), the issue of removal may be referred, upon Petition to the Queen, to the Privy Council for determination. This latter procedure was the colonial equivalent to the Parliamentary power to address for removal. In the Memorandum it is regarded as an exercise of a species of original jurisdiction, contrasted with the separate jurisdiction to hear appeals against actual removal pursuant to section 2 of Burke's Act. Of course the power of the Privy Council to act in its original jurisdiction was not limited to any narrow grounds of misbehaviour constituting breach of condition of good behaviour, and, for that reason, in cases not pertaining to office it was not tied to alleged contravention of the law.

19. There is a similar mixture of discussion [illegible]d Chelmsford's observations [referred to at 21-2[illegible]e short statement of Lord Chelmsford merely adds some general comments to the Memorandum. It deals with both the appellate jurisdiction of the Privy Council under the Act and the original jurisdiction outside it. Lord Chelmsford accepts that a judge may be suspended pending the exercise of the original jurisdiction. The sentence after next to that quoted [at 22] is

> Such serious cases ought to be brought before the Privy Council, either by appeal on the part of the removed or suspended Judge, or upon the recommendation of the Secretary of State

Hence the remarks are apt to cover both conduct constituting a breach of condition of office and other conduct which may justify petition to the Privy Council (either with or without suspension), analogous to the English Parliamentary power to address. Moreover, Dr. Lushington, who gave an opinion immediately after Lord Chelmsford, stated that the procedure of suspension and reference to the Privy Council in its original jurisdiction is appropriate in cases of the sort discussed.

20. In the result the Memorandum has little relevance to the proper construction of section 72. If it is an authority for anything, it supports the distinctions made in my opinion.

21. Convention debates [22-24]. As has been said, the meaning of section 72 is to be derived from the construction of its terms, standing within Chapter III and the Constitution as a whole, and having regard to the extent to which it provides that judicial tenure under the Constitution differs from tenure of British judges under English constitutional law. As is picked up in paragraphs 10 and 11 of my opinion, legislative history casts permissible light upon meaning. This does not mean that too much is to be constructed from selective quotation of the Convention Debates. The references made in paragraphs 12 and 17 of my opinion were for the limited (and, as was suggested, also permissible) purpose of ascertaining the mischief to be remedied. The identified mischief was the perceived necessity adequately to safeguard the independence of the judiciary as an essential feature of the Federation established by the Constitution. It does not further the task of construction to speculate [as does the Pincus Opinion at 22] that there may have been a silent majority of delegates in disagreement with those who spoke.

22. Clearly it was the primary concern of Mr Isaacs, both at the Adelaide Convention (20th April 1897) and at Melbourne (31st January 1898) to ensure that a decision of Parliament to address for removal should not be challengeable. It was at the Melbourne Convention that Isaacs accepted the amendment to add 'upon the ground of misbehaviour or incapacity'. Isaacs then accepted (Conv. Deb. at 313) that 'to remove any misconception, these words should be added, so that the Houses may show that they are not attempting to remove a Judge for anything but misbehaviour or incapacity'. His concern (also at 313) was to ensure that in the exercise of the power so limited, Parliament's decision should not be amenable to review.

> I want to lay it down distinctly that a Judge shall not be removed under any circumstances, except for misbehaviour or incapacity; but I want the verdict of Parliament—the verdict of the States House by itself, the verdict of the people's House by itself, the conjoint, independent and separate verdicts of these two Houses to be final and unchallengeable.

Of course the speeches and the opinions of Isaacs, and any other delegate, are not determinative of meaning. Reference to them merely is confirmatory of what is comprehended upon construction of the terms of section 72 itself, namely that it is for Parliament alone to address for removal, but upon the limited ground of proved misbehaviour or incapacity.

23. The Pincus Opinion [at 23] asserts that what is referred to as a critical sentence of Todd (set out in my opinion, paragraph 5) commencing 'Misbehaviour includes . . .' is hardly suggestive of an exhaustive definition. In its context, I disagree. Todd was there seeking to define misbehaviour constituting breach of condition of office granted during good behaviour which would support the exercise of the power of removal without address of Parliament. In other words, he sought to define the content of the first condition of office referred to by Quick and Garran (set out in paragraph 5 above). As he was seeking to mark out the limits of the amenability of a judge to removal by the Crown without address from Parliament, there is no reason to suppose that his statement was intended to be anything else but exhaustive. This particularly must be so in the circumstance that conduct not constituting breach of condition of office was nonetheless subject to address by Parliament on grounds which were required neither to pertain to office nor to arise from any alleged contravention of the law. It was this power of Parliament which Todd [at 860, quoted in my paragraph 6 and by Pincus (quoting Isaacs) at 23] described as one which 'may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held'. Having acknowledged that the power to address for removal was not dependent upon misbehaviour pertaining to office or contravention of the law, it cannot be supposed that in the context of discussion of the power to remove for breach of condition of office, Todd contemplated the existence of an unspecified fourth or wider category of misbehaviour in addition to the three categories stated in his definition. There simply is no basis for inference that Todd embraced the possibility of any wider meaning of misbehaviour as part of the Crown's power to remove for breach of condition.

24. For the reasons stated, I also disagree with the comment in the Pincus Opinion [at 24] that it is a misapprehension to say that at the end of the 19th century the notion of judicial misbehaviour justifying removal from office had some received technical meaning. Misbehaviour, as a breach of what Quick and Garren refer to as the first condition of office, did have a technical meaning. In England, and in the Australian States, the Parliamentary discretion to address for removal remained at large. As has been seen, both British judges and colonial judges were amenable to removal for misbehaviour as a breach of condition of office; they were also liable to removal for some wider ground (not necessarily related to breach of the law) which would not constitute breach of the term for office held during good behaviour. The Pincus Opinion [at 24] does not take this matter any further by reference to what Mr. Wise said at the Adelaide debates. The comment in the Opinion is based upon a misconception. In any event, at 945, Mr. Wise makes it clear that here he was referring to the power of removing on address from both Houses, where, of course, to use the expression of the Pincus Opinion, 'no criminal conduct was necessary'.

25. GENERAL [24-27]. Contrary to what the Pincus Opinion states [at 24], it is not the case that a conclusion has been drawn 'too readily' that the use of the word 'misbehaviour' was intended to incorporate the law as to the removal of judges in England prior to the Act of Settlement of 1700, whether by reference to Coke or otherwise. My opinion draws no such conclusion by reference to the law of removal prior to 1700. As has been seen, what is contrasted with the terms of section 72 is the law in respect of the tenure of British judges, as it was seen when section 72 was drafted, and the obvious points of departure of section 72 from this law.

