REMOVAL OF JUDGES FROM OFFICE

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The power under s 72(ii) of the Constitution *to remove federal judges for proved misbehaviour or incapacity has never been exercised, nor has the High Court of Australia been called upon to construe the meaning of those terms. With a particular emphasis upon 'proved misbehaviour', this paper attempts to identify some ways in which the interpretation of s 72(ii) may develop. The power to remove judges is informed by the centuries of legal history over which the concept of judicial tenure has developed in Anglo-Australian law, the Convention Debates, accepted modes of constitutional interpretation and international experience. While uncertainty remains at the margins, the nature and degree of proved misbehaviour sufficient to invoke s 72(ii) must be proportionate to the constitutional significance of effectuating an exception to judicial tenure.*

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I Introduction

Section 72(ii) of the *Constitution* provides that Justices of the High Court and other courts created by the Commonwealth Parliament shall not be removed from office 'except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'. The provision affords a level of protection of judicial tenure by requiring the involvement of both Houses of Parliament and, thus, in effect, preventing the executive from 'sacking the umpire'.[1] But it is not without its difficulties, most notably the lack of any definition of 'misbehaviour'. So far in this nation's history, it has not been necessary for the High Court to construe the conditions for removal prescribed by s 72(ii). It is, however, conceivable that the need to do so may one day arise, and so it is worth considering what 'proved misbehaviour' entails.

The concept of 'proved misbehaviour' is rooted in legal history, and there is little doubt that the framers of the *Constitution* had a developed and historical conception of it. But although their sense of the concept is capable of providing us with the central point or connotation of proved misbehaviour, more is required to identify the amplitude of its denotation. As a constitutional concept, it is of a kind that is capable of growing and evolving with the standards and experience of Australian society.[2]

The object of this paper is to attempt to identify some of the ways in which interpretation of the concept may develop, in light of legal history, the Convention Debates, the text and context of s 72(ii) of the *Constitution*, and the evolving norms of Australian society.

[1] PH Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed, 1997) 530.

[2] See ibid 912; *A-G (NSW) ex rel Tooth & Co Ltd v Brewery Employés Union of New South Wales* (1908) 6 CLR 469, 611–12 (Higgins J); *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959) 107 CLR 208, 267 (Windeyer J); *Street v Queensland Bar Association* (1989) 168 CLR 461, 537–8 (Dawson J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 302–3 (Dawson J) ('*Tasmanian Dam Case*'). See also James A Thomson, 'Removal of High Court and Federal Judges: Some Observations concerning Section 72(ii) of the Australian Constitution' (Pt 1) [1984] (June) *Australian Current Law* 36033, 36033 ('Removal of High Court and Federal Judges (Pt 1)').

II History

The historical conception of judicial tenure and the related concept of judicial misbehaviour developed in England over several centuries, culminating in the *Act of Settlement 1700*, 12 & 13 Wm 3, c 2 ('*Act of Settlement*'),[3] and by the end of the 19th century were relatively settled.[4] Following European settlement of Australia, the same English notions of judicial misbehaviour were progressively adopted in the Australian colonies.[5] But, to begin with, the role of a judge in the Australian colonies was significantly different from the role of an English judge.[6] It was only after the emergence of systems of responsible government under the colonial constitutions, and later Federation, that the core notions of judicial independence and, relatedly, the concept of misbehaviour warranting removal from office, became relevant.

A *Development of Standards in England*

The first English judges were agents of the monarch.[7] English common law courts began life as emanations of *Curia Regis* during the reign of Henry I and dramatically expanded during the reign of Henry II.[8] Thus, by at least the late 12th century, the accepted understanding of the judges' role was as delegates of

[3] Lane (n 1) 531, discussing *Act of Settlement 1700*, 12 & 13 Wm 3, c 2, s 3 ('*Act of Settlement*'). See also FW Maitland, *The Constitutional History of England: A Course of Lectures Delivered by FW Maitland*, ed Herbert Fisher (Cambridge University Press, 1950) 68–9; Alpheus Todd, *On Parliamentary Government in England: Its Origin, Development, and Practical Operation* (Longmans, Green, and Co, 2nd ed, 1887–9) vol 2, 855 ('*On Parliamentary Government*').

[4] See Todd, *On Parliamentary Government* (n 3) 856–8.

[5] See, eg, the ostensible bases for the removal of Algernon Montagu from the office of Puisne Justice of the Supreme Court of Van Diemen's Land in John McLaren, *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial, 1800–1900* (University of Toronto Press, 2011) 157, 160–70.

[6] See David Clark, 'The Struggle for Judicial Independence: The Amotion and Suspension of Supreme Court Judges in 19th Century Australia' (2013) 12 *Macquarie Law Journal* 21, 22, 35.

[7] See Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed, 1923) vol 1, 153–6. See also Richard Hudson, 'The Judicial Reforms of the Reign of Henry II' (1911) 9(5) *Michigan Law Review* 385, 386.

[8] Pollock and Maitland (n 7) 109–10, 153–6; AKR Kiralfy, *Potter's Historical Introduction to English Law and Its Institutions* (Sweet & Maxwell, 4th ed, 1958) 104–6; Hudson (n 7) 392–5.

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the King, appointed at His Majesty's pleasure (*durante bene placito regis*),[9] and vested with the King's authority to do justice in his name.[10]

Over time, English judges developed a greater degree of independence, but, so long as they were appointed at the King's pleasure, their position vis-à-vis the Crown remained precarious. That became especially apparent during the reigns of the Stuarts,[11] when judges were not infrequently removed from office for failing to adhere to the King's will.[12] The notorious removal of Sir Edward Coke by James I followed a sustained period of disagreement between the Chief Justice, the King and others,[13] as to the scope of the Crown prerogative,[14] the interaction of the Court of King's Bench with the ecclesiastical tribunals and the Court of Chancery,[15] and Coke's refusal to abide James I's command to stay a suit concerning the scope of the prerogative.[16]

Coke had been the Speaker of the House of Commons and Attorney-General during the reign of Elizabeth I,[17] in which role he championed the royal prerogative.[18] He kept the post of Attorney-General after James I acceded to the throne in 1603.[19] He was then appointed Chief Justice of the Court of Common Pleas in 1606.[20] That was followed by a series of conflicts with the King that

[9] See Lane (n 1) 531; Kiralfy (n 8) 105.

[10] See Francis West, *The Justiciarship in England 1066–1232* (Cambridge University Press, 1966) 31–2, 56–9; Ralph V Turner, *The English Judiciary in the Age of Glanvill and Bracton, c 1176–1239* (Cambridge University Press, 1985) 65–6.

[11] 1603 to 1714: 'The Stuarts', *The Royal Family* (Web Page) <https://www.royal.uk/stuarts>, archived at <https://perma.cc/J37X-GTK4>.

[12] Sir John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 178–9; Henry Hallam, *The Constitutional History of England: From the Accession of Henry VII to the Death of George II* (John Murray, 5th ed, 1846) vol 2, 357.

[13] GW Thomas, 'James I, Equity and Lord Keeper John Williams' (1976) 91 (July) *English Historical Review* 506, 520–1; John P Dawson, 'Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616' (1941) 36(2) *Illinois Law Review* 127, 129–30.

[14] Dawson (n 13) 129–30.

