JUDICIAL REVIEW OF PROCEEDINGS FOR REMOVAL OF JUDGES FROM OFFICE

ENID CAMPBELL*

I. INTRODUCTION

In Australia, judges are formally appointed by the relevant vice-regal representative: the governor-general, a governor of a state or the administrator of a territory of the Commonwealth. There are statutory provisions for removal of judges from office and in some cases they are constitutionally entrenched. Section 72(ii) of the federal Constitution of Australia, for example, provides that:

> The Justices of the High Court and of other courts created by the Parliament -
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> (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.

Section 53 of the New South Wales *Constitution Act* 1902, as amended in 1992, is modelled on s 72(ii) of the federal Constitution. It applies to all the state's judicial officers (as defined in s 52) and it is entrenched by s 7B of the Act.[1]

The statutory provisions for removal of judges in the other Australian states (with the exception of Victoria), however, are not constitutionally entrenched.[2] The provisions relating to the removal of judges of the Supreme Courts are, in most of these other states, modelled on England's *Act of Settlement* 1701

* Emeritus Professor of Law, Monash University.

1 The provisions to which s 7B applies cannot be altered unless the alterations have been approved by electors voting at a referendum.

2 Section 77(1) of the Victorian *Constitution Act* 1975, on the removal of Supreme Court judges, cannot be altered except in accordance with s 18. The provisions to which s 18 applies cannot be altered except by absolute majorities in both Houses of Parliament.

(effective from the accession of George I in 1714) and the Act 1 Geo III, c 23 (1760).[3] Article III, s 7 of the *Act of Settlement* provided that

> judges' commissions be made *quamdiu se bene gesserint* [during good behaviour] ... but upon address of both Houses of Parliament it may be lawful to remove them.

The Act of 1760 provided that the judges' commissions should continue notwithstanding the demise of the Crown.

Before federation, proceedings for removal of several Australian colonial judges had been taken under the *Colonial Leave of Absence Act* 1782, an enactment of the Imperial Parliament generally known as *Burke's Act*.[4] This Act was repealed by the same Parliament in 1964.[5] After federation, no Australian state governor seems to have relied upon the Act and for practical purposes the Act became a dead letter.[6]

Since federation very few Australian judges, at least at superior court level, have been removed from office or have been the subject of inquiries which might have resulted in their removal from office.[7] Certainly no case has arisen in which the High Court of Australia has had occasion to rule on the legality of a

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3 See *Constitution Act* 1867 (Qld), ss 15, 16; *Supreme Court Act* 1995 (Qd), s 195; *Constitution Act* 1934 (SA), ss 74, 75; *Constitution Act* 1975 (Vic), s 77(1); *Constitution Act* 1889 (WA), ss 54, 55; *Supreme Court Act* 1935 (WA), ss 54, 55. Under the Tasmanian *Supreme Court (Judges' Independence) Act* 1857 judges are removable by the Governor but only on address of both Houses. Section 40(1) of the *Supreme Court Act* 1979 (NT) is modelled on s 72(ii) of the federal Constitution but is not entrenched. The position in the Australian Capital Territory is dealt with at Part II Section A below. The Australian legislation is reviewed in PH Lane, "Constitutional Aspects of Judicial Independence" in H Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, Judicial Commission of NSW (1997) 61 and Justice JB Thomas, *Judicial Ethics in Australia*, LBC Information Services (2nd ed, 1997) pp 202-7.

In some of the states the process for the removal of judges of lower courts is the same or similar to that for the removal of judges of the Supreme Court: see *District Courts Act* 1967 (Qld), s 14 (incapacity or misbehaviour); *District Court Act* 1991 (SA), s 15(1) (no cause is specified); *Magistrates Court Act* 1987 (Tas), s 9 (proved misbehaviour or incapacity); *County Court Act* 1958 (Vic), s 9 (no cause is specified); *District Court of Western Australia Act* 1969 (WA), s 11(1) (modelled on the *Act of Settlement*). In Tasmania and Western Australia, stipendiary magistrates are removable only by parliamentary process: *Magistrates Court Act* 1987 (Tas), s 9; *Stipendiary Magistrates Act* 1957 (WA), s 5. See also *Judicial Commissions Act* 1994 (ACT), ss 3, 5.

4 Act 22 Geo III, c 75; confirmed and amended by Act 54 Geo III, c 61. See *Willis v Gipps* (1846) 5 Moo PC 379; 13 ER 536; *Montague v Van Diemen's Land (Lieut-Gov)* (1849) 6 Moo PC 489; 13 ER 773. Boothby J of the South Australian Supreme Court was removed under this Act in 1867. See J Thomson, "Removal of High Court and Federal Judges: Some Observations Concerning Section 72(ii) of the Australian Constitution" [1984] *Australian Current Law* at [36033], note 13.

5 By the *Statute Law Revision Act* 1964 (UK). The Act did not state whether it was intended to have extra-territorial operation.

6 There were doubts about whether some of the legislation of the states was consistent with *Burke's Act*: see PH Lane, note 3 *supra* at 74-5; JB Thomas, note 3 *supra*, pp 203-4; C Wheeler, "The Removal of Judges from Office in Western Australia" (1979) 14 *UWALR* 305 at 315-23; J Waugh, "The Victorian Government and the Jurisdiction of the Supreme Court" (1996) 19 *UNSWLJ* 409 at 472-3. If repugnant to *Burke's Act* the legislation would have been invalid. Following enactment of the *Australia Act* 1986 (Cth and UK) the state parliaments passed legislation to validate all local statutes which might previously have been held invalid on this ground: *Interpretation Act* 1987 (NSW), s 34A (inserted 1992); *Acts Interpretation Act* 1915 (SA), s 22B (inserted 1992); *Acts Interpretation Act* 1931 (Tas), s 46C (inserted 1992); *Interpretation of Legislation Act* 1984 (Vic), s 58 (inserted 1994); *Interpretation Act* 1984 (WA), s 76A (inserted 1994).

7 See PH Lane, note 3 *supra* at 62-3, 70.

decision to remove a judge from office. In *Murphy v Lush*[8] the Court entertained an application by one of its members for an interlocutory injunction to restrain the inquiry into his conduct commissioned by the *Parliamentary Commission of Inquiry Act* 1986 (Cth). The application was made partly on the ground that one of the commissioners should be disqualified, but it was dismissed.

The general question which this article addresses is the extent to which proceedings, which may result in the removal of judges from office, and decisions to remove them may be reviewed by courts of a supervisory jurisdiction. The article does not, however, broach the much larger subject of whether present Australian laws on investigation of judicial conduct, and proceedings for suspension or removal of judges, are satisfactory, and, if not, how those laws might be improved.[9]

The first part of the article deals with the kinds of inquiries which may be undertaken to ascertain whether there are grounds for removing a judge from office. It considers whether there are any constitutional constraints on the use of extra-parliamentary bodies to conduct such inquiries when a constitution has invested the power of removal in the parliamentary arm of government. It also considers possible grounds on which judicial review may be sought in relation to actions taken at the inquiry stage, up to the point at which a report or recommendation is made. Attention is drawn to special problems which arise when the inquiries have been undertaken within a parliamentary forum.

The article goes on to consider the justiciability of decisions to remove judges from office, in particular those decisions which have been made through the exercise of parliamentary powers. Does a judge who has been removed by a parliamentary process have any prospect of obtaining judicial review of the ultimate decision that he or she be removed from office? Is the availability of judicial review contingent on whether the power of removal has been constrained by reference to grounds for removal or procedures to be followed in exercising a power of removal? And to what extent may judicial review be precluded by privative clauses?

The questions with which the article deals are, in the main, ones which have not so far arisen for decision by Australian courts. Some of them have, however, arisen in other countries within the common law world whose laws in relation to judicial tenure resemble those of Australia. Reference is made to pertinent cases which have come before courts in these polities.

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8 (1986) 60 ALJR 523; 65 ALR 651.

9 The subject is considered in JB Thomas, note 3 *supra*, ch 17. See also Constitutional Commission, *Final Report (Vol 1)*, 1988 at 402-11; E Campbell, "Suspension of Judges from Office" (1999) 18 *Aust Bar Rev* 63.