26. The Pincus Opinion [at 25] invites what is described as the 'safer course', namely, 'to come to the Constitution unaided by any authority, in the first place, and see if there is an ambiguity'. I readily accept that the words of section 72 should be construed within their context in Chapter III and the Constitution as a whole. The terms of section 72 do not stand alone. As the Pincus Opinion [at 25] points out for a contrary purpose, one is assisted in construing section 72 by the fact that it is the Justices of the High Court, and of other Federal Courts, who are being spoken of. To paraphrase the expression of the Opinion 'when one keeps the subject matter in mind' the limiting operation of section 72 becomes clear. Its interpretation is to be built upon the foundation of its context within the Constitution, as a whole, and recognition of the section's obvious and deliberate departure from the terms of judicial tenure under the British Constitution. Those differences are confirmed by the history of the section. As has been said, the reasons for section 72 being drawn to enhance the security of judicial tenure are sufficiently summarised by Quick and Garran, at 733-4 (referred to in paragraph 5 above). In essence, the Pincus Opinion concludes that Parliament may address for removal upon a ground defined upon its whim. The existence of such power would be destructive of the status and independence of the High Court as the independent interpreters of the Constitution and the Federation established by it. The example of the Pincus Opinion of a Judge becoming involved in political activities is inapposite. The relevant enquiry is whether the conduct complained of either constitutes misconduct pertaining to office or a contravention of the law of the requisite seriousness.

27. On the only occasion [at 26] where it refers to the principle, the Pincus opinion seems to accept that for breach of condition of good behaviour conduct outside official duties requires proof of conviction. The Opinion gives three grounds to support the view that this doctrine does not govern the use of the word 'misbehaviour' in section 72. In my view, none of these reasons sustains the load which Pincus seeks it to bear.

(1) Pincus asserts that both in England and the colonies before 1900 it is clear that the power to remove for judicial misconduct was not so confined. The answer to this is that in England before 1900 breach of condition of good behaviour was so confined; the quite separate power of Parliament to address always was unrelated to the issue of breach of condition of good behaviour. The position of the colonies is not particularly relevant on this aspect; although, as has been seen, the application of Burke's Act leads to the same result.

(2) The Opinion asserts that the language of section 72 makes it clear that conviction is not necessary in respect of conduct outside office. This assertion highlights the fact that the Pincus Opinion nowhere acknowledges that the requirement of section 72 is for 'proved' misbehaviour. The Opinion does not concede that there is any work to be done by this word to enhance the operation of the section. It is section 72 itself which requires an address of Parliament upon the ground of 'proved' misbehaviour. It must be that what is to be proved is to have some content. My view is that this requires the finding of grounds which constitute misbehaviour as a breach of condition of office held during good behaviour. It is difficult to comprehend that the proper meaning of the requirement for 'proved misbehaviour' is to be fixed by reference to undefined conduct left subjectively at large. The requirement for 'proved misbehaviour' does not rest easily with assertions that matters such as 'immorality', 'moral misbehaviour', 'a variety of reprehensible action or inaction, including mere immorality, or commercial misconduct not a mounting to the commission of an offence at all', or 'outrageous public behaviour, outside the duties of their office' are amenable to proof as misbehaviour.

(3) The Pincus Opinion suggests that it 'would have been foolish to leave Parliament powerless to remove a judge guilty of misbehaviour outside his duties, as long as an offence could not be proved'. (This is a variation of what is stated [at 25] with respect to 'outrageous public behaviour'). The Opinion asserts that this remark 'applies particularly to the High Court, which was to occupy a position at the pinnacle of the Australian Court system, and to exercise a delicate function in supervising compliance with the requirements of the Constitution on the part of the legislatures'.

Apart from begging the question as to what is misbehaviour, this comment ignores the obvious operation of section 72 to give direct effect to the principle that the judiciary should be secure in their independence from control by the legislature and the executive. Far from being a proper assumption that it was intended that a Justice of the High Court should be amenable to removal for undefined reasons relating to behaviour 'outside his duties', it is the position of the High Court in the Australian Constitutional structure which both explains and confirms the limitations which seem to be clearly enough embraced by the terms of section 72 itself. It is the antithesis of the recognition of the High Court as the arbiters of the Constitution to concede that there is a general power to control the composition of the Court by the application of an undefined power in Parliament to address for removal.

28. As to this aspect of the argument, I do not understand the relevance of the dialogue between Messrs. Isaacs and Barton (with the delegates playing chorus) extracted [at 27] for the stated purpose of 'casting doubt on the theory that there was an intention to limit the plain words of s.72 by ancient technical rules'. Far from modifying the words of section 72 by reference to ancient technical rules, it is the plain words of section 72 which alter the terms of judicial tenure existing in English law. Be that as it may, the dialogue itself is relevant only to the result which (as is noted in paragraph 22 above) Isaacs was anxious to ensure, namely, that it was for Parliament alone to determine the issue of misbehaviour. The dialogue says nothing relevant to the proper meaning of 'proved misbehaviour'.

29. Hence in as much as the argument of Pincus is intended there to be drawn together [at 26-27], it is suggested that the maters relied upon are destructive of the conclusion that the requirement for 'proved misbehaviour' in section 72 is not limited to that which would constitute breach of condition of office held during good behaviour.

30. The Pincus Opinion does not demonstrate error. This is not surprising for, as has been noted, it turns away from discussion of the miters which I found determinative of the proper construction of section 72. My reconsideration of these matters goes to confirm my earlier opinion that, for proved misbehaviour in matters not pertaining to office, section 72 requires proof of contravention of the law of the requisite seriousness.

GAVIN GRIFFITH
Solicitor-General

3rd September 1984

Senator GARETH EVANS I seek leave to give notice of motion.

Leave granted.

Senator GARETH EVANS I give notice that, on the next day of sitting, I shall move:

That the Senate-

(a) refer—

(i) all evidence given before the Senate Select Committee on the Conduct of a Judge, and

(ii) all documentary or other material furnished to the Committee,

relevant to the Briese allegation, to the Director of Public Prosecutions for consideration by him whether a prosecution should be brought against the Judge; and

(b) request the Director of Public Prosecutions, should he conclude that a prosecution not be brought, to furnish a report to it on the reasons for reaching that conclusion.

Finally, I formally table my ministerial statement and move:

That the Senate take note of the statement.

Senator DURACK (Western Australia) (3.49)—The Attorney-General (Senator Gareth Evans) has put down a most important, but I regret to say, disappointing statement in regard to the report of the Senate Select Committee on the Conduct of a Judge which was tabled in this chamber a little over a week ago. The statement of the Attorney covers a lot of matters of serious legal and constitutional importance. I believe it is necessary to study them carefully. Certainly, in the time that has been available since notice was given of this statement, it has not been possible for me at least to study the supplemental opinion of the Solicitor-General which has just been incorporated. Of course, that opinion covers ground of which we are very familiar. I think the issues have now become fairly clear in relation to the question of what amounts to misbehaviour. I feel that the

→ file memorandum
Counsel + Solicitors

C2

IN THE MATTER OF SECTION 72 OF THE CONSTITUTION

Our advice is sought by the Attorney-General of the Commonwealth on the meaning of "proved misbehaviour" in Section 72 of the Constitution. In particular we are asked:

(1) Is misbehaviour for this purpose limited to matters pertaining to:-
   (a) the judicial office in question; and
   (b) the commission of a serious offence which renders the person unfit to exercise the office.