[15] Maitland (n 3) 268–71.

[16] Ibid 270–1; Baker (n 12) 178.

[17] Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke: 1552–1634* (Hamish Hamilton, 1957) 66, 70–1.

[18] WS Holdsworth, *A History of English Law* (Methuen & Co, 1924) vol 5, 426–7; John Lord Campbell, *The Lives of the Chief Justices of England: From the Norman Conquest till the Death of Lord Mansfield* (Blanchard & Lea, 1851) vol 1, 229, quoted in George Smith, 'Dr Bonham's Case and the Modern Significance of Lord Coke's Influence' (1966) 41(2) *Washington Law Review* 297, 298; Justice PA Keane, 'Sir Edward Coke' (Speech, Selden Society, 23 April 2015) 11 <https://www.hcourt.gov.au/publications/speeches/current/speeches-by-justice-keane>, archived at <https://perma.cc/H2J8-RPH4>.

[19] Bowen (n 17) 152–4.

[20] Ibid 239, 241.

eventually ended Coke's judicial career.[21] The first and most famous of them concerned the jurisdictions of lay and ecclesiastical courts.[22] Before Coke was appointed Chief Justice, the Archbishop of Canterbury, Richard Bancroft, challenged the control that the common law courts exercised over the jurisdiction of the ecclesiastical courts.[23] Upon Coke's appointment, he waded into the dispute, resulting, in 1607, in *Fuller's Case*.[24] After determining that the King's Bench had jurisdiction to grant a writ of prohibition in respect of the detention of a person by order of the High Commission, Coke — with the 'approbation of the other judges' — contradicted Archbishop Bancroft's appeal to the King to resolve the matter personally.[25] According to Coke's account, the triumphalism of which might rightly be doubted,[26] he stated in *Prohibitions del Roy* ('*Case of Prohibitions*') that '[t]he King in his own person cannot adjudge any case, either criminal or betwixt party and party',[27] and that 'the King cannot take any cause out of any of his courts, and give judgment upon it himself'.[28] Reputedly in the face of the greatly offended King, Coke cited Bracton: '[*Q*]*uod Rex non debet esse sub homine, sed sub Deo et lege*'.[29]

Following further conflicts, the tussle between Coke and James I culminated in Coke's appearance in 1616 before the Privy Council, where he refused to concede that he would stay a suit if the King so ordered,[30] and consequently he was suspended by the Privy Council.[31] He was forbidden to go on circuit and ordered to revise the 'errors' in his reports and, on 14 November 1616, he was dismissed.[32]

Coke's dismissal led, in the short term, to judges being more disposed to make decisions in favour of the royal prerogative,[33] obviously for fear that, if they did not, they would be removed from office. As Lord Campbell recorded,

[21] Dawson (n 13) 129.

[22] See Holdsworth, *A History of English Law* (n 18) 429–30.

[23] Ibid.

[24] (1607) 12 Co Rep 41; 77 ER 1322. See generally Bowen (n 17) 257–8.

[25] Holdsworth, *A History of English Law* (n 18) 430.

[26] Ibid 430–1.

[27] (1607) 12 Co Rep 63; 77 ER 1342, 1342 ('*Case of Prohibitions*'), quoted in Holdsworth, *A History of English Law* (n 18) 430.

[28] *Case of Prohibitions* (n 27) 1343, quoted in Holdsworth, *A History of English Law* (n 18) 430.

[29] 'The King is under no man, yet he is under God and the law': *Case of Prohibitions* (n 27) 1343.

[30] Baker (n 12) 178; Dawson (n 13) 130. See also Sir William Holdsworth, 'Sir Edward Coke' (1935) 5(3) *Cambridge Law Journal* 332, 334.

[31] Holdsworth, 'Sir Edward Coke' (n 30) 335.

[32] Ibid.

[33] Dawson (n 13) 138. See also John Lord Campbell (n 18) 229, 291–3.

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at the first sitting of Sir Henry Montagu, Coke's successor, the Lord Chancellor, Ellesmere, told Montagu to '[r]emember the removing and putting down your late predecessor, *and by whom*',[34] to which Montagu is said to have replied, among other things: 'I will not be busy in stirring questions, especially of jurisdictions … I will devote myself *Deo, Regi, et Legi*'.[35] Montagu's choice of syntax is to be contrasted with Coke's famous invocation of Bracton in 1607.

The apparent deference to the monarch damaged the Court's reputation for impartiality and led to hostility on the part of the propertied classes. The so-called ship-money cases, in which the Court of King's Bench upheld Charles I's royal prerogative to levy ship-money tax during peacetime and to extend its imposition to inland counties without parliamentary approval, were among the more significant examples.[36] They resulted in such widespread unrest that Charles I eventually relented and accepted that justices should thenceforth be appointed for as long as they were of good behaviour (*quamdiu se bene gesserint*).[37] But despite that development, justices were even then sometimes effectively sidelined by the device of suspending them from hearing cases without removing them from office.[38] And following the Restoration, the appointment of justices at the King's pleasure was reintroduced.[39] James II, whose four-year reign began in 1685 and ended with the Glorious Revolution of 1688–89, removed 12 justices from office, mostly for refusing to recognise his claim to dispense with statutes.[40]

The terms of settlement of the Glorious Revolution were embodied in the *Bill of Rights 1688*, 1 Wm & M sess 2, c 2 ('*Bill of Rights 1688*') and the *Act of Settlement*, with the latter manifesting a clear rejection of the divine right of the sovereign and an affirmation of the supremacy of Parliament.[41] By s 3, the *Act of Settlement* also provided that judges' commissions should once again be *quamdiu se bene gesserint* and, for the first time, that judges could be removed from office upon a motion passed by both Houses of Parliament.[42]

[34] John Lord Campbell (n 18) 292 (emphasis added).

[35] 'To God, the King, and the Law': ibid 293.

[36] DL Keir, 'The Case of Ship-Money' (1936) 52 (October) *Law Quarterly Review* 546, 548–50; Baker (n 12) 178.

[37] Baker (n 12) 178–9.

[38] See (1672) T Raym 217; 83 ER 113, 113 ('*Re Justice Archer*').

[39] Joseph H Smith, 'An Independent Judiciary: The Colonial Background' (1976) 124(5) *University of Pennsylvania Law Review* 1104, 1108.

[40] Baker (n 12) 179.

[41] *Act of Settlement* (n 3) s 3.

[42] Ibid.

Today, the *Act of Settlement* stands, together with the prescriptions of the *Magna Carta 1297*, 25 Edw 1, c 9 ('*Magna Carta*') and the *Bill of Rights 1688*, as one of the three great 'constitutional statutes' of the United Kingdom.[43] Section 3 of the *Act of Settlement* — later included in s 12(1) of the *Supreme Court of Judicature (Consolidation) Act 1925*, 15 & 16 Geo 5, c 49 and now in s 11(3) of the *Senior Courts Act 1981* (UK) — also stands as the fons et origo of both art III § 1 of the *United States Constitution* and s 72(ii) of the *Australian Constitution*.