II. PRE-REMOVAL INQUIRIES

A. Forms of Inquiry

Before a judge is removed from office, there will usually be an inquiry into whether there are sufficient grounds for removal. Indeed, such an inquiry may be required by law. If Houses of Parliament must be involved in the removal process they may appoint a parliamentary committee to make such an inquiry.[10] If the Houses are not required to be involved and the decision whether to remove is to be made by a vice-regal representative, that officer may appoint an ad hoc committee to make enquiries and advise.[11] In some cases it may even be thought appropriate to appoint a royal commission of inquiry.

In the case of Justice Lionel Murphy, a Justice of the High Court of Australia, the federal Parliament decided that it was appropriate to entrust the task of inquiry to an extra-parliamentary commission. This it did by enacting the *Parliamentary Commission of Inquiry Act* 1986 (Cth). The Queensland Parliament adopted the same course of action in the case of Justice Angelo Vasta, a Justice of the Queensland Supreme Court, and a judge of the District Court. Its special measure was the *Parliamentary (Judges) Commission of Inquiry Act* 1988 (Cth).[12]

New South Wales is the only Australian jurisdiction in which there is a standing statutory body with the power to make inquiries which may ultimately result in the removal of a judge from office. The *Judicial Officers Act* 1986 (NSW) brought into being a Judicial Commission which includes a Conduct Division. The chief judges of the courts of New South Wales are ex officio members of the Commission. Under s 15(1) of the Act anyone may complain to the Commission about "a matter that concerns or may concern the ability or behaviour of a judicial officer". The responsible Minister may, under s 16, also refer such a matter to the Commission. Section 15(2) provides that:

> The Commission shall not deal with a complaint unless it appears to the Commission that
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> (a) the matter, if substantiated, could justify parliamentary consideration of removal of the judicial officer from office;
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> (b) although the matter, if substantiated, might not justify parliamentary consideration of removal of the judicial officer from office, the matter warrants further examination on the ground that the matter may affect or may have affected the performance of judicial or official duties of the officer.

The Act regulates the processes of inquiry. Section 18 requires a preliminary investigation, which may result in the summary dismissal of a complaint. Section 20 itemises circumstances in which complaints must be dismissed summarily. Should the Commission not dismiss a complaint summarily, then it

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10 See, for example, Senate Select Committee on the Conduct of a Judge, *Report to the Senate*, August 1984 (PP 164/1984); Senate Select Committee on Allegations Concerning a Judge, *Report to the Senate*, October 1984 (PP 271/1984).

11 Principles of procedural fairness would usually require the adoption of such a measure: see *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342.

12 The members of both Commissions were all retired judges.

must refer the complaint to its Conduct Division for investigation.[13] But in its reference the Commission must, according to s 19, classify the complaint as either serious or minor. The complaints which must be classified as serious are those which "if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office".[14]

How a complaint is classified by the Commission affects the manner in which the complaint is investigated by the Conduct Division and thus the outcome of the investigation. If the complaint has been classified as minor, then the hearings in relation to the complaint must be conducted in private. If, however, the complaint has been classified as serious, the general rule is that the hearing should be in public.[15] Another stipulation is that, if the complaint has been classified as serious, the report of the Conduct Division on its investigation must be presented to the governor.[16] Should that report be adverse to the judicial officer, the Minister must table it in the Parliament.[17] To assist them in the discharge of their investigatory functions, the Judicial Commission and the Conduct Division have been invested with all of the statutory powers given to royal commissions by standing state legislation.[18]

In 1992 the *Judicial Officers Act* 1986 (NSW) was amended to provide (in s 41) that the judicial officers of the state cannot be removed in the absence of a report from the Conduct Division of the Judicial Commission to the governor stating that the matters reported on could justify parliamentary consideration of removal. To date only one such report has been presented - that of 1998 in respect of Justice Vince Bruce of the Supreme Court. A motion for the removal of the judge from office was introduced in the Legislative Council but was defeated.

The system for investigation of complaints against judges established by the New South Wales *Judicial Officers Act* 1986 is not unique. A comparable system was established by the India *Judges' Inquiry Act* 1968,[19] by the *Judicial Councils Reform and Judicial Conduct and Disability Act* 1980[20] in the United States of America and by the *Judges Act* 1985[21] of Canada.

The *Judicial Officers Act* 1994 of the Australian Capital Territory represents a somewhat different system for investigation of complaints against judges which, if substantiated, may result in their removal. The power to remove is vested in the Legislative Assembly and the Executive, the latter consisting entirely of Ministers for the time being. (In this Territory there is no vice-regal representative.) Judicial officers cannot, however, be removed from office

13 Section 21. The Conduct Division must consist of three members. At least two must be serving judges; the third member may be a retired judge.

14 Section 30.

15 Section 24.

16 Section 29.

17 Section 29.

18 Section 25.

19 Enacted under art 124(5) of the Constitution of India. Article 124(4) is similar to s 72(ii) of the Australian federal Constitution.

20 28 USC § 332.

21 Section 65.

except after investigation and report by a Judicial Commission appointed by the Executive to investigate a particular matter. Such a Commission must consist of three serving judges or two serving judges and one former judge.

There are two ways in which inquiries by a Judicial Commission may be initiated. If a complaint is made by a member of the public to the Attorney-General and that officer "is satisfied on reasonable grounds that the complaint could, if substantiated, justify consideration by the Legislative Assembly of a resolution requiring the removal from office of the judicial officer the subject of the complaint", then the Attorney-General must request the Executive to appoint a Judicial Commission; and the Executive must accede to the request.[22] Alternatively, a member of the Legislative Assembly may, by motion, seek to have a specific allegation examined by a Judicial Commission. Notice of the motion must be given to the Attorney-General within a specified time. If within that time the Attorney-General has not notified the member that the Executive has been requested to appoint a Judicial Commission, then the Assembly may resolve that the complaint be examined by such a Commission. That resolution obliges the Executive to appoint a Commission.[23] The report of a Commission must be submitted to the Attorney-General and tabled before the Legislative Assembly.[24]

The *Judicial Officers Act* 1994 (ACT) makes it clear that the only matters which may be referred to a Judicial Commission are ones which relate or may relate "to the behaviour or physical or mental capacity of a judicial officer". Section 5(1) of the Act limits the grounds on which such an officer may be removed to "misbehaviour or physical or mental incapacity". But if the Legislative Assembly passes a resolution requiring the Executive to remove a judicial officer from office on any one of these grounds, the Executive is bound to comply with that requirement. The Assembly's resolution must, however, have been preceded by an inquiry and a report by a Judicial Commission, and specified steps must be taken to ensure that the judicial officer concerned has been afforded due process.[25]

The territory's Act is not entrenched and can be repealed or amended like any other statute.

B. Constitutionality of Extra-Parliamentary Inquiries

A constitutional requirement that judges cannot be removed from office except through a parliamentary process does not preclude the relevant parliament from enacting legislation which establishes extra-parliamentary machinery for investigation and report on judicial conduct. Under the Constitution of the United States of America judges of the federal courts cannot be removed from office except through impeachment by the House of Representatives and trial

22 Section 16.

23 See ss 16 and 18.

24 The judicial officer who is the subject of the report must be afforded an opportunity to comment on it and the comments, if any, must also be tabled (ss 23 and 24).

25 Part IV.

before the Senate.[26] But, to date, all challenges to the constitutionality of the *Judicial Council Reform and Judicial Conduct and Disability Act* 1980 have been unsuccessful.