(2) In relation to (1)(b) is it a prerequisite that there has been a conviction in a court.

(3) What is the standard of proof required.

(4) Is the Parliament's decision justiciable, either in relation to proof of facts or interpretation of the Constitution (e.g. the meaning of the word "misbehaviour").

We propose to make some general observations about Section 72 before considering the specific questions.

The Section provides so far as relevant:

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.

Section 71 vests the judicial power of the Commonwealth in the High Court of Australia, in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. It goes on to provide that the High Court is to consist of a Chief Justice and so many other Justices, not less than two, as the Parliament prescribes.

This Section has been long interpreted to mean that, except where the Constitution may otherwise expressly provide, the Commonwealth's judicial power may be exercised only by courts. Section 49 of the Constitution is one such exception. That Section, it will be remembered, provides that 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."

Since the Commons House possessed the power of committing for contempt of Parliament, of judging itself of what is a

contempt and of committing for contempt by a warrant stating generally that a contempt had taken place and because the Constitution expressly in Section 49 gave to the Commonwealth Parliament its members and committees the powers privileges and immunities of the Commons House, that Section necessarily conferred power to judge of contempt of it and to commit to prison those guilty of it: Reg. -v- Richards; Ex Parte Fitzpatrick and Browne (1955) 92 C.L.R. 157; 92 C.L.R. 171.

The address referred to in Section 72 is not a power privilege or immunity of the Commons House. That House has no part to play in the removal of those exercising the judicial power of the Commonwealth. And the Senate and the Representatives when acting under Section 72 do not exercise any of those privileges powers and immunities secured to the Houses their members and committees by Section 49 any more than they do so when exercising the legislative powers given by Section 51 and Section 122. For 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 Reg. -v- Richards (supra.) at pp. 162-163; Halsbury 4th Ed. Vol. 34 par.1479, p.593.

The power to remove a federal judge, like the power to appoint, is vested in the Governor-General in Council, that is, the Governor-General acting with the advice of the Federal Executive Council: Section 63. Between the office holder and the Executive there is inserted the requirement that removal shall be only upon or consequent to an address of both Houses. It may be, but it is not required, that removal following an address would be a matter of course.

Whatever the opinion of the Houses, the Governor-General may only act upon his Ministers' advice and their advice might be against removal. The possession by the Crown of a discretion as to compliance or non-compliance with an address was asserted by two eminent lawyers: see Opinions on Imperial Constitutional Law (1971) p.65. Section 72 is not inconsistent with the existence of such a discretion in the Governor-General should his Ministers so advise him.

And the address may only pray for such removal "on the ground of proved misbehaviour or incapacity". It is necessary to approach the significance to be attached to the expression "proved misbehaviour or incapacity" with a number of factors in mind. First is that the only constitutional authority given to the Houses is to address the Governor-General in Council praying for the judge's removal on one or more of the specified grounds. There is not a power of impeachment of all civil officers. In this regard the Australian Constitution differs from that of the United States which by Article 3 Section 1 provides that the judges of the Supreme and inferior courts hold their offices during good behaviour and by Article 2 Section 4 that all civil officers of the United States shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery and other High Crimes and Misdemeanours. See Constitution of the United States of America, Senate Document No. 92-82 (1973) p.574 for instances of the application of Article 2 Section 4 to judges.

Again it needs to be remembered that, unlike the House of Lords, neither the Senate nor the Representatives possesses, except as Section 49 provides, any judicial power. That power by a provision "novel in the Empire" in the language used by Griffith CJ. as long ago as 1918 (Waterside Workers

Federation of Australia -v- J.W. Alexander Limited (1918) 25 C.L.R. 434 at p.441) is vested by Section 71 in the courts we have earlier mentioned. Yet the unique provision made by the addition of the word "proved" to the expression "misdemeanour or incapacity" suggests the exercise of an authority indistinguishable from the judicial power. At its lowest, it implies a charge, evidence and something very like trial.

Looking at the Constitution with the benefit of judicial examination of Chapter III extending over three quarters of a century, one cannot but be impressed by the unfailing emphasis placed upon the notion expressed in Section 71 that the Courts alone may exercise judicial power. Section 72 contains no grant to the Parliament of any authority (except to address the Governor-General in Council). It may be that the reason for inserting the impeachment power (Article 2 Section 4) into the U.S. Constitution was that it, by Article 111 Section 1, vested the judicial power in the Supreme Court and the inferior courts. Thus express provision was made to overcome the fact that Congress might not, as Parliament may not except for Section 49, exercise judicial power.

If therefore any powers of adjudicating upon the question whether behaviour amounts to proved misbehaviour are vested in the Houses of Parliament, it must be given by implication. Yet such an implication is inconsistent with the principle in Section 71 that adjudicatory powers are, except as otherwise expressly given, for the courts alone. To them is committed the power and authority also finally to interpret and apply the Constitution. If such a power of decision rests with the Parliament, how in

a matter central to the independence of the federal judiciary may the courts correct what may be an error? There is no remedy against an address of both Houses. Whatever else happened, it would stand. And it should be remembered that Section 72 is of vital importance to the States whose interests are often adverse to those of the Commonwealth. For Section 74 makes the High Court in effect the final arbiter on inter se questions: see Waterside Workers Federation of Australia -v- J.W. Alexander Limited (1918) 25 C.L.R. 434 at pp.468-469.

And no reason exists to imply such an adjudicatory authority in the Houses. The requirement for an address from both Houses is not to grant positive authority, but to check that of the Executive which, absent statutory requirement, might dismiss at pleasure: see Alexander's case (supra) at p.468.

In the event we think that the words "proved misbehaviour" should be given the meaning which they naturally bear, that is, as requiring the finding by a court of acts which amount to misbehaviour in proceedings to which the judge is a party.

Section 76(i) of the Constitution read with the Judiciary Act gives the High Court original jurisdiction in matters arising under the Constitution, or involving its interpretation. Properly constituted proceedings raising the question whether specified acts or activities on the part of a federal judge constituted misbehaviour within the meaning of Section 72(ii) of the Constitution or, for that matter, whether specified judicial failures or physical or other frailties constituted incapacity within that provision, would raise matters within Section 76(i). The judicial finding would establish "proved

misbehaviour or incapacity".

We do not wish to imply that only by such proceedings might the necessary basis for an address be laid. There might, however unlikely, be conviction of bribery, for example. We mention Section 76(i) only to indicate that the view we take of the meaning of "proved misbehaviour" in Section 72(ii) accords not only with constitutional principle developed over the last 80 odd years and with the separation and mutual independence of the judicial and legislative organs but yields as well a practical and effective result.