B *Development of Standards in the Australian Colonies*

The development of judicial independence in the Australian colonies took longer. The *Act of Settlement* was not received into British colonies, and judges appointed to colonial courts were customarily appointed only during the monarch's pleasure.[44] The *New South Wales Act 1823* (Imp) 4 Geo 4, c 96, which provided for the establishment of the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land, stipulated that 'it shall and may be lawful for His Majesty, His Heirs and Successors, from time to time as Occasion may require, to remove and displace any such Judge or Chief Justice' of those courts.[45] The constituent Acts of the Supreme Courts of Victoria and Western Australia were to similar effect.[46] Coordinately, the *Colonial Leave of Absence Act 1782* (Imp) 22 Geo 3, c 75 ('*Burke's Act*') empowered the Governor of a British colony to remove any person occupying public office in the colony, and thus to remove a judge from office, for, among other things, neglect of duty or misbehaviour.[47] *Burke's Act* provided for a right of appeal to the Judicial Committee of the Privy Council,[48] but, in practice, it vested the decisional power in the local executive, which acted as 'judge and jury' in suits for removal.[49]

Compared to the *Act of Settlement*, these provisions present as retrograde. But, by the standards of the day, they were relatively unremarkable. Early colonial judges were more in the mode of Sir Francis Bacon's 17th century notion of

[43] See Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 465, 468.

[44] See, eg, *Supreme Court Ordinance 1861* (WA) 24 Vict, No 15, s 11 ('*Supreme Court Ordinance*').

[45] *New South Wales Act 1823* (Imp) 4 Geo 4, c 96, s 1.

[46] *An Act to Make Provision for the Better Administration of Justice in the Colony of Victoria 1852* (Vic) 15 Vict, No 10, s 5; *Supreme Court Ordinance* (n 44) s 11.

[47] *Colonial Leave of Absence Act 1782* (Imp) 22 Geo 3, c 75, s 2 ('*Burke's Act*').

[48] Ibid. See Todd, *On Parliamentary Government* (n 3) 881–2.

[49] Clark (n 6) 58.

the judiciary — 'lions under the throne'[50] — than an equal arm of government like the English judiciary had become. It was common for colonial judges to occupy seats in the colonial Legislative Council and Executive Council,[51] and to be called upon to perform advisory functions.[52] For instance, the *Australian Courts Act 1828* (Imp) 9 Geo 4, c 83 ('*Australian Courts Act*') required the colonial courts of New South Wales and Van Diemen's Land to consider and pronounce upon the repugnancy of any colonial legislation to the laws of England and communicate that opinion to the relevant Governor and Legislative Council.[53] At the same time, however, the *Australian Courts Act* also provided, that, notwithstanding such a judicial determination that legislation was repugnant to the laws of England, the Governor in Council could proclaim the legislation to be in force.[54] And if disagreement persisted, the question of inconsistency was resolved by the Colonial Office in London, determining whether to recommend the allowance or disallowance of the legislation.[55]

During the early part of the 19th century, the British Colonial Office maintained tight control over colonial government, including colonial judicial process. For example, during the 1830s when the Colonial Office disapproved of a sentence passed by Justice Algernon Montagu of the Supreme Court of Van Diemen's Land, it ordered Governor Arthur to release the prisoner and remit the fine imposed.[56] Justice Montagu was later removed from office under *Burke's Act* and, despite strong public disapproval of what the public perceived to be a politically motivated intervention, the Judicial Committee of the Privy Council affirmed the executive's decision.[57]

By the latter half of the 19th century, however, the nature of the colonial judicial role was beginning to change. In 1855, New South Wales and Victoria,

[50] Francis Lord Verulam, *The Essayes or Counsels, Civill and Morall* (1625) 324, quoted in Stephen Sedley, *Lions under the Throne: Essays on the History of English Public Law* (Cambridge University Press, 2015) 123.

[51] Clark (n 6) 54.

[52] Ibid 56; McLaren (n 5) 29, 41.

[53] *Australian Courts Act 1828* (Imp) 9 Geo 4, c 83, s 22 ('*Australian Courts Act*'). For more on the practical operation of this provision, see Enid Campbell, 'Colonial Legislation and the Laws of England' (1965) 2(2) *University of Tasmania Law Review* 148, 161–4 ('Colonial Legislation').

[54] *Australian Courts Act* (n 53) s 22.

[55] Enid Campbell, 'Colonial Legislation' (n 53) 169.

[56] McLaren (n 5) 161.

[57] Ibid 166–7.

and in 1856, South Australia, adopted constitutions incorporating judicial tenure provisions modelled on s 3 of the *Act of Settlement*.[58] In 1857, Tasmania and, in 1865, Queensland, enacted legislation likewise protective of judicial tenure.[59] And during the 1860s, colonial judges were excluded from legislation governing the public service, and, following the adoption of responsible government in the colonial constitutions, judges ceased to occupy legislative positions.[60] But even then, the Colonial Office continued to exercise the power to remove colonial judges from office under *Burke's Act*.

That occurred, for example, in the case of Justice Boothby of the Supreme Court of South Australia, who was accused of, among other things, persistently failing to administer South Australian legislation and refusing to give effect to the *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63.[61] The Colonial Office directed that Justice Boothby be removed pursuant to *Burke's Act*.[62] The Executive Council of South Australia responded that they considered the preferment of the Imperial Act to the removal process provided for in the colony's constitution 'an affront to responsible government', and that it risked the relationship between the colony and Great Britain.[63] But Justice Boothby's removal proceeded under *Burke's Act* notwithstanding.[64]

C *The Drafting of s 72(ii)*

When, then, it came time to draft s 72(ii) of the *Australian Constitution*, it was against the background of imperial and colonial legislation regarding judicial tenure; art III § 1 of the *United States Constitution*, which, as has been mentioned, was modelled on s 3 of the *Act of Settlement*; and art II § 4 of the *United States Constitution*, which provides that the President, Vice President and all civil officers of the United States (and thus federal judges) 'shall be removed

[58] *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, sch 1 ss 38–9; *Victoria Constitution Act 1855* (Imp) 18 & 19 Vict, c 55, sch 1 s 38; *Constitution Act 1856* (SA) 19 Vict, No 2, ss 30–1.

[59] *Supreme Court Act 1867* (Qld) 31 Vict, No 23, s 9; *Supreme Court (Judges' Independence) Act 1857* (Tas) s 1.

[60] See Clark (n 6) 53–5.

[61] Ibid 42.

[62] Ibid 42–3.

[63] Ibid.

[64] Ibid 43–4. See also *Memorandum of the Lords of the Council on the Removal of Colonial Judges* (1870) 6 Moo PC NS app, 9; 16 ER 827, 827.

from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors'.[65]

Andrew Inglis Clark's first draft of s 72(ii) of the *Constitution*, as it appeared as cl 61 of his February 1891 draft Bill, made no provision for removal for misbehaviour or incapacity, nor, consequently, that misbehaviour or incapacity had to be 'proved'.[66] But later that year, following a number of amendments, the 1891 Convention adopted cl 2 of ch III of the 1891 draft Constitution Bill, which provided that 'Judges of the Supreme Court of Australia and of the other Courts of the Commonwealth shall hold their offices during good behaviour'.[67]

1 *The 1897 Drafting Committee*

Members of the 1897 Drafting Committee disagreed over whether the grounds for removal needed to be specified.[68] The Committee also debated whether to include a prescribed minimum number of Justices, and whether the mode of removal contemplated by the *Act of Settlement* was satisfactory. Charles Kingston QC submitted that the power to remove a judge merely upon the passage of a motion by both Houses of Parliament 'independent of any consideration as to whether he was incapable or [had] misconducted himself, should not be allowed for one moment'.[69] Likewise, Josiah Symon QC submitted that federal judges 'ought to be placed in such a position that their pulses ought not to beat one atom faster in consequence of the animadversion or the efforts of any one party in Parliament'.[70] Kingston proposed amendments that included express references to 'misconduct, unfitness, or incapacity'.[71]

Isaac Isaacs, then Attorney-General of Victoria, was chief among the opponents to Kingston's proposals. Citing the works of Dr Alpheus Todd,[72] Isaacs

[65] Thomson, 'Removal of High Court and Federal Judges (Pt 1)' (n 2) 36033. See generally W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 278–9 ('*The Constitution (1st ed)*').