Under this Act, a Judicial Council may appoint an investigating committee to investigate complaints against judges who are accused of engaging "in conduct prejudicial to the effective and expeditious administration of the business of the courts" as well as complaints which allege an inability to discharge the duties of judicial office "by reason of mental or physical disability".[27] After investigation, the Judicial Council is to "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit".[28] The action may be an order "that for a temporary period no further cases be assigned to the judge". If the investigation has disclosed "a potentially impeachable offense", the Judicial Council may refer the complaint, and the record and proceedings in relation to it, "to the Judicial Conference of the United States for possible transmission to the House of Representatives". The transmission to the House is, however, no more than a determination by the Judicial Conference "that consideration of impeachment may be warranted".[29]

In the case of a *Matter of Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*,[30] a federal Circuit Court rejected a challenge to the constitutionality of this legislation. The Supreme Court of the United States subsequently denied an application for certiorari, thereby indicating that it found no reason to review the decision of the lower court.[31] The Circuit Court had rejected the argument that, in assigning to judges a non-judicial function, the statute violated separation of powers principles enshrined in the Constitution. The Circuit Court held that:

> the judicial complaint procedures, being ancillary to the administration of the courts, are duties which the Congress could properly confer upon the *judicial* rather than the *executive* branch. Indeed ... far more serious separation of powers objections would have arisen had the same powers been conferred upon a permanent agency in the executive (or legislative) branch.[32]

There were other grounds on which the constitutionality of the statute was challenged, but which the Circuit Court did not accept as valid. One was that the statute improperly derogated from the independence of the federal judiciary and detracted from the power of removal conferred by the Constitution upon the Congress.[33] Another was that the Act infringed the due process rights of judges under investigation.[34] The Circuit Court did not find it necessary to rule on the constitutionality of the provisions in the Act which allow a Judicial Council "to

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26 Article I, ss 1.5, 3.6 and 3.7; art II, s 4.
27 28 USC s 372(c)(1).
28 28 USC s 372(c)(6) and (7).
29 28 USC s 372(c)(8).
30 783 F 2d 1488 (1986).
31 477 US 904 (1986).
32 783 F 2d 1488 at 1505-6.
33 *Ibid* at 1510-12.
34 *Ibid* at 1513-14. See also *Hastings v Judicial Conference of the United States*, 829 F 2d 91 (1987).

forbid further assignment of cases to a judge on a temporary basis for a time certain" or to "reprimand by public announcement".[35]

The constitutionality of the Australian *Parliamentary Commission of Inquiry Act* 1986 (Cth) was challenged in *Murphy v Lush*,[36] though the report of the case does not examine what the ground of the challenge was. In the event, the court did not find it necessary to rule on this challenge. The case had come before the High Court, constituted by six Justices, as an application for an interlocutory injunction to restrain the Commission from proceeding with the inquiry entrusted to it by the Parliament. The Justices accepted that the validity of the Act was a triable issue but they decided that convenience required that the inquiry should proceed. The injunction sought was for that reason refused. Justice Murphy died before the Commission completed its inquiry. (Indeed the Commission was effectively countermanded by a federal enactment which was passed once it became known that the judge was afflicted with a terminal illness.)

Had the High Court found it necessary to rule on the challenge by Justice Murphy to the validity of the Act, it is doubtful whether it would have held the Act to be unconstitutional. The task of the Commission under s 5(1) of the Act was simply to "inquire, and advise the Parliament, whether any conduct of the Honourable Lionel Keith Murphy has been such as to amount, in its opinion, to proven misbehaviour within the meaning of section 72 of the Constitution". This task did not involve the exercise of any of the judicial powers of the Commonwealth. Nor was it one which involved an impermissible delegation of the powers vested in the Houses of Parliament and the Governor-General in Council by s 72(ii) of the Constitution. The three members of the Commission were required under the Act to be judges or former judges of a federal court or a Supreme Court of a state or territory, but they were to be appointed by resolutions of the Senate and the House of Representatives.[37] No judge or former judge was required to accept appointment. And, had a serving judge of a federal court accepted appointment, it is unlikely that the High Court would have held that his or her participation in the inquiry was incompatible with the duties of judicial office and that the appointment was, for that reason, invalid.[38]

For constitutional purposes, the *Parliamentary Commission of Inquiry Act* 1986 (Cth) could be characterised as a law with respect to a matter incidental to the execution of powers vested by s 72(ii) of the Constitution in the Houses of the federal Parliament and officers of the Commonwealth. The Act could therefore be regarded as one of a kind the Parliament is expressly authorised to enact under s 51(xxxix) of the Constitution - the express incidental power. Although the Act included penal provisions which might have been used against persons who, for example, failed to respond to a witness summons, it is unlikely that these provisions could have been assailed on the ground that they were

35 *Ibid* at 1510.

36 (1986) 60 ALJR 523; 65 ALR 651.

37 Section 4(2).

38 See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

disproportionate measures.[39] The provisions certainly did not stray beyond the powers and privileges which the Houses of the Parliament might themselves have exercised had they undertaken the inquiry, pursuant to s 49 of the Constitution.

C. Grounds for Judicial Review

There can be little doubt that, subject to any valid privative clauses,[40] the actions of an extra-parliamentary commission of inquiry which has been established to inquire into and report on the conduct of a judge are subject to judicial review according to general principles of administrative law. A body of this kind is analogous to a royal commission of inquiry or a body such as the Independent Commission Against Corruption created by the New South Wales *Independent Commission Against Corruption Act* 1988. Courts of supervisory jurisdiction have on many occasions been asked to review the actions of such bodies and have not hesitated to do so.

The grounds upon which judicial review may be sought are several. If the commission is a creature of statute and the statute has prescribed qualifications for appointment to it, an appointment might be challenged on the ground that the appointee does not possess the requisite qualifications. If the commission is bound to observe principles of natural justice, proceedings may be instituted in an appropriate court of law to prevent the participation, or further participation, in the inquiry, of a particular commissioner on the ground that there is reasonable apprehension of bias on his or her part.[41] Certainly the High Court of Australia had no doubt about its jurisdiction under s 75(v) of the federal Constitution to entertain the suit by Justice Murphy for an interlocutory injunction to restrain proceedings before the Commission appointed under the *Parliamentary Commission of Inquiry Act* 1984 (Cth) on the ground that its presiding member was disqualified by reason of the rule against bias.[42] Judicial review could also be sought on the ground that the commission had acted in breach of statutory procedural requirements or in breach of common law requirements of procedural fairness.[43]

Yet another ground on which a court ruling may be sought during the course of proceedings before a commission of inquiry is that the commission called for a kind of evidence under summons, the giving or production of which it cannot legally require. It is now well established that privileges such as the privilege against self-incrimination and legal professional privilege are available not

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39 On when proportionality is a measure of the validity of statutes, see *Leask v Commonwealth* (1996) 187 CLR 579.

40 See Part IV below.

41 *Gibson v O'Keefe* (unreported, NSW Supreme Court, Einstein J, 26 June 1998).

42 *Murphy v Lush* (1986) 60 ALJR 523; 65 ALR 651.

43 *ICAC v Chafey* (1993) 30 NSWLR 21; *Rees v Crane* [1994] 2 AC 173; *Barnwell v Attorney-General* [1994] 3 LRC 30.

merely in curial proceedings but also in proceedings before extra-curial bodies, unless those privileges have clearly been overridden or modified by statute.[44]

Another principle which may be of particular relevance when judicial conduct is under investigation is that a judge cannot be compelled to testify either about his or her reasons for decisions in particular cases or about the manner in which judicial discretions and powers have been exercised by him or her.[45] Nor can judicial officers who are responsible for allocating cases among the members of a court be compelled to testify about their reasons for selecting one judge rather than another to sit in a particular case.[46]

Courts of supervisory jurisdiction have in the past entertained applications for orders to prevent certain inquiries being pursued by a commission of inquiry on the ground that those inquiries go beyond the commission's terms of reference.[47] If the inquiry is one in which the commission is required to investigate allegations against a judge and to report on whether, in its opinion, the judge's conduct amounts to misbehaviour or incapacity within the meaning of a constitutional or statutory provision, a court may be asked to restrain investigation of a particular allegation on the ground that, even if it were to be substantiated, it could not reasonably be regarded as indicative of misbehaviour or incapacity.[48] Judicial commissions may, at an early stage in their proceedings, find it necessary to make rulings on what allegations can and cannot be investigated.[49] Those rulings may be contested by the judge who is the subject of the investigation or by a person summoned to give evidence on a particular matter.[50] It is also conceivable that if the commission has declined to investigate certain allegations on the ground that, even if substantiated, they would not indicate misbehaviour or incapacity, someone with the requisite standing to sue might seek judicial review of the commissioners' decision not to investigate.[51]

There is a Canadian precedent for judicial review of an extra-parliamentary decision to initiate an inquiry into a judge's fitness to remain in office. *Gratton v Canadian Judicial Council and Attorney-General of Canada*[52] concerned a

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44 *Hammond v Commonwealth* (1982) 152 CLR 188; *Sorby v Commonwealth* (1983) 152 CLR 28; *Baker v Campbell* (1983) 153 CLR 52; *Esso Australian Resources Ltd v Dawson* (1999) 162 ALR 79.