We have mentioned above a conviction for bribery as illustrative of activity by a judge which all would accept as establishing "proved misbehaviour". The illustration was intended to relate to the acceptance by a federal judge of a bribe to procure a favourable decision. But should a judge be convicted abroad of bribing a jailer to procure the release from unjustified and arbitrary imprisonment of a member of his family, for example, that result need not follow.

Whether activity amounts to "proved misbehaviour" is in the last resort a question of the interpretation of the Constitution. On those questions the High Court is the final judge. The Parliament is not. In many cases, no doubt, the activities established by curial decision will leave no doubt that they amount to misbehaviour upon which an address may be founded. The Parliament, however, may not itself decide finally either the existence of the activities nor their quality. In other words, the question of the meaning of the expression and of its application to established activities is always one for the judicature,

although in many cases, its intervention may not be necessary.

Where doubt exists the judge or the Speaker or President of the Senate, or the Attorney-General may invoke the jurisdiction of the High Court either under section 75(iii) or (v) or section 76(i) of the Constitution.

It is thus our view that the existence of activities said to amount/"proved misbehaviour" depends upon their being curially found to exist. Whether such found facts constitute "proved mishehaviour" within section 72(ii) is likewise a judicial question. However, facts curially established may be such as to leave no doubt that the federal judge who performed them was guilty of "proved misbehaviour". Nonetheless, even in such a case the question whether they do bear that character may be determined by the Court either at the instance of the judge the Speaker, the President of the Senate or the Attorney-General of the Commonwealth.

We realise that the conclusion we favour does not accord with much that was said during the Convention debates. But the Constitution must be interpreted according to its language and consistently with the principles that the High Court has elaborated since 1901. And it can hardly be denied that many even of the more illustrious delegates did, when judges of the High Court, express constitutional views that have been long rejected. The Engineers' Case (1920) 28 C.L.R. 129 is devoted to rebutting one such error. The Boilermakers' Case (1956) 94 C.L.R. 254; 95 C.L.R. 529 is a more recent if more doubtful example of the development of constitutional principle unforeseen at the Convention debates.

Above all, conclusions apt for a unitary system in which the House of Lords is also a court are not appropriate to a federation where the various governmental functions are constitutionally assigned to different organs. No doubt one must bear in mind the effect upon such notions of representative government, as the observations concerning delegated legislation in Victorian Stevedoring and General Contracting Co. Pty. Limited and Meakes -v- Dignan (1931) 46 C.L.R. 73 at pp.101-102 make clear. See also the Boilermakers' Case 94 C.L.R. at pp.276-278. But the central fact remains that the Parliament is assigned only the authority to address the Governor-General in Council praying the removal of federal judges upon grounds of proved misbehaviour or incapacity. It is not assigned an impeaching power. It is not assigned a judicial power. Without them it possesses no authority to decide whether activity exists or existed which may amount to misbehaviour nor whether the true complexion of established activity is "proved misbehaviour".

We turn now to the particular questions we are asked.

In our view, to constitute misbehaviour the acts or defaults in question must normally be in the performance of the duties of the judicial office since that behaviour will bear directly on that question. But there may be imagined cases where although acts are not done in the exercise of judicial power, yet they are so connected with it that they do amount to misbehaviour in the judicial office. The facts of Montagu -v- Lieutenant-Governor etc. of Van Diemen's Land (1849) 6 Moo. P.C. 489; 13 E.R. 773, which show a misuse by a judge of judicial office so as to obstruct the recovery of a debt against him, would amount to such misbehaviour.

Whether the commission of an offence amounts to proved misbehaviour must depend on the offence. It will normally be 'serious' if that word is meant to refer to moral turpitude even though the crime is not so expressed. But the characterisation of the quality of the act must ultimately be made by the judicial arm. No doubt that decision will not be divorced from community notions as to what may disqualify a person from holding the judicial office in question, for the question only arises in the context of displacing a judge from his office.

Conversely, the commission of a serious offence would not be, in our view, an exhaustive statement of the acts which might amount to misbehaviour. We think that the proper emphasis should be on the seriousness or moral quality of the acts rather than whether or not they happen to be criminal. For example, in respect of an assault committed by a judge it would not in our view be determinative of the question of misbehaviour whether the acts amounted to an offence or that the rights infringed were asserted in a civil action for tort. We should say that the examples given in R. -v- Richardson (1758) 97 E.R. 426, 439 tend to confirm the inappropriateness of the classification of an action as a crime or a tort as determinative of the present question.

To adapt some of the observations of the members of the High Court in Ziems -v- Prothonotary of the Supreme Court of New South Wales (1957) 97 C.L.R. 279, allowing an appeal where a barrister's name was removed from the Roll of Barristers on the ground of his conviction and sentence for manslaughter, the question is not whether a judge has committed an offence or whether he has been convicted, it

is whether his conduct constitutes misbehaviour so as to render him no longer fit to be a judge. But where actions of the judge in his private character, connected neither with his judicial duties nor the misuse of his office, are relied on to constitute proved misbehaviour, they must be more than unconventional or unwise. Morally reprehensibe legal wrongdoing must be involved, although the form of the punishment or the reparation of the rights of those injured need not, in our view, be that of the criminal law.

To that extent the suggested criteria for misbehaviour beg the question whether a person is unfit to exercise the office by reason of misbehaviour. To substitute other words for those appearing in the Constitution may often be, at best, unhelpful. It is the text itself which has to be construed.

We therefore answer question one No, for the reasons given.

We have perhaps said enough to answer Question two also. To reiterate, it is the seriousness of the acts which, in our view, provides the best guide to the decision of the ultimate issue. Where the acts are criminal then they would normally be established by conviction. But conviction is neither a necessary nor sufficient pre-requisite to a conclusion of misbehaviour. However on the view we take the proof of the misbehaviour must be extraneous to the Parliament.

Question three asks what is the standard of proof required. Where the proof is made in criminal proceedings then the standard will be, subject to statute, proof beyond reasonable doubt. Otherwise the standard will be the civil standard affected by considerations of the seriousness of the allegations made and the gravity of the consequences flowing from a

particular finding referred to in Briginshaw -v- Briginshaw (1938) 60 C.L.R. 336.

As to justiciability, we have already said that the existence of activities said to constitute "proved misbehaviour" must be judicially established. Whether activities thus established amount to "proved misbehaviour" is a question of the interpretation of the Constitution. On such questions the High Court alone is the final judge. Since the interpretation of section 72(ii) bears upon the legal rights of judges, it follows that neither House may conclusively determine these questions.

We do not doubt that the Parliament would in such matters, particularly where the decision of the Court had been obtained by the Speaker or the President of the Senate, apply the Court's decision.

We do not think that the High Court could set aside an address by both Houses of the Parliament even if it was based on an erroneous view of the meaning of section 72(ii).