[66] See John Reynolds, 'A I Clark's American Sympathies and His Influence on Australian Federation' (1958) 32(3) *Australian Law Journal* 62, 72, reproducing 'A Bill for the Federation of the Australasian Colonies' ('Inglis Clark's Draft Constitution Bill').

[67] Thomson, 'Removal of High Court and Federal Judges (Pt 1)' (n 2) 36034–5; 'Commonwealth of Australia Bill' in *Official Report of the National Australasian Convention Debates*, Sydney, 2 March to 9 April 1891, app, 956.

[68] Thomson, 'Removal of High Court and Federal Judges (Pt 1)' (n 2) 36034.

[69] *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 941.

[70] Ibid 942.

[71] *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 946.

[72] Ibid 948–9, quoting Alpheus Todd, *Parliamentary Government in England: Its Origin, Development, and Practical Operation*, ed Spencer Walpole (Sampson Low, Marston & Co, rev ed, 1892) vol 1, 191–3.

dismissed the concern that Parliament would be actuated by 'a sudden impulse of public feeling' and warned that the inclusion of express grounds of removal would open a removal process to excessive litigation and judicial review by a judge's 'brother judges'.[73] Symon, nevertheless, continued to press for the inclusion of express criteria of misbehaviour and incapacity, contending that by their omission judicial independence would be lost,[74] and that 'high minded and capable' persons would not accept judicial appointments for want of security in office.[75] And perhaps most compellingly, Edmund Barton QC articulated the need for the express criteria as emanating from the fact that the federal judiciary was intended to be the bulwark of the *Constitution*;[76] that any question as to whether the Parliament had transgressed the law of the land was within the courts' jurisdiction;[77] that '[a]crimony may arise between the Parliament and the Supreme Court, and we have to ensure that the judges shall not be removed upon the occurrence of that acrimony'; and that if judges were to be removable absent such criteria, there would be a 'crumbling of the keystone of the federal arch … because upon the safety of the judicature rests the safety of the *Constitution*'.[78]

The possibility of removal by the kind of impeachment process provided for in art II § 4 of the *United States Constitution* was considered but rejected.[79] Sir John Downer expressed concern over the lack of such an express procedure. He argued:

> We ought to surround the removal of the judge … with all sorts of precautions. We ought to ensure him a trial, and not act upon the loose talk of the two popular Houses in a mere debate, to which he has no possible opportunity of replying.[80]

But the predominant view, encapsulated in the submissions of Bernhard Wise, was that the American approach would 'raise difficulties out of all proportion to [its] value'.[81]

[73] *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 949.

[74] Ibid 950–1.

[75] Ibid 951, cited in Thomson, 'Removal of High Court and Federal Judges (Pt 1)' (n 2) 36037.

[76] *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 952.

[77] See ibid 952–3.

[78] Ibid 953.

[79] See ibid 944–6 (Patrick Glynn, Henry Higgins, Sir William Zeal, Adye Douglas, Bernhard Wise, Charles Kingston).

[80] Ibid 956.

[81] Ibid 945.

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2 *Inclusion of the 'Misbehaviour' and 'Incapacity' Criteria*

In the result, at the Adelaide Convention in 1897, Kingston moved an amendment to limit the grounds for removal to misbehaviour or incapacity.[82] Supported by Barton,[83] Kingston argued that those criteria were essential in order to prevent the possibility of Parliament procuring the removal of a judge simply because that judge had decided issues adversely to the Commonwealth.[84] Isaacs opposed the amendment, as he had done in the Drafting Committee, on the basis that it would render decisions to remove judges open to judicial review.[85] But Kingston and Barton persuaded the Convention that such decisions of the Parliament would not be judicially reviewable. The Kingston motion prevailed.[86]

3 *Deletion of a Judicial Incompatibility Clause*

Until just before the draft *Constitution* was finalised, it included a clause prohibiting federal judges from holding executive office.[87] But that clause was opposed and ultimately removed on the basis that it would restrict the sovereign's ability to appoint the sovereign's agents as administrators of the government, and that could include judges.[88] Professor Greg Taylor has argued that its removal was not so much a rejection of an aspect of the separation of powers as a choice to allow a balance to be struck according to the judgment of Parliament, the executive and the judges themselves as to those executive functions that it would be appropriate for judges to perform.[89] But as Taylor observes, the absence of such a clause has resulted in the judicial assessment of incompatibility by 'a value judgment, sometimes carried out … on the finest of criteria'.[90]

[82] Ibid 946–7. See Enid Campbell, 'Judicial Review of Proceedings for Removal of Judges from Office' (1999) 22(2) *University of New South Wales Law Journal* 325, 341–2 ('Judicial Review').

[83] *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 952–3.

[84] See ibid 946–7.

[85] Ibid 948–9.

[86] Ibid 960–1.

[87] John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 931, quoted in Greg Taylor, 'The Judicial Incompatibility Clause: Or, How a Version of the *Kable* Principle Nearly Made It into the Federal Constitution' (2017) 38(2) *Adelaide Law Review* 351, 352.

[88] Greg Taylor (n 87) 370.

[89] Ibid 370–1.

[90] Ibid 372.

4 *Inclusion of 'Proved'*

During the Convention Debates in Melbourne in 1898, there was also some further disagreement as to whether a parliamentary determination of misbehaviour or incapacity should be appealable. Kingston, for example, proposed the wording: 'upon the ground of misbehaviour or incapacity, proved to the satisfaction of such Houses'.[91] Likewise, Barton insisted on the inclusion of 'proved', for otherwise, as he said, '[t]here might be a defect in their method of arriving at a conclusion'.[92] Given Barton's previously expressed opinion that a parliamentary decision to remove a judge from office would not be judicially reviewable,[93] one wonders whether Barton appreciated that inclusion of the requirement that such be 'proved' would result in a finding of misbehaviour or incapacity becoming appealable. But ultimately Barton's formulation was adopted.

III The Text and Context of s 72(ii)

It remains to essay the meaning of 'misbehaviour' in s 72(ii) of the *Constitution*.[94] Writing shortly after Federation, Professor Harrison Moore posited that, inasmuch as s 72(ii) requires a motion of both Houses of Parliament to remove a federal judge from office, the protections afforded by s 72(ii) are greater than its English, colonial, and American equivalents.[95] That now appears doubtful.

The task of interpreting s 72(ii) is complicated by the indeterminate range of contexts in which relevantly material misbehaviour may occur.[96] Authority suggests that the boundaries of the concept are objectively ascertainable

[91] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 318.