45 *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418 at 433, 457, 458, 462; *Hennessy v Broken Hill Co Pty Ltd* (1926) 38 CLR 342 at 349; *Zanatta v McCleary* [1976] 1 NSWLR 230; *MacKeigan v Hickman* [1989] 2 SCR 796 at 828-34; *Warren v Warren* [1996] 3 WLR 1129 at 1136-7, per Lord Woolf MR; *Evidence Act* 1995 (Cth), ss 16(2) and 129; *Evidence Act* 1995 (NSW), ss 16(2) and 129.

46 *MacKeigan v Hickman*, note 45 *supra*.

47 *Thelander v Woodward* [1981] 1 NSWLR 644; *Queensland v Wyvill* (1989) 90 ALR 611; *Eatts v Dawson* (1990) 93 ALR 497; *Attorney-General (Queensland) v Queensland* (1990) 94 ALR 515. But a court may decline to intervene on the ground that the application for review is premature: see *Langton v ICAC* (unreported, NSW Supreme Court, Sperling J, 8 April 1998).

48 On the concept of "misbehaviour" see Thomas, note 3 *supra*, pp 15-19.

49 The 'Murphy Commission' presented a report on what might constitute misbehaviour: *Parliamentary Commission of Inquiry: Re the Honourable Mr Justice Murphy* (PP 443/1986), reprinted in (1986) 2 *Aust Bar Rev* 203.

50 *Ross v Costigan (No 1)* (1982) 41 ALR 319; *Ross v Costigan (No 2)* (1982) 41 ALR 337; *Lloyd v Costigan* (1983) 48 ALR 241; *Harper v Costigan* (1983) 50 ALR 665.

51 The person or body appointing the commission would presumably have standing.

52 [1994] 2 FC 769 (Trial Div).

decision made under the *Judges Act* 1985 (Can) to inquire into an allegation that a judge of the Ontario Court of Justice may have been incapacitated by reason of infirmity. The alleged infirmity had been occasioned by a stroke. Judicial review of the decision was sought on the ground that, even if the allegation was substantiated, it would not constitute grounds for removal of the judge from office under s 99(1) of the Canadian *Constitution Act* 1867. This Act provides that "the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons". The Federal Court's decision in the case will be examined later in the article.[53] For present purposes it is sufficient to record that the Trial Division of the Federal Court had no doubts about its jurisdiction to review the decision that there should be an inquiry and to pronounce on the meaning and effect of s 99(1) of the *Constitution Act* 1867. The result of the ruling of the Court was that the inquiry commissioned by the Judicial Council was allowed to proceed.

It is by no means unknown for reports of commissions of inquiry to be the subject of applications for judicial review. Unless such reports carry legal consequences they cannot be quashed by certiorari.[54] But they can be the subject of declaratory relief on grounds such as excess of jurisdiction,[55] breach of an obligation to accord procedural fairness,[56] or a finding which is not open in law, for example a finding that certain conduct amounts to corruption.[57]

In 1998, a Justice of the Supreme Court of New South Wales, Justice Vince Bruce, instituted proceedings in that court in an attempt to prevent a report of the Judicial Commission of that state, in respect of complaints about him, being used as a basis for his removal from office by the requisite parliamentary process. The Commission had, after inquiry, reported that there was a case for consideration by the New South Wales Houses of Parliament as to whether the judge should be removed from office on the ground of a continuing incapacity to fulfil the duties of office. The complaints about Justice Bruce were principally concerned with long delays in delivery of judgments in cases tried before him. The application of the judge for judicial review rested partly on a contention that there was no evidence to support the finding in the report and partly on a contention that the *Judicial Officers Act* 1986 (NSW) required that a report of the Conduct Division of the Judicial Commission which could lead to a parliamentary address for removal of a judge had to be a unanimous report of all three members of that Conduct Division. The Court of Appeal, which heard the case, rejected Justice Bruce's contentions, but noted that if the three persons constituting the Conduct Division were not unanimous the report should say so,

53 See text accompanying notes 64-6 *infra*.

54 *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 8 ALR 691; 50 ALJR 471.

55 *Balog v ICAC* (1990) 169 CLR 625.

56 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

57 *Greiner v ICAC* (1992) 28 NSWLR 125.

and that the dissenting member should record his or her reasons for dissent. This should be done in order to inform the Parliament.[58]

D. Judicial Review of Parliamentary Proceedings

When an inquiry into the conduct of a judge has been undertaken within a parliamentary forum, judicial review of the proceedings would generally be regarded as in breach of parliamentary privilege. If, however, a person summoned to appear as a witness before a House or a parliamentary committee failed to appear or refused to answer questions, and for that failure or refusal was adjudged to be in contempt of parliament and penalised by imprisonment, it is possible that a court of law would entertain an application for a determination of the question whether the conduct adjudged to be in contempt was capable of being so regarded.[59]

Courts of law would certainly decline to review a parliamentary motion for removal of a judge and would probably decline also to entertain proceedings the object of which was to prevent a parliamentary address for removal being presented to a vice-regal representative, or to obtain a declaration that the address could not legally be acted upon: for example, because the address failed to assign grounds for removal. Even if a court were to accept that a decision to remove a judge, upon parliamentary address, is susceptible to judicial review, it might well consider it inappropriate to intervene before such a decision is made. Judicial intervention in parliamentary legislative processes is, after all, generally considered inappropriate notwithstanding that the legislation which results from that process may be unconstitutional.[60] A parliamentary address for the removal of a judge can be seen as analogous to a Bill for an Act.

III. JUDICIAL REVIEW OF DECISIONS TO REMOVE JUDGES FROM OFFICE

A decision to remove a judge from office is a momentous decision not only for the judge but for the judiciary as a whole. It will be a decision of great moment regardless of whether it is legally valid. Judges in respect of whom such decisions have been made, who believe those decisions to be quite wrong or unfair, may seek judicial review of them. Those who have been endowed with legal authority to dismiss a judge from office may, before exercising that authority, seek assurance that what they propose to do is lawful or not susceptible to challenge before a court of law.

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58 *Bruce v Cole* (1998) 45 NSWLR 163. The parliamentary proceedings on the motion for dismissal of the judge are described in J Waugh, "A Question of Capacity: The Case of Justice Bruce" (1998) 9 *PLR* 223.

59 See *Burdett v Abbott* (1811) 14 East 1 at 150; 104 ER 501 at 558; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162; *Parliamentary Privileges Act* 1987 (Cth), s 9.

60 *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203; *Clayton v Heffron* (1960) 105 CLR 214 at 235; *Cormack v Cope* (1974) 131 CLR 432. See also *Harper v Home Secretary* [1955] 1 Ch 238.