However, the Court could, and in our view would, restrain the Ministers comprising the Federal Executive Council from advising His Excellency to remove the judge. It would also, we think, if occasion required it, restrain His Excellency from acting on advice to remove the judge. If the address was not founded upon "proved misbehaviour" properly construed, it would quash any order removing the judge. The Court would only act if the activities established to its satisfaction were not "proved misbehaviour" within section 72(ii) properly understood.

The address and the actions of the Parliament leading to its adoption bear no relation either to the matters comprised within section 49 and referred to in Reg. -v- Richards Ex parte Fitzpatrick and Browne (supra.) nor to those purely internal procedures mentioned in Osborne -v- Commonwealth (1911) 12 C.L.R. 321. The address is an essential statutory pre-requisite to displacing a federal judge from his office, the taking of which jeopardises his right to its enjoyment.

We answer the questions as above.

Chambers,
August 13, 1984

M. H. BYERS

A. ROBERTSON

MEMORANDUM

This memorandum deals with the expression "proved misbehaviour" in Section 72 of the Constitution. In particular, it summarizes the three principal views which have hitherto been expressed regarding that expression, and sets out a number of criticisms which may be made of at least two of those views. The analysis takes the form of a consideration of a number of hypothetical examples of behaviour which might give rise to a suggestion that there has been "misbehaviour" tested by each of the views referred to.

(a) The Bennett View

In a memorandum dated 4 July 1984, and included in the Report to the Senate by the Senate Select Committee on the Conduct of a Judge (August 1984), Dr Bennett suggests that insofar as one is dealing with the conduct of a judge (other than the manner in which he exercises or has exercised his judicial functions), the only type of behaviour which can give rise to "proved misbehaviour" is conduct which has led to a criminal conviction. Parliament's role under Section 72 is said to be confined to considering whether the circumstances of the conviction and the nature of the offence are such that the conviction constitutes "proved misbehaviour". Not all convictions would be sufficiently grave to warrant this description eg. traffic violations.

Bennett suggests that any broader view would be untenable. He says it would be astonishing if the Parliament were to conduct what would amount to a trial for a serious criminal offence.

He does not indicate whether a conviction for a sufficiently grave offence sustained before the judge assumes judicial office (but not disclosed by him) could amount to "proved misbehaviour". The tenor of his advice, however, is that pre-appointment conduct would be irrelevant.

I do not set out in this memorandum the full range of arguments which Bennett draws upon to sustain his conclusion. It is plain, however, that he takes the view that the words "proved misbehaviour" had acquired a technical meaning in the last decade of the nineteenth century, and that this meaning is reflected in Section 72 as it is to be construed today.

(b) The Solicitor-General's View

In a memorandum dated 24 February 1984 the Solicitor-General considers the term "proved misbehaviour" within the meaning of Section 72. He concludes that it is limited to matters pertaining to:

(i) "judicial office, including non-attendance, neglect of or refusal to perform duties; and

(ii) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office".

Dr Griffith does not distinguish between conduct under (ii) which occurred pre-appointment, and similar conduct post-appointment. It may be inferred, however, that since the conduct set out in (i) can only occur post-appointment, and since no distinction is drawn in the language preceding (ii), that the Solicitor-General would take the view that pre-appointment conduct cannot, as a matter of law, amount to "proved misbehaviour".

The distinction between pre-appointment and post-appointment conduct was never discussed during the course of the Convention Debates. The strongest argument for excluding pre-appointment from consideration conduct is the threat that extensive scrutiny of such conduct would pose to the independence of the judiciary. The temptation to roam back through the life of a judge looking for criminal conduct (no matter how isolated, or remote from the time of appointment) would always be present to a Government dissatisfied with the rulings given by that Judge in matters affecting Government programmes.

(c) The Pincus View

This view finds expression in a memorandum dated the 14 May 1984. Mr Pincus contends that whether any conduct alleged against a judge (not pertaining directly to his judicial office) constitutes misbehaviour is a matter for Parliament. There is no "technical" or fixed meaning of misbehaviour. It is not necessary in order to invoke the jurisdiction under Section 72 that an offence against the general law be proved. There may be other discreditable conduct on the part of a Judge which may demonstrate that he is unfit to hold judicial office. This will be a matter for Parliament to determine.

Once again Mr Pincus does not, in terms, distinguish between pre-appointment conduct, and post-appointment conduct. The tenor of his advice seems to be that it is entirely a matter for Parliament as to whether any such discreditable behaviour (no matter when it occurred) renders the Judge unfit to hold judicial office.

Criticisms of the Bennett View

Dr Bennett suggests that his view is supported by an analysis of the Convention Debates and the relevant statements of legal principle which are set out in the authorities dating back to the eighteenth century. This memorandum does not deal with that argument. Rather, it seeks to demonstrate that the Bennett view would give rise to some absurd consequences by testing that view in the light of some concrete examples.

Each of the following situations would plainly be thought to render a Judge unfit to hold judicial office. The Bennett view would dictate that no steps could be taken to remove the Judge even if the facts set out were clearly proved - beyond reasonable doubt, if necessary, or openly admitted by the Judge.

1. The Judge has, post-appointment, committed murder while on an overseas trip in a country to which he cannot be extradicted.

2. The Judge has, post-appointment, been tried for murder in Australia, and found not guilty by reason of insanity. He is no longer insane, however,and therefore not suffering from any incapacity.

3. The Judge has, post-appointment, been tried for murder in Australia, and acquitted. The Judge then openly boasts that he was, in fact, guilty of the offence. Because he did not give sworn evidence at his trial, he cannot be charged with perjury.

4. The Judge has, post-appointment, been tried for a serious offence in Australia,and convicted. The conviction is quashed on appeal because (a) a necessary consent to prosecute had not been obtained from a duly authorised officer
or (b) a limitation period had expired, which fact had gone unnoticed.

5. The Judge has, post-appointment, been tried for a serious offence involving dishonesty in Australia. The Magistrate finds him guilty but determines to grant an adjourned bond without proceeding to conviction.

Criticisms of the Griffith View

Each of the following situations would be thought by many to render a Judge unfit to hold judicial office. The Griffith view would lead to the conclusion that no steps could be taken to remove the Judge even if the facts set out were clearly proved.

1. The Judge has, post-appointment, openly endorsed a particular political party, and publicly campaigned for its election to office.

2. The Judge has, post-appointment, engaged in discussions with others which fall short of establishing a conspiracy to commit a crime, but are clearly preparatory to such a conspiracy. For example, the Judge is overheard to be discussing with another person the possibility of hiring someone to commit a murder. Alternatively, the Judge is overheard discussing with another the possibility of importing some heroin from overseas.