[92] Ibid.

[93] See ibid 315.

[94] See generally James A Thomson, 'Removal of High Court and Federal Judges: Some Observations concerning Section 72(ii) of the Australian Constitution' (Pt 2) [1984] (July) *Australian Current Law* 36055, 36056 ('Removal of High Court and Federal Judges (Pt 2)'). To illustrate, each Commissioner of the Parliamentary Commission established to inquire into the conduct of Justice Murphy adopted their own — but perhaps overlapping — definition of misbehaviour: see Gabriël Moens and John Trone, *Lumb, Moens & Trone: The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 9th ed, 2016) 318–19, quoting Parliamentary Commission of Inquiry, 'Re the Honourable Mr Justice Murphy: Ruling on Meaning of "Misbehaviour"' (1986) 2(3) *Australian Bar Review* 203, 210 (Sir George Lush), 221 (Sir Richard Blackburn), 230 (Andrew Wells) ('Re the Honourable Mr Justice Murphy').

[95] Moore, *The Constitution (1st ed)* (n 65) 278, quoted in Thomson, 'Removal of High Court and Federal Judges (Pt 2)' (n 94) 36055.

[96] See, eg, *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591, 611 (Windeyer J) ('*Capital TV*'); Thomson, 'Removal of High Court and Federal Judges (Pt 2)' (n 94) 36056–7.

because, with some possible exceptions, Parliament is not authorised to determine for itself the meaning of constitutional terms.[97] But that means no more than that Parliament may not treat as misbehaviour that which cannot possibly be conceived of as 'misbehaviour' in the ordinary sense of the word. It still leaves unanswered the question of what can properly be conceived of as 'misbehaviour'.

Historically, the range of terms used to describe the kind of misbehaviour sufficient to justify the loss of judicial office included 'corruption or corrupt motive',[98] 'dishonest motive',[99] 'perversion of justice',[100] 'abuse of power',[101] 'badness of heart and corrupt intention',[102] 'partial and oppressive behaviour',[103] 'partisan political bias',[104] 'moral delinquency',[105] and 'corruption or moral turpitude'.[106] Such epithets bespeak varying degrees of judicial and moral obliquity and, more problematically, variable degrees of objectivity. One person's or,

[97] See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J); *Love v Commonwealth* (2020) 375 ALR 597, 600 [7] (Kiefel CJ), 612 [64] (Bell J), 618 [87] (Gageler J), 636–7 [168] (Keane J), 650–1 [236], 653 [244] (Nettle J), 677 [329] (Gordon J), 693 [401] (Edelman J). See also AR Blackshield, 'The Appointment and Removal of Federal Judges' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 400, 420–2, discussing 'Re the Honourable Mr Justice Murphy' (n 94).

[98] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers, 4th ed, 2014) 806, citing United Kingdom, *Cobbett's Parliamentary History of England*, 1 February 1722, vol 7, 961 ('*Baron Page's Case*'), United Kingdom, *Parliamentary Debates*, House of Commons, 30 April 1816, vol 34, 112 (Sir Samuel Shepherd, Solicitor-General) ('*Lord Ellenborough's Case*').

[99] Joseph (n 98) 806, citing United Kingdom, *Parliamentary Debates*, House of Commons, 21 February 1843, vol 66, 1129 (Sir James Graham) ('*Lord Abinger's Case*').

[100] Joseph (n 98) 806, citing United Kingdom, *Parliamentary Debates*, House of Commons, 28 February 1856, vol 140, 1561 (Viscount Palmerston) ('*Torrens's Case*'); *Lord Abinger's Case* (n 99) 1129 (Sir James Graham).

[101] Joseph (n 98) 806, citing United Kingdom, *Parliamentary Debates*, House of Commons, 14 June 1825, vol 13, 1138 (Thomas Denman, Speaker), United Kingdom, *Parliamentary Debates*, House of Commons, 21 June 1825, vol 13, 1247 (Thomas Denman, Speaker), United Kingdom, *Parliamentary Debates*, House of Commons, 24 June 1825, vol 13, 1350, United Kingdom, *Parliamentary Debates*, House of Commons, 27 June 1825, vol 13, 1407 (Thomas Denman, Speaker), 1408, 1410 (John Tremayne) (collectively, '*Kenrick's Case*').

[102] Joseph (n 98) 806, citing *Lord Abinger's Case* (n 99) 1129 (Sir James Graham).

[103] Joseph (n 98) 806, citing *Lord Abinger's Case* (n 99); United Kingdom, *Parliamentary Debates*, House of Commons, 21 June 1825, vol 13, 1247 (Thomas Denman, Speaker).

[104] Joseph (n 98) 806, citing United Kingdom, *Parliamentary Debates*, House of Commons, 6 July 1906, vol 160, 369 (John MacNeill) ('*Grantham's Case*').

[105] Joseph (n 98) 806, citing United Kingdom, *Parliamentary Debates*, House of Commons, 23 June 1924, vol 175, 7 (James MacDonald, Prime Minister) ('*McCardie's Case*').

[106] Joseph (n 98) 806, citing *Grantham's Case* (n 104) 410 (Sir Henry Campbell-Bannerman, Prime Minister and First Lord of the Treasury).

more to the point, one political party's sense of partisan political bias may equate to another person's or political party's perception of political neutrality. Optimally, it should be possible to identify objective criteria of deviance.

Writing in 1889, shortly before Federation, Todd observed that, apart from the ability of the Parliament to remove a judge from office under s 3 of the *Act of Settlement*, the Crown had power to remove a judge from office for misbehaviour in office on the following basis:

> '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.[107]

Todd wrote that Parliament also had power to remove a judge from office under s 3 of the *Act of Settlement* on a wider basis:

> [T]he 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.[108]

Todd's thesis, that 'misbehaviour' in the constitutional context of s 3 of the *Act of Settlement* was wider than misbehaviour in an official capacity, implies that,

[107] Todd, *On Parliamentary Government* (n 3) 857–8 (citations omitted).

[108] Ibid 860 (emphasis added).

in the constitutional context of s 72(ii), one should look to the *Constitution*, and in particular ch III, to derive the essential characteristics of 'misbehaviour' as it is conceived of in s 72(ii).

To similar effect, Professor Patrick Harding Lane contended that the 'ungarnished term', 'misbehaviour', is to be interpreted not only by reference to its historical origins but also by reference to its constitutional purpose.[109] It takes its meaning from a constitutional context that involves the separation of powers; the role of judges as persons vested with Commonwealth judicial power and subject to restrictions flowing from the investiture of judicial power; the institutional integrity of ch III courts; and public confidence in the administration of justice. These concepts — cognate standards in Australian constitutional law — are in turn informed by two predominant features of the judicial function: independence and impartiality.[110] Hence, the conduct with which s 72(ii) is concerned is conduct that so materially undermines either or both of those features that the institutional integrity of the relevant court is impaired.[111]

A *Separation of Powers*

Axiomatically, the legitimacy of the exercise of judicial power depends on its officers being above criticism.[112] It is, therefore, a fundamental assumption of the *Constitution* that federal judicial power must be exercised impartially and

[109] Lane (n 1) 534.