The availability of judicial review of a decision to remove a judge from office will depend on a number of considerations, including who has been invested with the power to remove and whether the power to remove is restricted as regards causes for removal. There can be little doubt that, if the power of removal is vested in a vice-regal representative (acting with or without the advice of an Executive Council) or some other executive agency, and the power is exercisable only on specified grounds, a purported exercise of that power will be judicially reviewable according to general principles of administrative law.[61]

In those jurisdictions in which the provisions for the removal of judges are couched in much the same terms as Article III, s 7 of the *Act of Settlement*, there may be dispute about whether the parliamentary process is the sole method of removal or whether a judge's commission may also be revoked by a writ of *scire facias* on the ground of misbehaviour.[62] This is undoubtedly a justiciable question. In *Valente v The Queen*[63] the Supreme Court of Canada had no doubt that, under s 99(1) of the *Constitution Act* 1867, the only method by which judges of the superior courts of Canada may be removed is by the parliamentary process. This view was endorsed by the Federal Court in *Gratton v Judicial Council of Canada*.[64]

Another issue which arose in *Gratton's* case was whether the parliamentary power of removal under s 99(1) is exercisable only for specific cause. Contrary to the view expressed by Isaacs and Rich JJ in *McCawley v The King*[65] in relation to the *Act of Settlement*, on which s 99(1) of the Canadian *Constitution Act* 1867 is based, the Canadian Federal Court held in *Gratton's* case that the power conferred by s 99(1) is a restricted one and that judges of Canada's superior courts can be removed only for misbehaviour.[66] The Court did, however, accept that misbehaviour in this context extends to permanent incapacity.[67] Strayer J justified this construction of s 99(1) on the basis that:

> it is necessary to give a meaning to subsection 99(1) which, having regard to the role of Canadian superior courts as guardians of the constitutional constraints imposed on Parliament, will properly limit the grounds for removal and therefore the discretion of Parliament in the dismissal of superior court judges. The definition of the grounds for removal should be those consistent with the general purpose of judicial independence...[68]

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61 *Ex parte Ramshay* (1852) 18 QB 174; 118 ER 65; *Stewart v Secretary of State for Scotland* [1998] SLT 385 (HL). See also E Campbell, "Termination of Appointments to Public Offices" (1996) 24 *Fed L Rev* 1.

62 See S Shetreet, *Judges on Trial*, North-Holland Publishing Company (1976) pp 90-9; J Thomas, note 3 *supra*, pp 205-6. In *R v Hughes* (1866) LR 1 PC 81 it was held that *scire facias* was not available in colonies where the Letters Patent sought to be revoked had been issued in England.

63 [1985] 2 SCR 673 at 695.

64 Note 52 *supra*.

65 (1918) 26 CLR 9 at 58-9. See also S Shetreet, note 62 *supra*, pp 104-6.

66 Note 52 *supra*.

67 *Ibid* at 792-6.

68 *Ibid* at 790.

> [J]udicial independence is too important to the balancing of our Constitution to leave available, for future choice by Parliament, grounds for removal other than breach of good behaviour.[69]

Strayer J did not find it necessary to rule on how the restriction on the parliamentary power might be enforced.

In their consideration of s 72(ii) of Australia's federal Constitution, two of the members of the 'Murphy Commission' conceded that removal of a federal judge might raise justiciable issues.[70] The Honourable Andrew Wells QC (a former judge of the Supreme Court of South Australia) suggested that to satisfy s 72(ii) the address presented by the Houses of the Parliament to the Governor-General must specify the ground or grounds on which removal is sought.[71] He also suggested that the decision to remove a judge (presumably that of the Governor-General in Council) might be judicially reviewable if the grounds assigned could not in law be capable of being regarded as misbehaviour or incapacity.[72] Though he had no doubt that a judge subject to a parliamentary inquiry had a right to natural justice, he did not express a view on whether that right might be enforced by a court of law and, if so, how.[73]

One likely objection to judicial review of the procedures adopted by the Houses of Parliament in investigating allegations against a judge is that such review would contravene Article 9 of the *Bill of Rights* 1689, a part of the law of all Australian jurisdictions.[74] Article 9 provides that:

> the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Article 9 has been interpreted by courts as precluding reception by them of evidence of proceedings in a parliament, at least when such evidence is sought to be adduced to question or impeach those proceedings.[75] A case in which a judge claimed that he or she was denied natural justice in the parliamentary forum could not easily be sustained without proof of the nature of proceedings in that forum. In the 1993 case of *Nixon v United States*,[76] the United States Supreme Court ruled that the question whether the Senate's trial of a judge, following impeachment by the House of Representatives, had been fair was a non-justiciable political question.[77]

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69 *Ibid* at 791.

70 Note 49 *supra* at 210, 249.

71 *Ibid* at 225.

72 *Ibid* at 249.

73 *Ibid* at 231. W Harrison Moore considered that there could be no judicial review of a decision to remove a federal judge "except perhaps in a case where the procedure was flagrantly unjust": *The Constitution of the Commonwealth of Australia*, Maxwell & Sons (2nd ed, 1910) p 203.

74 Article 9 applies in all states and territories either because of legislation adopting the privileges of the House of Commons or because it reflects an inherent privilege or because of state legislation on the application of Imperial statutes.

75 *Prebble v Television New Zealand Pty Ltd* [1995] 1 AC 321; *Parliamentary Privileges Act* 1987 (Cth), s 16; *Laurance v Katter* (1997) 141 ALR 447; G Griffith, *Parliamentary Privilege: Use, Misuse and Proposals for Reform*, NSW Parliamentary Library Research Service (Briefing Paper No 4/97) pp 24-45.

76 506 US 224 (1993).

77 The Court had regard to the history of the relevant provisions in the United States Constitution: *ibid* at 735-9.

It is possible that the High Court of Australia would take the same view were a judge of a federal court to contest the validity of a decision to remove him or her from office on the ground that the parliamentary procedures which preceded that decision had been unfair and in breach of the judge's right to natural justice. But the Court could not avoid consideration of whether it has jurisdiction to review a decision made in purported exercise of the power conferred by s 72(ii) of the Constitution, and if so, upon what grounds. Nor could the Court fail to notice salient differences between s 72(ii) and the comparable provisions of the United States Constitution.

Under the Constitution of the United States, the power to remove federal judges rests solely in the Houses of Congress. The President has no voice at all in this process. Indeed, he or she is removable from office by that same process. These provisions of the United States Constitution reflect the old English system under which royal officers might be removed from office if impeached by the House of Commons and tried and "found guilty" by the House of Lords. Section 72(ii) of Australia's federal Constitution, in contrast, adopts a modified version of the system established by the *Act of Settlement* 1701. It provides that judges of Australian federal courts cannot be removed from office except through the process it prescribes, which is a parliamentary process. It also makes it clear that the Governor-General in Council has the final word in that process. It does not, by its terms, require the Governor-General in Council to accede to a parliamentary address seeking removal of a judge from office, and it is not inconceivable that the Governor-General in Council might decline to take the action sought by the Houses of the Parliament. Grounds on which the Governor-General might decline to act might be want of sufficient particulars in the address, reason to believe that the judge had been denied procedural fairness, failure to show that the alleged misbehaviour or incapacity had been "proved", or even disagreement with the conclusion of the Houses that the conduct of the judge amounted to misbehaviour or incapacity within the meaning of s 72(ii). Were the parliamentary address one which sought the removal of a judge from office on account of conduct prior to appointment to judicial office, it is not impossible that there could be disagreement between the parliamentary majorities which supported the address for removal and the Executive Councillors advising the Governor-General. Those Councillors might advise that, in their opinion, s 72(ii) does not authorise removal of a judge on account of the judge's conduct prior to appointment to judicial office, or if it does, that the conduct which the Houses have adjudged to be misbehaviour is not so adjudged by them.

Houses of a parliament which have passed motions for the removal of a judge and have presented the required address for removal might have grounds for complaint if their address is not acted upon by those in whom the ultimate power of removal has been reposed. The presiding officers of those Houses would probably be recognised as having standing to sue for judicial remedy to enforce the vice-regal agents' duty to consider an address for removal and to do so within a reasonable time after presentation of the address. (A duty to consider an address from the Houses may arise from the fact that the power of removal

conferred by s 72(ii) is exercisable only during the parliamentary session in which the address has been presented.) The presiding officers would, however, encounter some difficulties in persuading a court of law that the vice-regal agents are legally bound to do that which the parliamentary address seeks.