3. The Judge has, post-appointment, set in train a course

of conduct which, if completed, will amount to a serious criminal offence. All that has hapopened thus far, however, falls short of an attempt to commit that offence. For example, the Judge tells another that he proposes to burn down his premises and claim the insurance. He is found with a container of kerosene as he approaches those premises, and makes full admissions as to his intent. He cannot be convicted of attempted arson, or attempting to defraud his insurance company because his acts are not sufficiently proximate to the completed offence to amount to an attempt.

4. The Judge has, post-appointment, attempted to do something which is "impossible", and therefore has committed no crime. For example, the Judge has attempted to manufacture amphetamines by a process which cannot bring about that result (unknown to him). See DPP v Nock (1978) A.C. 979

5. The Judge has, post-appointment, habitually consorted with known criminals, and engaged in joint business ventures with them. The offence of consorting has been abolished in the jurisdiction in which these acts take place. To take an analogy, assume that a Justice of the United States SupremeCourt was constantly seen in the company of Al Capone. Would such conduct not tend to bring the administration of justice into disrepute?

6. The Judge has, post-appointment, been a partner in the ownership of a brothel. The jurisdiction in which that occurs has legalized prostitution, and it is no offence to own a brothel there either.

7. The Judge has, post-appointment, habitually used marijuana and other drugs in a jurisdiction which has decriminalised such use, but treats these as "regulatory" offences.

8. The Judge has, post-appointment, frequently been sued for non-payment of his debts. He deliberately avoids paying his creditors until proceedings are taken against him.

9. The Judge has, post-appointment, frequently been sued for defamation, and has been required to pay damages each time.

10. The Judge has, post-appointment, conducted a number of enterprises through a corporate structure. His actions have led to prosecution under the Trade Practices Act for false or misleading statements. Both he, and his comopanies have been fined.

Pre-Appointment Conduct

It is arguable that discreditable conduct on the part of the Judge pre-appointment may amount to "proved misbehaviour", or, at least, be relevant to post-appointment conduct. If the point of a conviction is that it demonstrates unfitness for

office because it may establish a propensity to commit that type of conduct again (or other criminal conduct) why is it relevant that the initial criminal behaviour occurred pre-appointment? The test is whether it allows the necessary inference to be drawn. A criminal act committed one week prior to appointment is no different to a criminal act committed one week after appointment. The same applies to discreditable conduct.

It follows that criminal conduct or discreditable conduct which is so remote in time from the time of appointment as to render it improper to infer that such conduct is likely to be repeated may be excluded from consideration. For example, an isolated assault committed while the Judge was a youth would plainly fit this description. Some conduct is so serious, however, that irrespective of when it was committed, great harm would be done to the integrity of the judicial system if it became known that a Judge of the highest Court had been responsible for it. These are questions of degree, in the first instance, for Parliament to determine.

Mark Weinberg
24 June 1986

MEMORANDUM

This memorandum deals with the word "misbehaviour" in section 72 of the Constitution. It traces first the history of the view which has been expressed that the word had in 1900 a technical meaning which was adopted by the framers of the Constitution. Thereafter an alternative view is suggested.

In questions of constitutional history the orthodox starting point is Quick and Garran. In their Annotated Constitution of the Australian Commonwealth (1901) they deal with the word "misbehaviour" in section 72 as follows

> Misbehaviour means misbehaviour in the grantee's official capacity. "Quamdiu se bene gesserit must be intended in matters concerning his office, and is no more than the law would have implied, if the office had been granted for life". (Coke, 4 Inst. 117.) "Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise." (Todd, Parl. Gov. in Eng., ii. 857, and authorities cited.)

This passage was quoted by Mr Isaacs (as he then was) at page 948 of the Convention Debates at Adelaide in 1897. Mr Isaacs also quoted the continuation of the extract from Todd as follows -

> "In the case of official misconduct, the decision of the question whether there be a misbehaviour rests with the grantor, subject, of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office the misbehaviour must be established by a previous conviction by a jury."

The passage in Todd (which I have set out as it appears at page 858 of the second edition) was in fact reproduced from an opinion dated 22 August, 1864 of the Victorian Attorney-General Mr Higinbotham and the Minister for Justice Mr Michie:

> The legal effect of the grant of an office during good behaviour is the creation of an estate for life in the office (Co. Lit. 42 v.). Such an estate, however, is conditional upon the good behaviour of the grantee, and like any other conditional estate may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity (4 Inst. 117). Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty or non-attendance (9 Reports 50); and thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise Rex v Richardson (1 Burr. 539). In the case of official misconduct, the decision of the question whether there be misbehaviour, rests with the grantor, subject, of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury. (1b).

This opinion was given in relation to section 38 of the Constitution Act of Victoria which is in the following terms:

> "The Commissions of the present judges of the Supreme Court and all future judges thereof shall be continue and remain in force during their good behaviour notwithstanding the demise of Her Majesty or Her heirs and successors any law and usage or practice to the contrary thereof in anywise notwithstanding: provided always that it may be lawful for the Governor to remove any such judge or judges upon the address of both Houses of the Legislature."

A number of observations can therefore be made about the contention that misbehaviour in a person's unofficial capacity means a conviction for any infamous offence by which the offender is rendered unfit to exercise any office or public franchise.

First, it can be said that Messrs Higinbotham and Michie did not use the word "means" but the word "includes". It is not apparent that they attempted an exhaustive enumeration of the circumstances of misbehaviour.

Secondly, Messrs Higinbotham and Michie rely on the authority of Rex v Richardson.

Thirdly, the contention involves the proposition that judges appointed under Chapter III of the Constitution hold office during good behaviour.

Fourthly, the contention assumes that the decision in Rex v Richardson delimits what may constitute misbehaviour in an unofficial capacity in respect of all officers.

Fifthly, it is assumed by the proponents of the contention that the new procedure provided in section 72 of the Constitution does not affect the question.

In examining these matters it is convenient first to set out a further passage from the opinion of Messrs Higinbotham and Michie. With the omission of one sentence the passage earlier set out continues

> "These principles apply to all offices, whether judicial or ministerial, that are held during good behaviour (v. 4. Inst. 117). But in addition to these incidents, the tenure of the judicial office has two peculiarities: 1st. It is not determined, as until recently other public offices were determined, by the death of the reigning monarch. 2ndly. It is determinable upon an address to the Crown by both Houses of Parliament. The presentation of such an address is an event upon which the estate in his office of the judge in respect of whom the address is presented, may be defeated. The Crown is not bound to act upon that address; but if it think fit so to do it is thereby empowered, (notwithstanding that the Judge has a freehold estate in his office from which he can only be removed for misconduct, and although there may be no allegation of official misbehaviour) to remove the Judge without any further inquiry, or without any other cause assigned than the request of the two Houses. There has been no judicial decision upon this subject; but the nature of the law which regulates the tenure of the judicial office has been explained by Mr Hallam in the following words:- (Const. Hist. Vol. 3, p.192) "No Judge can be dismissed from office except in consequence of a conviction for some offence, OR the address of both Houses of

> Parliament, which is tantamount to an Act of the Legislature)."