[110] See *Republican Party of Minnesota v White*, 536 US 765, 793 (Kennedy J) (2002):

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

[111] Speaking extra-curially, Sir Gerard Brennan said:

> Appearance, no less than the reality, of independence is essential. The judiciary, the least dangerous branch of government, has public confidence as its necessary but sufficient power base. It has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people whom we serve have confidence in the exercise of the power of judgment.
>
> Sir Gerard Brennan, 'Judicial Independence' (Speech, Australian Judicial Conference, 2 November 1996) <https://www.hcourt.gov.au/publications/speeches/former/speeches-by-the-hon-sir-gerard-brennan>, archived at <https://perma.cc/B3DB-838W>.

[112] Anton Cooray, 'Standards of Judicial Behaviour and the Impact of Codes of Conduct' in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) 349, 349–50; *South Australia v Totani* (2010) 242 CLR 1, 20 [1] (French CJ).

independently.[113] That requires a strict separation of federal judicial power, and of the federal judiciary from non-judicial power,[114] to maintain liberty[115] and the public perception that legal controversies are 'quelled by judges acting independently of either of the other branches of government'.[116]

History teaches that 'it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will'.[117] Judicial tenure is for that reason considered to be '[o]ne of the most important guarantees of judicial independence',[118] and an essential feature of the separation of powers.[119]

[113] See, eg, *Caperton v A T Massey Coal Co Inc*, 556 US 868, 891 (Roberts CJ for Roberts CJ, Thomas and Alito JJ, Scalia J agreeing at 902) (2009); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 25 (Gaudron J) ('*Wilson*').

[114] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269–72 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers*").

[115] See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 151 (Brennan J), citing Sir William Blackstone, *Commentaries on the Laws of England* (15th ed, 1809) bk 1, 269.

[116] *Wilson* (n 113) 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ, Gaudron J agreeing at 22).

[117] *Humphrey's Executor v United States*, 295 US 602, 629 (Sutherland J for the Court, McReynolds J agreeing at 632) (1935).

[118] Sir Guy Green, 'The Rationale and Some Aspects of Judicial Independence' (1985) 59(3) *Australian Law Journal* 135, 139. See also *Wilson* (n 113) 12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); Chief Justice LK King, 'Minimum Standards of Judicial Independence' (1984) 58(2) *Australian Law Journal* 340, 344.

[119] See Sir Anthony Mason, 'Judicial Independence in Australia: Contemporary Challenges, Future Directions' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 7, 7–8. See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 469–70 (Isaacs and Rich JJ) ('*Waterside Workers*"); James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 1st ed, 2010) 82; Brian Opeskin, 'Judicial Exits: The Tenure of Judges in Three Apex Courts' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 89, 89; AW Bradley, 'The Constitutional Position of the Judiciary' in David Feldman (ed), *English Public Law* (Oxford University Press, 2004) 333, 339–42.

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B *The Role of Judges Vested with Commonwealth Judicial Power*

But judicial tenure alone is not enough. According to established precepts of ch III jurisprudence — as articulated, for example, in *New South Wales v Commonwealth* ('*Wheat Case*'),[120] *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*")[121] and *Kable v Director of Public Prosecutions (NSW)*[122] — an inquiry into the constitutional validity of the conferral of a power or function on a judge involves an assessment of the nature of the power or function according to whether 'the function [or power] to be performed must be performed judicially, that is, without bias' and in accordance with natural justice,[123] or whether the judge is called upon to exercise a political function, making decisions 'not confined by factors expressly or impliedly prescribed by law'.[124] As stated in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* ('*Wilson*'):

> The constitutional condition on the vesting of non-judicial power in (or conferring of a non-judicial function on) a Ch III judge is that the exercise of the power (or the performance of the function) be compatible with performance of judicial functions … When that condition is satisfied, judges not only are, but are seen to be, independent of the other branches of government.[125]

Hence, the incompatibility doctrine decrees that

> no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power …[126]

The doctrine serves to protect the impartiality and independence of the judiciary upon which its legitimacy depends, and the appearance of independence preserves public confidence in the judicial branch.[127]

[120] (1915) 20 CLR 54.

[121] *Boilermakers'* (n 114).

[122] (1996) 189 CLR 51.

[123] *Wilson* (n 113) 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

[124] Ibid.

[125] Ibid 14 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), citing *Grollo v Palmer* (1995) 184 CLR 348 ('*Grollo*').

[126] *Grollo* (n 125) 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

[127] See *Wilson* (n 113) 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), citing *Mistretta v United States*, 488 US 361, 407 (Blackmun J for Rehnquist CJ, Brennan, White, Marshall, Blackmun, Stevens, O'Connor and Kennedy JJ) (1989).

C *The Institutional Integrity of ch III Courts*

It is, however, in the nature of federal jurisdiction that the federal judiciary is sometimes called upon to exercise judicial power contrary to the interests of the Parliament[128] and the executive.[129] In order, therefore, that judicial independence be maintained, the standard of conduct sufficient to warrant the description of 'misbehaviour' must be grave.[130] The constitutional demand of independence to which judicial tenure gives effect should not be subjected to the removal process under s 72(ii) of the *Constitution* unless the impugned judicial conduct is of such gravity as to impair or undermine the constitutional demand of independence and related constitutional norms. To adopt and adapt Todd's thesis, the standard of misbehaviour sufficient to warrant removal should scale according to the constitutional gravity of the process.[131]

The first and most fundamental aspect of the judicial role is to determine cases according to law: 'by ascertainment of facts, application of legal criteria and the exercise, where appropriate, of judicial discretion',[132] and where judicial discretion is involved, in accordance with legal constraints.[133] The doctrine of *stare decisis* and the ad hoc analogical case-by-case development of guiding principle[134] define a judge's adjudicative function and distinguish it from a personal, partial, or unfettered decision-making power.[135] Hence, as it appears, it is an implicit assumption of the *Constitution* that judicial power will be exercised fairly and impartially according to law, and that a determination of a matter lacking those features is not an exercise of judicial power but an exercise of personal or political power.

It follows that, if a judge were to act in bad faith, or unfairly, or intentionally otherwise than without fear, favour, affection, or ill will, that judge would be an

[128] See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 548 [33] (McHugh J, Callinan J agreeing at 626 [265]), 582 [127] (Gummow and Hayne JJ, Gleeson CJ agreeing at 514 [3], Gaudron J agreeing at 546 [26]).

[129] See, eg, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 183 [68]–[69] (French CJ), 204–5 [148] (Gummow, Hayne, Crennan and Bell JJ), 237 [258] (Kiefel J); *M v Home Office* [1994] 1 AC 377, 396–7, 427 (Lord Woolf, Lord Keith agreeing at 395, Lord Templeman agreeing at 395, Lord Griffiths agreeing at 396, Lord Browne-Wilkinson agreeing at 396).

[130] See generally Lord Taylor, 'The Independence of the Judiciary in a Democracy' (1995) 4(1) *Asia Pacific Law Review* 1.

[131] See Todd, *On Parliamentary Government* (n 3) 860–1.

[132] *Wilson* (n 113) 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), citing *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

[133] See, eg, *House v The King* (1936) 55 CLR 499, 504 (Dixon, Evatt and McTiernan JJ).

[134] See, eg, *Cominos v Cominos* (1972) 127 CLR 588, 607–8 (Mason J).

[135] See *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 168–9 (Lord Scarman) ('*Duport Steels*').