The Australian High Court could not claim a complete want of jurisdiction to review a decision made in reliance on s 72(ii) of the Constitution to remove a judge of a federal court from office. The ultimate authors of such a decision would be the Governor-General and the members of the Federal Executive Council. Under s 64 of the Constitution, the Queen's Ministers of state for Commonwealth are members ex-officio of that Executive Council. For the purposes of s 75(v) of the federal Constitution both the Governor-General and members of the Federal Executive Council are certainly officers of the Commonwealth, and thus persons whose actions are susceptible to review by the Court in exercise of the supervisory jurisdiction conferred on it by s 75(v).[78] The necessary involvement of the executive branch of government in proceedings to remove a judge of an Australian federal court from office provides one ground on which the Australian High Court might rely in rejecting the position adopted by the United States Supreme Court in *Nixon v United States*.[79]

There are undoubtedly hard questions which a court of law would have to address if the legality or constitutionality of a decision to remove a judge were to be contested and the decision to remove a judge proceeded from an address of a parliamentary house. When the decision to remove has been made in purported exercise of a power expressed in terms similar to Article III, s 7 of the *Act of Settlement* 1701, the question may be the same as that considered in *Gratton v Judicial Council of Canada*,[80] namely, whether cause for removal must be shown and whether that cause must be misbehaviour or incapacity. Even when it is clear that a judge cannot be removed from office except for misbehaviour or incapacity, there remains a question as to whether the parliamentary judgment that misbehaviour occurred or that the judge is incapable is susceptible to any form of judicial review. A court could conceivably take the view that the parliamentary address must, as it were, set out reasons for 'judgment' and that the court may properly rule on whether the conduct adjudged to constitute misbehaviour or incapacity is capable of being so regarded. If the provision governing removal stipulates, as does s 72(ii) of the Australian federal Constitution, that misbehaviour or incapacity must be proved, a court may need to consider whether the parliamentary address must provide evidence that the Houses of the parliament have attended to matters of proof. A court may need to consider whether s 72(ii) of the Constitution, by implication, imposes on those in whom the power of removal is vested a duty to accord procedural fairness, breach of which invalidates a decision.

If s 72(ii) of the Constitution were construed as limiting the power of removal by requiring that a judge must be accorded procedural fairness, then Article 9 of

78 Section 75(v) gives the High Court an original jurisdiction in any matter "[i]n which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

79 Note 76 *supra*.

80 Note 52 *supra*.

the *Bill of Rights* 1689, in its application to the federal Parliament (by virtue of s 49 of the Constitution and s 16(1) of the *Parliamentary Privileges Act* 1987 (Cth)) might not be regarded as effective to preclude judicial inquiry into parliamentary proceedings to determine whether the act of removal was unconstitutional. In its recent decision in *Egan v Willis*,[81] the High Court ruled that the exclusionary rules of evidence, which have been constructed on the basis of Article 9 of the *Bill of Rights* 1689, cannot prevent Australian courts from receiving evidence of parliamentary proceedings, when that evidence is tendered as proof that constitutional limitations on parliamentary powers have been exceeded.

In a commentary on the case of Justice Murphy, Professor AR Blackshield suggested that had the judge eventually been removed from office by the parliamentary process, review by the High Court of the validity of the removal would have been unthinkable.[82] The Court may well have been discomforted had it been requested to rule on the validity of the dismissal of one of its brethren. But it would have had to recognise that s 72(ii) of the federal Constitution applies to judges of all the federal courts and not simply to Justices of the High Court of Australia. It may also have had to be reminded that parliaments can and do enact legislation preventing removal of certain non-judicial officers from office except by a parliamentary process and for specified causes.[83] The Court would, in point of principle, have had to decide the case on the basis that the challenge might have been presented by anyone whose tenure was protected by s 72(ii) or a similar clause.

The legislative history of s 72(ii) indicates that the framers of the Constitution believed that judges who were removed from office by the parliamentary process would have to accept the decision of the parliament as final and would not be entitled to seek judicial review.[84] Initially it had been proposed that the Constitution should include a clause similar to Article III, s 7 of the *Act of Settlement* 1701 but in terms which made it clear that the only way in which federal judges could be removed was on address from the Houses of Parliament. At the National Australasian Convention held in Adelaide in 1897, the Premier of South Australia, Charles Kingston QC, moved an amendment to restrict the grounds for removal to misbehaviour or incapacity.[85] His concern, also shared by Edmund Barton QC, was that if a federal judge could be removed for any reason it would be open to the Houses of the federal Parliament to procure a dismissal simply because a judge had made decisions which were adverse to the Commonwealth.[86]

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81 (1998) 158 ALR 527 at 570-3, per Kirby J.

82 AR Blackshield, "The 'Murphy Affair'" in J Scutt (ed), *Lionel Murphy: A Radical Judge*, McCulloch Publishing (1987) p 254.

83 For example, members of the federal Industrial Relations Commission: *Workplace Relations Act* 1996 (Cth), ss 24, 28(1). See also Thomas, note 3 *supra*, pp 207-8.

84 The legislative history is described in J Thomson, note 4 *supra* at [36033]-[36047].

85 *Official Report of the National Australasian Convention Debates, 1897*, CE Bristow, Government Printer, pp 946-7.

86 *Ibid*, pp 951-3.

Isaac Isaacs, then Attorney-General for Victoria, opposed Kingston's proposal. He warned that its adoption would render removals vulnerable to challenge in the courts which he believed was undesirable.[87] Henry Bournes Higgins agreed.[88] Kingston and Barton, however, assured the delegates that if the Houses pronounced a judge incapable or guilty of misbehaviour their judgment would be final.[89] The Kingston motion was agreed to.[90] The resulting sub-clause, 72(iii), presented at the third session of the Convention in Melbourne in 1898,[91] provided that federal judges:

> [s]hall not be removed except for misbehaviour or incapacity, and then only by the Governor-General in Council, upon an address by both Houses of the Parliament in the same session praying for such removal.

It was preceded by a sub-clause stating that the federal judges "[s]hall hold their offices during good behaviour".

Isaacs was not satisfied that sub-clause 72(iii) would "make the judgment of the Governor-General in Council and of the two Houses of Parliament final".[92] He did, however, concede that such desirable finality would be achieved by a reformulation of the sub-clause along the lines proposed by the then Premier of New South Wales, GH Reid.[93] The reformulation involved deletion of the opening words of the sub-clause ("Shall not be removed except for misbehaviour or incapacity") and addition after the words "praying for such removal" of the words "upon the ground of misbehaviour or incapacity". The reformulation was agreed to, producing what in essence is now s 72(ii).[94]

There can be little doubt that the delegates to the Convention sought to exclude any possibility of judicial review of the removal of a judge by the parliamentary process. And they considered that process to be the only method by which a federal judge could be removed from office.

IV. JUDICIAL REVIEW IN THE FACE OF PRIVATIVE CLAUSES

Parliaments sometimes enact legislation with the object of excluding judicial review of acts or decisions made in purported exercise of certain statutory powers, or else with the object of restricting the grounds upon which such acts or decisions may be judicially reviewed. Section 4(3) of Queensland's *Parliamentary (Judges) Commission of Inquiry Act* 1988 sought to preclude review of the proceedings of the Commission. It provided that "the conduct of the inquiry and the right of the Commission to inquire into any matter shall not

87 *Ibid*, pp 947-9.
88 *Ibid*, pp 953-4.
89 *Ibid*, pp 952, 957.
90 *Ibid*, p 960.
91 *Official Record of the Debates of the Australian Federal Convention, 1898 Vol 1*, RS Brain, Government Printer, p 308.
92 *Ibid*, p 311.
93 *Ibid*, pp 312-3. See also pp 313-4, p 318 (Kingston), p 315 (Barton) and p 318 (Josiah Symon QC).
94 *Ibid*, p 318.

be justiciable in any court". Section 60 of the *Judicial Officers Act* 1994 of the Australian Capital Territory is also intended to preclude any form of judicial review of official proceedings which may result in the removal of a judge from office or of any decision to remove a judge from office.

It debars "proceedings for an injunction, declaration or writ of mandamus, prohibition or certiorari" in relation to the following:

- A decision of the Attorney-General to request the Executive to appoint a Judicial Commission;
- A decision of the Attorney-General to decline to take action with respect to a complaint;
- A decision of a member of the Legislative Assembly to move a motion for appointment of a Judicial Commission and to give notice of that motion to the Attorney-General;
- A resolution of the Legislative Assembly that the Executive appoint a Judicial Commission;
- A decision of the Executive to appoint a Judicial Commission;
- Any proceedings of a Judicial Commission appointed by the Executive;
- A decision by the Attorney-General to table a report of a Judicial Commission;
- Any decision by the Executive, after the requisite processes, to remove a judicial officer from office.