It can be observed that Hallam's statement of the effect of the Act of Settlement takes no account of removal for misbehaviour in the course of judicial duties.

In similar vein, Todd, having set out the passage from the opinion of Higinbotham and Michie referred to what Mr Denman stated at the bar of the House of Commons when appearing as counsel on behalf of Sir Jonah Barrington. Mr Denman said that

> "Independently of a parliamentary address or impeachment for the removal of the judge, there were two other courses upon for such a purpose. These were (I) a writ of scire facias to repeal the patent by which the office had been conferred; and (2) a criminal information [in the court of kings bench] at the suit of the attorney-general."

Todd explains (at page 859)

> "Elsewhere, the peculiar circumstances under which each of the courses above enumerated would be specially applicable have been thus explained: "First, in cases of misconduct not extending to a legal misdemeanour, the appropriate course appears to be by scire facias to repeal his patent, "good behaviour" being the condition precedent of the judges tenure; secondly, when the conduct amounts to what a court might consider a misdemeanour, then by information; thirdly, if it amounts to actual crime, then by impeachment; fourthly, and in all cases, at the discretion of Parliament, "by the joint exercise of the inquisitorial and judicial jurisdiction" conferred upon both Houses by statute, when they proceed to consider of the expediency of addressing the Crown for the removal of a judge."

The passage in quotations is from the Lords Journal (1830) v.62 page 602. It totally contradicts the proposition that misbehaviour had a technical meaning limited to an infamous offence the subject of a conviction. Barrington is the only judge to have been removed by the Crown upon an address by both Houses.

Todd (at page 860) then goes on to explain that the two Houses of Parliament had had conferred upon them:

> a right to appeal to the Crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of his judicial office. This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held. The liability to this kind of removal is, in fact, a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof.

This passage is also inconsistent with the excerpt from the Lords Journal reproduced by Todd on the preceding page of his book. Further, it contains a use of the word misbehaviour which suggests that it did not, to Todd, have a technical meaning.

It will of course be necessary to return to the question of whether section 72 of the Constitution limits the Parliament to those matters which are said by Todd to go to the breach of the conditions upon which an office is granted. But

first, a perspective on the conclusions of Messrs Higinbotham and Michie and upon the historical meaning of misbehaviour is afforded by considering the facts and the judgment of Lord Mansfield for the Court in Rex v Richardson (1758) 1 Burr 517; 97 ER 426.

The question in Richardson's case was whether Richardson had good title to the office of a portman of the town of Ipswich. The answer to that question depended on whether there was a vacancy duly made, that is, whether the Corporation of Ipswich had power to amove Richardson's predecessors for not attending the great Court.

Lord Mansfield (at page 437) began by referring to the second resolution in Bagg's case, 11 Co. 99 "that no freeman of any corporation can be disfranchised by the corporation; unless they have authority to do it either by the express words of the charter, or by prescription".

At page 439 of the report of Richardson's case this proposition was said to be wrong and the correct law was that "from the reason of the thing, from the nature of corporations, and for the sake of order and government" the power of amotion was incident, as much as the power of making bye-laws.

It was therefore decided first that the Corporation had an incidental power to amove. The second question was whether the cause was sufficient. It was held that the absences from the great Court by Richardson's predecessors was not sufficient to be a cause of forfeiture.

It was however in relation to the first point, the question of whether the Corporation had power to amove, that the following appears

> "There are three sorts of offences for which an officer or corporator may be discharged.
>
> 1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.
>
> 2nd. Such as are only against his oath, and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.
>
> 3rd. The third sort of offence for which an officer or corporator may be displaced, is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law.

The Court overruled the decision in Bagg's case to the extent that it stood for the proposition that a corporation did not have authority, apart from by charter or prescription, to disfranchise a freeman of a corporation unless he was convicted by course of law. That part of the decision turned on a corporation's power of trial rather than the power of amotion. The decision of the Court was that the power of trial as well as amotion for the second

sort of offences was incident to every corporation. Those offences, it will be recalled, are those against the officer's oath and the duty of his office as a corporator.

It is in this context that Lord Mansfield said, at page 439:

> "Although the corporation has a power of amotion by charter or prescription, yet, as to the first kind of misbehaviours, which have no immediate relation to the duty of an office, but only make the party infamous and unfit to execute any public franchise: these ought to be established by a previous conviction by a jury, according to the law of the land; (as in cases of general perjury, forgery, or libelling, etc)."

It is this notion which finds its way into each edition of Halsbury's Laws of England. In the 4th Edition, Volume 8 at paragraph 1107 the law is stated as follows:

> Judges of the High Court and of the Court of Appeal, with the exception of the Lord Chancellor, the Comptroller and Auditor General, and the Parliamentary Commissioner for Administration hold their offices during good behaviour, subject to a power of removal upon an address to the Crown by both Houses of Parliament. Such offices may, it is said, be determined for want of good behaviour without an address to the Crown either by criminal information or impeachment, or by the exercise of the inquisitorial and judicial jurisdiction vested in the House of Lords. The grant of an office during good behaviour creates an office for life determinable upon breach of the condition.
>
> "Behaviour" means behaviour in matters concerning the office, except in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office, which amounts legally to misbehaviour though not committed in connection with the office. "Misbehaviour" as to the office itself means improper exercise of the functions appertaining to the office, or non-attendance, or

> neglect of or refusal to perform the duties of the office.

The authorities given for the propositions contained in the second paragraph above quoted are 4 Co. Inst. 117, R v Richardson and the Earl of Shrewsbury's case (1610) 9 Co. Rep. 42a at 50a. This last reference is to the statement (77 ER at 804) "there are three causes of forfeiture or seisure of offices for matter in fact, as for abusing, not using or refusing".

The same propositions are repeated in Hearn's Government of England (1886) at pages 83 and 84, Ansons' Law and Custom of the Constitution, (1907) Volume 2 Part 1 pages 222 to 223 and, most recently, in Shetreet's Judges on Trial (1976) at pages 88 to 89. The relevant paragraph in that book is as follows

> "Conviction involving moral turpitude for an offence of such a nature as would render the person unfit to exercise the office also amounts to misbehaviour which terminates the office, even though the offence was committed outside the line of duty. In Professor R.M. Jackson's opinion, at common law "scandalous behaviour in [a] private capacity" also constituted breach of good behaviour. It is respectfully submitted that this statement, for which no authoriy is cited, cannot be sustained. It clearly appears from the authorities that except for criminal conviction no other acts outside the line of duty form grounds for removal from office held during good behaviour."

The authorities for the proposition contained in the first sentence and in the last sentence are Richardson's case, Anson, Halsbury and Hearn.