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unsuitable repository of federal judicial power. And likewise, although perhaps more problematically, if a judge not suffering from any disabling malady were consistently to refuse to undertake the volume of work reasonably to be expected of a judge of the court of which he or she is a member, and so consistently failed to determine matters at the speed and to the standard properly to be expected of a judge of that court, the judge should not be regarded as a suitable repository of federal judicial power.

These of course are clear cases, because the impugned misbehaviour bears directly on the capacity of the judge to discharge the function for which he or she has been appointed and thus upon the institutional integrity of the court. More difficult to describe in terms of an objective criterion of misbehaviour are cases where impugned behaviour is such that, although not bearing directly on the discharge of the judge's judicial duties, it is conceived of as reflecting so adversely on the judge's character or integrity as to render him or her an unsuitable repository of federal judicial power: for example, conviction of a serious criminal offence, other moral obliquity, or bankruptcy. This latter class of cases invokes standards of character and integrity that are, to some extent, contestable and, therefore, about which reasonable minds may differ. For that reason, they are also more susceptible to political manipulation. But there is a body of previous experience in this country and abroad that provides relevant guidance.

IV Previous Experience

A *Previous Experience in Australia*

It is salutary to observe that the Commonwealth Parliament has not once in the 120 years since Federation been called on to decide whether a federal judge should be removed from office for proved misbehaviour. But Parliament came perilously close to having to do so, in 1986, in the case of Justice Lionel Murphy of the High Court.

In 1984, allegations were published in the press implying that, inter alia, Justice Murphy had attempted to pervert the course of justice by seeking to influence the New South Wales Chief Stipendiary Magistrate to deal favourably with one of Justice Murphy's friends, a solicitor, Morgan Ryan.[136] Those allegations were raised in Parliament and a Senate Committee investigated them.[137] The

[136] See AR Blackshield, 'The "Murphy Affair"' in Jocelynne Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 230, 237–8, 243. See also HP Lee, 'Of Courts and Judges: Under the Spotlight, in the Limelight and Seeing the Light' (2015) 41(2) *Monash University Law Review* 283, 284–5.

[137] See Stephen Walmsley, *The Trials of Justice Murphy* (LexisNexis Butterworths, 2017) 28–9.

Committee reported that it was not persuaded of the truth of some allegations,[138] but was unable to agree on the truth of allegations regarding the Magistrate.[139] A second Senate Committee was established, assisted by two retired judges, to consider the matter afresh.[140] Four of the six members of that second Committee found that it was not open to convict Justice Murphy of any criminal offence, but five of the six members of the second Committee considered that it would be open to the Parliament to conclude that Justice Murphy was guilty of 'misbehaviour' within the meaning of s 72(ii) of the *Constitution*.[141] That led the Commonwealth Director of Public Prosecutions to recommend that Justice Murphy be prosecuted for attempting to pervert the course of justice.[142] Justice Murphy thus stood trial in the Supreme Court of New South Wales on two counts of attempting to pervert the course of justice, and, in July 1985, he was convicted of one count and acquitted of the other.[143] On appeal to the Court of Criminal Appeal, however, it was ordered that the conviction be quashed, on the ground that the trial judge had misdirected the jury, and, following a second trial, Justice Murphy was acquitted.[144]

But then still more allegations of impropriety were made (a total of 42 in all),[145] and, in response to those allegations, the Parliament enacted the *Parliamentary Commission of Inquiry Act 1986* (Cth) ('*Parliamentary Commission of Inquiry Act*').[146] The *Parliamentary Commission of Inquiry Act* established a one-off Parliamentary Commission of Inquiry ('Commission') comprised of three retired judges to inquire into and advise the Parliament whether any conduct of Justice Murphy (other than conduct which had been the subject of the previous criminal proceedings) amounted to 'proved misbehaviour' within the meaning of s 72(ii) of the *Constitution*.[147]

[138] Blackshield, 'The "Murphy Affair"' (n 136) 236.

[139] Ibid 239–40, 245; Walmsley (n 137) 35.

[140] Walmsley (n 137) 53–4.

[141] Blackshield, 'The "Murphy Affair"' (n 136) 248.

[142] Walmsley (n 137) 71–2.

[143] Blackshield, 'The "Murphy Affair"' (n 136) 249.

[144] Ibid 249, 252–3.

[145] Geoffrey Lindell, 'The Murphy Affair in Retrospect' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 280, 283–4.

[146] See Walmsley (n 137) 405–18.

[147] Ibid 417–19. See *Parliamentary Commission of Inquiry Act 1986* (Cth) ss 4–5 ('*Parliamentary Commission of Inquiry Act*').

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In July 1986, the Commission announced that it found that 28 of the new allegations were wholly lacking in substance but that it had determined to consider the remaining 14 allegations.[148] But at that point, it was learned that Justice Murphy was dying of cancer and the Commission ceased its work.[149] Justice Murphy died on 21 October 1986,[150] and the *Parliamentary Commission of Inquiry Act* was repealed by s 3 of the *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth).

As is apparent from the report of the Commission,[151] they considered that, although the word 'misbehaviour' was one traditionally used in defining the tenure of an office susceptible to forfeiture by the grantor for breach of condition by the grantee — and to some extent that traditional meaning supported the notion that the only relevant 'misbehaviour' was misbehaviour in office[152] — s 72 of the *Constitution* fell to be construed in light of the fact that the *Constitution* brought into existence an entirely new state, creating institutions that went beyond British antecedents.[153] In the Commission's view, s 72 swept away the concept and language of tenure of office susceptible to forfeiture by the grantor for breach of condition by the grantee, and instead gives sole power of removal to Parliament to be exercised upon proof of 'misbehaviour' as assessed in light of contemporary values.[154] As the Sir George Lush expressed his conclusion on the matter:

> The view of the meaning of misbehaviour which I have expressed leads to the result that it is for Parliament to decide what is misbehaviour, a decision which will fall to be made in the light of contemporary values. The decision will involve a concept of what, again in the light of contemporary values, are the standards to be expected of the judges of the High Court and other courts created under the *Constitution*. The present state of Australian jurisprudence suggests that if a matter were raised in addresses against a judge which was not on any view capable

148 Geoffrey Browne, 'Lionel Keith Murphy (1922–1986)', *The Biographical Dictionary of the Australian Senate (Online Edition)* (Web Page) <https://biography.senate.gov.au/murphy-lionel-keith>, archived at <https://perma.cc/PH3Y-C4VR>. See also Lindell (n 145) 284.

149 See Walmsley (n 137) 423–5, 434.

150 Jocelynne A Scutt, 'Introduction' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 11, 11.

151 Parliamentary Commission of Inquiry, Parliament of Australia, *Special Report Dealing with the Meaning of 'Misbehaviour' for the Purposes of Section 72 of the Constitution* (Parliamentary Paper No 443, 19 August 1986) ('*Special Report*').

152 See *Capital TV* (n 96) 611 (Windeyer J); John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 731.

153 See the reasons of the Sir George Lush: *Special Report* (n 151) 17–19.

154 Ibid 17, 19 (Sir George Lush), 32 (Sir Richard Blackburn), 41, 44–5, 68–9 (Andrew Wells).

> of being misbehaviour calling for removal, the High Court would have power to intervene if asked to do so.[155]

Sir Richard Blackburn OBE and the Andrew Wells QC opined in similar vein.[156]

B *Experience Abroad*

The applicable legislation of other countries differs in material respects. But the experience in those jurisdictions with similar constitutional structures is instructive.