Section 60 detracts from the jurisdiction conferred on the Supreme Court of the territory by the *Supreme Court Act* 1933.[95] This Act was originally an enactment of the Commonwealth Parliament, but by s 34 of the *Australian Capital Territory (Self Government) Act* 1988 (Cth) it was, from 1 July 1992, converted into an Act of the territory's Legislative Assembly and thus an Act which the Assembly may amend, in exercise of the power given to it by s 22(1) of that Act "to make laws for the peace, order and good government of the territory". The jurisdiction of the Supreme Court is in no way entrenched nor does s 60 of the *Judicial Officers Act* 1994 appear to be inconsistent with any overriding statute of the Commonwealth Parliament.

Whether or not s 60 would be regarded by the Supreme Court (or by the High Court, on appeal) as effectively precluding judicial review of actions to which it relates is by no means certain. Were the decision of the House of Lords in *Anisminic v Foreign Compensation Commission*[96] to be followed, the conclusion might be that s 60 does not effectively preclude judicial review on the ground of jurisdictional error by any of the agencies of executive government involved in the processes prescribed by the *Judicial Officers Act* 1994. In *Anisminic*, the House of Lords held that the Parliament of the United Kingdom cannot, by its enactments, preclude altogether judicial review of the actions of bodies created

95 See ss 20(1), 34, 34B.
96 [1969] 2 AC 147.

by it, particularly when review is requested on the ground that such a body has exceeded the limits of the powers invested in it by statute.

Were the Supreme Court of the Australian Capital Territory to be presented with a case in which its supervisory jurisdiction was invoked, and the defendant(s) or respondent(s) sought to rely on s 60 of the *Judicial Officers Act* 1994 to resist the proceedings, clearly the Court could not avoid determination of whether the section is effective in precluding judicial review of the action or matter sought to be reviewed. It is not inconceivable that the judicial officer or other person who has sought judicial review (for example, a witness who has been summoned to appear before a Judicial Commission) might contest the constitutionality of s 60 on the ground that it is a provision of a kind which even the Commonwealth Parliament cannot enact in exercise of the power given to it by s 122 of the federal Constitution to make laws for the government of Commonwealth territories. Were such a constitutional issue to be raised, the matter would be one in which the High Court has an original jurisdiction under s 30 of the *Judiciary Act* 1903 (Cth),[97] and the matter might be removed to the High Court pursuant to s 40 of that Act.

The legislative power conferred on the federal Parliament by s 122 of the Constitution is not an unlimited power,[98] and any limitations to which it is subject will necessarily qualify the powers granted to territory legislatures to make laws for the peace, order and good government of the territory. The High Court might well hold that these (territorial) powers do not extend to the enactment of legislation which purports to preclude any form of review of legislation or executive acts on constitutional grounds. But unless a statute defining a territory court's jurisdiction has been entrenched, it is doubtful whether the High Court would be prepared to hold that a territory legislature cannot in any way detract from that jurisdiction. On the other hand, some judges might be sympathetic to an argument that if a territory legislature enacts legislation of the kind exemplified by the *Judicial Officers Act* 1994 (ACT), it cannot preclude altogether judicial review of the actions of those upon whom powers have been conferred by that legislation, particularly if review is called for on the ground that powers conferred by or under the legislation have been exceeded. To preclude judicial review in such a situation, it could be argued, is tantamount to the provision of a blank cheque to the repositories of statutory powers to behave as they wish in the purported exercise of those powers.

The strategy adopted by the House of Lords in *Anisminic v Foreign Compensation Commission*[99] was not, of course, to rule that the seemingly 'judge-proof' privative clause in question was unconstitutional, for the United Kingdom has no entrenched constitutional instrument according to which the

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97 Enacted pursuant to s 76(i) of the Constitution.

98 The High Court has held that the power is subject to s 90 (*Capital Duplicators Pty Ltd v ACT (No 1)* (1992) 177 CLR 248) and to s 51(xxxi) (*Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513). In *Kruger v Commonwealth* (1997) 190 CLR 1 the Court was evenly divided on the question of whether the territories power may be constrained by a requirement that judicial powers be reposed only in an independent judiciary.

99 Note 96 *supra*.

validity of governmental acts may be tested. The strategy was rather that of ruling that the privative clause under consideration was ineffective in precluding judicial review on the ground of jurisdictional error. Nevertheless, it was a strategy which had the same practical effect as a pronouncement that the privative clause was, at least to that extent, invalid and thus one which the court could ignore.

Australian courts have not been prepared to hold provisions such as s 60 of the *Judicial Officers Act* 1994 (ACT) wholly invalid. Such provisions have instead been interpreted according to what is called "the *Hickman* principle".[100] According to this principle privative clauses which, on their face, appear to preclude any form of judicial review are read:

> as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided

that the following conditions are satisfied:

(a) The body's "decision is a bona fide attempt to exercise" the authority conferred;[101]

(b) The decision "relates to the subject matter of the legislation";[102]

(c) The decision "is reasonably capable of reference to the power given to the body";[103]

(d) The decision is not on its face beyond jurisdiction;[104]

(e) The decision does not violate "some inviolable limitation or restraint" upon the body's statutory powers.[105]

Although the *Hickman* principle has been developed in relation to privative clauses in federal legislation, it has been treated as applicable to state legislation containing such clauses.[106] It has been suggested that the effect of the principle is to enlarge the substantive powers accorded to the decision-maker by statute.[107] This is because application of the principle validates some decisions which

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100 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615, per Dixon J. The principle and elaborations of it are discussed in M Aronson and B Dyer, *Judicial Review of Administrative Action*, LBC Information Services (1996) pp 966-80 and CD Campbell, "An Examination of the Provisions of the Migration Amendment Bill (No 4) Purporting to Limit Judicial Review" (1998) 5 *AJ Admin L* 135 at 140-8. See also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 629-34, per Gaudron and Gummow JJ.

101 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615.

102 *Ibid.*

103 *Ibid.*

104 *Ibid* at 618. See also *R v Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australia* (1947) 75 CLR 361; *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 and *R v Murray; Ex parte Proctor* (1949) 77 CLR 387.

105 *R v Metal Trades Employees' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 209.

106 Aronson and Dyer, note 100 *supra*, p 978; *Londish v Knox Grammar School* (1997) 97 LGER 1 at 5-7.

107 *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 194, per Brennan J; at 205, per Deane and Gaudron JJ; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 630, per Gaudron and Gummow JJ.

otherwise would have been regarded as being in excess of power or jurisdiction, but the principle cannot be used to validate all such decisions; decisions which are manifestly beyond power are not protected.

Decisions to which s 60 of the *Judicial Officers Act* 1994 (ACT) applies probably cannot be challenged on the ground that they have been made in breach of statutory procedural requirements. It cannot, however, be assumed that s 60 would be treated as effective to preclude altogether the possibility of judicial review of, say, a decision to remove a judicial officer. A court might well take the view that s 60 does not protect a decision to remove a judge when there is no evidence whatsoever of "misbehaviour or physical or mental incapacity" on the judge's part.

Were the federal Parliament to enact a provision along the lines of s 60 in relation to proceedings for the removal of judges of federal courts, the provision would not be effective in limiting the High Court's original jurisdiction under s 75(v). The provision would also be ineffective to preclude judicial review on constitutional grounds.[108]

In *R v Murray; Ex parte Proctor*,[109] Dixon J observed that:

> There is necessarily an appearance of inconsistency between a provision which defines and restricts the power of a tribunal and prescribes the course it must pursue and a provision which says that the validity of its decrees shall not be challenged or called in question on any account whatever.[110]

In *Anisminic*,[111] the House of Lords resolved the inconsistency between such provisions by treating a provision of the latter type as ineffective in precluding judicial review on the ground of jurisdictional error. In *Thomas v Attorney-General of Trinidad and Tobago*[112] the Judicial Committee of the Privy Council went somewhat further in holding that an ouster clause in a constitution could not effectively preclude judicial review on constitutional grounds. The particular clause in question had provided that:

> Any question whether - (a) a Commission has validly performed any function vested in it by or under this Constitution ... shall not be enquired into in any court.