In other words, the sole authority relied on is the decision of Lord Mansfield in Richardson's case which centred on the implied powers of corporations to remove officers. There has been no judicial decision upon the provisions of the Act of Settlement providing for the tenure by which judges hold their office. Richardson's case appears to have been referred to judicially only once and that was in R v Lyme Regis (1779) 1 Doug KB 149; 99 ER 149, another decision of Lord Mansfield dealing with the implied powers of municipal corporations. Uninstructed by the opinions of learned authors, one would have thought that the nature of the office must have a large bearing on the type of conduct which would render an incumbent unfit to continue to hold it. It is impossible to equate the position of a judge with that of an alderman of a municipal corporation: behaviour which might make a judge "infamous" might not have the same result for an alderman.

There can be no doubt that judges appointed under Chapter III of the Constitution hold office during good behaviour: the High Court so decided in Waterside Workers' Federation of Australia v J.W. Alexander Limited (1918) 25 CLR 434, 447, 457, 469-470, 486. Neither can there be any doubt that

there is only one method of removal, that being by the Governor-General in council (the executive) on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity. Where opinions diverge is as to what misbehaviour means. One view, shared by Mr D. Bennett QC and the Solicitor-General, is that in 1900 the word had a technical meaning and it is that meaning which was, and was intended to be, adopted in section 72 of the Constitution.

As to this, there are a number of observations to be made. Firstly, the sole judicial authority relied on is Richardson's case; secondly, that case did not concern judges; thirdly, it was not expressed to contain a definition of "misbehaviour"; fourthly, it concerned the powers of a corporation, in particular its power to amove and its power to try offences having no immediate relation to the duties of an office; fifthly, it is not clear that Lord Mansfield used the word "offence" as meaning other than a breach of law rather than a crime; sixthly, Todd's adoption of the apparently limited scope of the word is directly contradicted by the passage he quotes at page 859 of his work from the Lords Journal as follows:

> First, in cases of misconduct not extending to a legal misdemeanour, the appropriate course appears to be by scire facias to repeal his patent, "good behaviour" being the condition precedent of the judges tenure.

Seventhly, it appears from Bacon's Abridgement (7th ed.) VI p41 and Hawkins Treatise of the Pleas of the Crown 1. Ch 66 at least that misbehaviour having immediate relation to the duty of an office was not defined and had no technical meaning; it would be illogical to attribute a technical meaning to one aspect of the term.

It therefore seems unlikely that "misbehaviour" had a technical meaning in relation to the tenure of judges. If that be so then it is improbable that the delegates at the Constitutional Convention intended such a meaning. Indeed a concern of the delegates was to elide all formerly available procedures into one where the tribunal of fact was to be the Parliament. That in itself would seem to render less persuasive the view that a conviction for an offence was to be a necessary pre-condition of removal.

It is permissible to have regard to the debates at the Constitutional Conventions at least for the purpose of seeing what was the evil to be remedied: Municipal Council of Sydney v Commonwealth (1904) 1 CLR 208, 213-214; The Queen v Pearson; Ex parte Sipka (1983) 152 CLR 254, 262. It would not appear to be permissible to consider the speeches of individual delegates so as to count heads for or against a particular view. What is clear from a consideration of the various drafts of the Constitution and from the debates is that the Parliament was not intended to be at large in

making its address to the Governor-General. The practice in the United Kingdom was to be departed from having regard to the position of the Federal Courts, and in particular the High Court, in a federation. Secondly, for the better protection of the judges, it was intended by the word "proved" to impose some formality upon the conduct of the proceedings before the Parliament which was to be the tribunal of fact.

Before suggesting what the relevant test of misbehaviour might be, the question should be addressed of whether or not the proceedings in Parliament could be the subject of curial review. In my opinion it is clear that the High Court would intervene to correct any denial of natural justice and also to correct any attempt to give the word "misbehaviour" a meaning more extensive than it can legitimately bear. The Court might also intervene were there to be a total absence of evidence of misbehaviour. The proceedings are not internal to Parliament nor do they concern the privileges of the Houses. The matters referred to in Reg v Richards; ex parte Fitzpatrick and Browne (1955) 92 CLR 157 and in Osborne v The Commonwealth (1911) 12 CLR 321 would not therefore lead the Court to stay its hand.

It may be also that the High Court would decide that any facts upon which the Houses proposed to make an address

would need to be established in appropriate court proceedings.

Assuming then that misbehaviour has no technical meaning, what test is to be applied in respect of conduct off the bench? Having regard to the necessary preservation of the independence of the judiciary from interference, it would seem clear that conduct off the bench which would be described merely as unwise or unconventional would not constitute misbehaviour.

The lack of any readily apparent definition confirms the unwisdom of attempting to substitute other words for those which appear in the Constitution and of attempting an abstract exercise in the absence of facts. It would however seem simplistic to attempt to deal with the question on the basis of whether or not there was a conviction or whether or not a criminal offence had been committed by the Judge. It is by no means true to say that criminal offences are constituted only by conduct which destroys public confidence in the holder of high judicial office; some offences would not have that result. At the same time it would be the case that that confidence could be destroyed by conduct which, although not criminal, would generally be regarded as morally reprehensible. One manner of framing the question is to ask "is the conduct so serious as to render the person no longer fit to be a judge?" with that question being tested

by reference to public confidence in the office holder. It would appear to be unnecessarily restrictive, as well as leading to arbitrary distinctions, to demand that the conduct must be unlawful. Additionally that result or intention sits oddly with vesting a part of the power in the Parliament without reference to any anterior proceedings.

These notions are not, of course, of clear denotation and connotation. But that would seem to be a necessary consequence of the question in hand which, in relation to particular conduct, must have different answers in different times. It is a matter of fitness for office; all the facts and circumstances of alleged misbehaviour must be considered so as to weigh its seriousness and moral quality. Wrong doing must be a necessary requirement: legal wrong doing within the purview of the civil or criminal law would seem to be less important than the moral quality of the act.

I turn finally to the two related quesitons of whether or not misbehaviour within the meaning of section 72 may be an aggregation of incidents and whether behavour before appointment might of itself constitute misbehaviour.

As to the first of these questions I see no reason why the moral quality of the behaviour should not be arrived at upon a consideration of a sequence of events. This is not to say that a series of peccadillos might constitute misbehaviour

where one would not, but a series of events over a number of years could go to prove the quality of a particular act or acts.

Similarly, leaving aside questions of non-disclosure (see New South Wales Bar Association v Davis (1963) 109 CLR 428) there would appear to be no reason why facts and circumstances before a person's appointment as a judge could not be considered in determining the quality of an act or of acts after appointment. It would seem however that acts which took place before appointment, which were not of a continuing nature and which cast no light on behaviour after appointment, could not constitute misbehaviour in office.

A. ROBERTSON

Wentworth Chambers

23 June, 1986

PARLIAMENTARY COMMISSION
OF INQUIRY

MEMORANDUM

AUSTRALIAN GOVERNMENT
SOLICITOR
200 Queen Street
MELBOURNE VIC

DX 50 MELBOURNE