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 such misbehaviour is conveniently summarised by Todd, (727 Todd 3rd edn) 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) (729 Todd 3rd edn) as an additional power unrelated to breach of condition which -

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

> of that superintendence 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 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.
>
> In entering upon an investigation of this kind, Parliament is limited by no restraints, except such as may be self-imposed.

7. The position is much the same in Canada: section 99 of the British North America Act provides that judges "shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons". Likewise for the States of the Commonwealth. Indeed, many of the precedents cited by Todd as establishing Crown rights to remove for misbehaviour or upon address by Parliament concern judges with an Australian connection: Justice Willis was removed from the Bench in Upper Canada in 1829 and later from the Supreme Court of New South Wales in 1846; also debate concerning Justice Boothby of the Supreme Court of South Australia, 1861-1867; and Sir Redmond Barry (over the curious issue of taking vacation without leave) 1864-1865, discussed in some detail in Todd, Ch. VI.

8. Todd (at 860-1) emphasises obvious inhibitions upon the exercise of the discretionary powers of Parliament -

> Nevertheless, since statutory powers have been conferred upon Parliament which define and regulate

> 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 Adelaide and Melbourne Convention Debates confirms the extent to which 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 finding of proved misbehaviour.

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.