In the opinion of the Judicial Committee it was for the courts to decide the limits of the functions of commissions established under the Constitution. Moreover, the ouster clause was subject to the rights guaranteed by the Constitution.[113]

This ruling was relied upon by the Court of Appeal of Guyana in *Barnwell v Attorney-General*,[114] a case in which a judge of that country's High Court had sought judicial review of action taken by the Judicial Service Commission. The Commission had been established under the Constitution of Guyana in 1980. It

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108 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 250-2, 270, 288, 306.

109 (1949) 77 CLR 387 at 399.

110 This passage has been cited in many later cases: see M Aronson and B Dyer, note 100 *supra*, p 101, n 35. See also *Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491 at 508, per Kirby P.

111 Note 96 *supra*.

112 [1982] AC 113.

113 *Ibid* at 135.

114 [1994] 3 LRC 30.

had been empowered to make a representation to the President when it considered that the removal of a judge should be investigated. When such a representation was made the President was obliged to appoint a tribunal to conduct the investigation and to advise whether the judge ought to be removed from office. The only grounds for removal were inability to perform the functions of the office or misbehaviour. The President could not remove a judge unless the tribunal had reported that the judge ought to be removed; but if the tribunal advised removal, the President was duty bound to act on that advice. On the other hand, once the question of removal had been referred to a tribunal, the President could, in his discretion, suspend the judge.[115] Judge Barnwell had been suspended following a representation by the Judicial Service Commission. He sought judicial review of the Commission's actions, principally on the ground that, before making a representation to the President, the Commission had denied him his right to a fair hearing - a right secured by the Constitution.[116]

The Commission resisted the application for judicial review. It relied on an ouster clause in the Constitution which was exactly the same as that considered in *Thomas v Attorney-General of Trinidad and Tobago*.[117] Following *Thomas*, the Guyana Court of Appeal held that the ouster clause did not preclude judicial review on constitutional grounds.[118] The Commission's power under the Constitution to as it were, initiate proceedings for the removal of a judge was subject to the principles of natural justice, which were constitutionally entrenched. In the present case, natural justice had been denied.

V. QUESTIONS OF JUSTICIABILITY

Writing over a century ago, AV Dicey thought it

> worth notice that Parliamentary care for judicial independence has ... stopped just at that point where on *a priori* grounds it might be expected to end. The judges are not in strictness irremoveable; they can be removed from office on an address of the two Houses; they have been made by Parliament independent of every power in the state except the Houses of Parliament.[119]

Dicey was of course writing about the position in England. But he could also have been writing about the position in the other polities within the British Empire in which provisions modelled on Article III, s 7 of the *Act of Settlement* 1701 applied.[120]

Such provisions do not limit the grounds on which judges may be removed from office by the parliamentary process, and it has generally been assumed that

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115 Article 197.

116 Article 40(1)(a).

117 Namely, art 226(6).

118 [1994] 3 LRC 30 at 74 and 117.

119 AV Dicey, *An Introduction to the Law of the Constitution*, Macmillan (2nd ed, 1886) p 339. The first edition had been published in 1885.

120 See note 3 *supra*.

no limitations are to be implied.[121] If the parliamentary power of removal is effectively unlimited, there is certainly no sure foothold for judicial review of decisions to exercise the power.

Where, however, the parliamentary power has been limited, as it has by s 72(ii) of Australia's federal Constitution, and by s 53 of the New South Wales *Constitution Act* 1902, there is a foothold for judicial review, but it is by no means clear whether Australian courts of law would accept that it is within their province to stand in review of a parliamentary decision that a judge has been guilty of misbehaviour, or has become incapable of performing the duties of office, and should therefore be removed from office.

There can be little doubt that the architects of s 72(ii) intended that the decision of the parliament should be final and not reviewable by any court, and particularly the High Court.[122] They did not, however, advert to the very limited role the Court would play in the exercise of a purely supervisory jurisdiction. Some of them were obviously familiar with the *Colonial Leave of Absence Act* 1782 (UK) and the right of appeal to the Privy Council which it gave to colonial judges who had been removed from office pursuant to its provisions. They clearly did not wish federal judges to be subject to this Act.

Were an occasion to arise on which the High Court had to decide whether the removal of a judge of a federal court under s 72(ii) presents a justiciable question, the Court might have regard to the intentions of the framers of the Constitution, as disclosed in the convention debates.[123] It is, however, by no means certain that the Court would regard those intentions as controlling.[124] There is, after all, nothing in the text of the Constitution which expressly precludes judicial review of decisions to remove federal judges; the High Court might well take the view that the removal of a federal judge by the Governor-General in Council, upon an address by both Houses, is judicially reviewable on the ground that the conduct adjudged by the Houses as constituting misbehaviour could not in law be regarded as such.

To date the only case in which judicial proceedings were instituted which might have resulted in the removal of a federal judge was that concerning Justice Murphy.[125] Should such a case arise in the future, it is likely that the federal Parliament would once again enact legislation establishing a special commission to inquire into and report on whether there were grounds for removal. Had the special Commission established in 1986 presented an adverse report, Justice Murphy might have sought judicial review of the Commission's findings. Had an application for judicial review been successful, it is unlikely that either House of the federal Parliament would have sought to take the proceedings any further.

Had the Houses of the New South Wales Parliament chosen to act on the adverse report on Justice Vince Bruce and had the judge consequently been

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121 See *Gratton v Canadian Judicial Council*, note 52 *supra* at 784.

122 See text accompanying notes 84-94 *supra*.

123 On the permissible uses of the convention debates see *Cole v Whitfield* (1988) 165 CLR 360 at 365.

124 See *Abebe v Commonwealth* (1999) 73 ALJR 584 at [203], per Kirby J. See also JG Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1.

125 See note 8 *supra*.

removed from office, there would have been little point in his seeking judicial review.[126] After all, the state's Court of Appeal had already dealt with (and rejected) his application for judicial review of the report of the Conduct Division of the Judicial Commission.

Proceedings for removal of judges by the parliamentary process may be rare.[127] But once instituted they are likely to attract considerable publicity, especially when the judge is of a superior court. As Guyana's Court of Appeal recognised in *Barnwell v Attorney-General*,[128] the very fact that a judge's fitness to remain in office has become the subject of investigation may, when made public, sully the judge's reputation forever, notwithstanding that he or she is eventually cleared of the allegations against him or her.

Parliamentarians may wish to retain their ultimate power to decide whether judicial officers are fit to remain in judicial office. They may also wish their determinations that judges be removed from office not to be subject to any form of judicial review. They must, however, acknowledge that they have, by legislative enactment, conceded that the parliamentary forum is not adapted to the conduct of fair 'trials'. They have effectively deputed their adjudicatory function to extra-parliamentary bodies whose proceedings and findings will be judicially reviewable, absent valid ouster clauses.

It is surely a curious state of affairs if the judges of a superior court cannot be removed, except by a parliamentary process which, if it results in their removal, allows them no recourse to any court to challenge the legality or constitutionality of the act of removal. In contrast, a judge of an inferior court, removable by an officer of the executive branch of government, can seek judicial review of a decision to remove him or her from judicial office on any of the grounds upon which a supervisory jurisdiction may be invoked.

126 See text accompanying note 58 *supra*.

127 There is a useful survey of proceedings for removal of judges in Canada, England, Wales, Ireland and the United States, and their outcomes in GL Gall, *The Canadian Legal System*, Carswell Co (1977) pp 153-62. See also D Pannick, *The Judges*, Oxford University Press (1987) pp 89-90; A Todd, *On Parliamentary Government in England*, Longmans, Green & Co (1869) ch 6; A Todd, *Parliamentary Government in the British Colonies*, Longmans, Green & Co (2nd ed, 1894) pp 827-56.

128 [1994] 3 LRC 30 at 39-40 and 97.