1 *Canada*

In the matter of *New Brunswick (Judicial Council) v Moreau-Bérubé*, the Supreme Court of Canada was called on to consider a judicial review application regarding a decision by the Judicial Council, based on a report by a panel of inquiry, that conduct of Judge Moreau-Bérubé of the New Brunswick Provincial Court warranted her removal from office.[157] The impugned conduct consisted of remarks made, while sentencing two offenders, that reflected adversely on the inhabitants of the Acadian Peninsula and their inclination towards criminality.[158] A majority of the panel described the remarks as 'incorrect, useless, insensitive, insulting, derogatory, aggressive and inappropriate'.[159] The Judicial Council characterised their task as determining whether 'the conduct alleged [was] so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office'.[160] The Council concluded that it was, which obliged the Lieutenant-Governor in Council to remove the judge from office.[161]

Much of the Supreme Court's analysis was directed to the applicable standard of judicial review. The Supreme Court acknowledged the opinion expressed in the Friedland report that '[t]here is a tension between judicial accountability and judicial independence [but that] [j]udges should be accountable for

[155] Ibid 19.

[156] See ibid 32, 69.

[157] [2002] 1 SCR 249, 254–5 [1], 263 [10]–[12] (Arbour J for the Court) ('*Moreau-Bérubé*').

[158] Ibid 258–9 [3].

[159] Ibid 261 [7].

[160] Ibid 264 [12].

[161] Ibid.

their judicial and extra-judicial conduct'.[162] The Supreme Court then went on to observe that

> [i]n some cases … the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. … While it cannot be stressed enough that judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. This restraint on judicial independence finds justification within the purposes of the Council to protect the integrity of the judiciary as a whole.[163]

The Supreme Court concluded that, in view of the Judicial Council's reasoning and the statutory context in which it exercised its powers, the Judicial Council's finding that Judge Moreau-Bérubé demonstrated such serious bias that 'she could no longer expect to enjoy the public trust in a fair and independent judiciary' was a legally reasonable conclusion.[164]

2 *The Cayman Islands (Privy Council)*

In 2008, in the Cayman Islands, a question arose as to whether Justice Levers of the Grand Court of the Cayman Islands should be removed from office for misbehaviour comprising apparent racism, bias against particular categories of plaintiff and outwardly criticising her fellow judges.[165] The *Cayman Islands (Constitution) Order 1972* (Cayman Islands) authorised the Governor to establish a tribunal to investigate and report on the question,[166] and the tribunal so appointed recommended Justice Lever's removal from office on the basis of her failure to comply with minimum acceptable standards of judicial conduct,[167] including impartiality, courtesy to litigants, and absence of actual or perceived bias.[168]

[162] Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Report, May 1995) 129, quoted in *Moreau-Bérubé* (n 157) 278 [44] (Arbour J for the Court).

[163] *Moreau-Bérubé* (n 157) 285 [58]–[59].

[164] See ibid 290–2 [30]–[73].

[165] *Re Levers (Judge of the Grand Court of the Cayman Islands)* [2010] UKPC 24, [1], [10], [134] (Lord Phillips for the Court) ('*Re Levers*').

[166] *Cayman Islands (Constitution) Order 1972* (Cayman Islands) s 49J(4).

[167] *Re Levers* (n 165) [1]–[3] (Lord Phillips for the Court).

[168] See ibid [48]–[49], quoting *Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN Doc E/RES/2006/23 (27 July 2006) annex ('*Bangalore Principles of Judicial Conduct*') [2.2], [3.1]–[3.2], [4.6], [5.2]–[5.3], [6.6].

On appeal to the Privy Council, the Privy Council expressly endorsed[169] the *Bangalore Principles of Judicial Conduct*[170] and stated that the test for removal from office was 'whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit'.[171] Based on the tribunal's findings, the Privy Council concluded that

> Levers J has been guilty in court of completely inexcusable conduct that has given the appearance of racism, bias against foreigners and bias in favour of the defence in criminal cases. … [And] that by her misconduct Levers J showed that she was not fit to continue to serve as a judge of the Grand Court …[172]

In consequence, the Privy Council advised Her Majesty to remove Levers J 'on the ground of her misbehaviour'.[173]

3 *New Zealand*

The High Court of New Zealand considered a judicial review application by Justice Wilson, then a judge of the Supreme Court of New Zealand, seeking relief against a recommendation of the Judicial Conduct Commissioner to the Acting Attorney-General to appoint a Judicial Conduct Panel to inquire into Justice Wilson's conduct while a Judge of the Court of Appeal.[174] Relief was also sought in respect of the Acting Attorney-General's decision to appoint such a panel of inquiry.[175] An aspect of the dispute concerned an asserted failure on the part of the Commissioner to articulate the standard of 'misbehaviour' sufficient to warrant removal under the *Constitution Act 1986* (NZ).[176] The High Court of New Zealand considered international jurisprudence concerning the meaning of 'misbehaviour', including the Justice Levers and

169 *Re Levers* (n 165) [48]–[49] (Lord Phillips for the Court).

170 A set of principles endorsed by a meeting of Chief Justices and other Supreme Court Justices in 2002 and endorsing the tribunal's focus on the minimum requisite standards of judicial behaviour: *Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN Doc E/RES/2006/23 (27 July 2006) Preamble.

171 *Re Levers* (n 165) [50] (Lord Phillips for the Court), citing *Therrien v Minister of Justice* [2001] 2 SCR 3.

172 *Re Levers* (n 165) [134] (Lord Phillips for the Court).

173 Ibid.

174 *Wilson v A-G (NZ)* [2011] 1 NZLR 399, 403–4 [1]–[5] (Wild, Miller and Lang JJ) ('*Wilson (NZ)*').

175 Ibid 404 [5].

176 Ibid 404 [6].

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Judge Moreau-Bérubé cases previously referred to.[177] It also referred[178] to Wells's analysis in the Justice Murphy inquiry, that to 'force misbehaviour into the mould of a rigid definition might preclude the word from extending to conduct that clearly calls for condemnation under s 72, but was not — could not have been — foreseen when the mould was cast'.[179] The Court agreed with the conclusion of the Privy Council in *Re Levers*, that moral turpitude was not a necessary element of misbehaviour.[180] It held that the Commissioner was not in error in adopting a standard of misbehaviour that did not require dishonesty but included conduct falling 'so far short of accepted standards of judicial behaviour as to warrant the ultimate sanction of removal'.[181]

4 *The Latimer House Principles*

According to the *Commonwealth (Latimer House) Principles on the Three Branches of Government* ('*Latimer House Principles*'), the grounds on which judges may be removed from office should be clearly discernible from the legal or constitutional framework under which they serve, and restricted to incapacity and misconduct.[182]

The terms 'incapacity' and 'misconduct' are defined respectively as an 'inability to perform judicial duties' and 'serious misconduct'.[183] This formulation is said to indicate 'that mental or physical incapacity should only be grounds for removal when the judge is effectively prevented from performing his or her functions'.[184] The word 'misconduct' is used instead of 'misbehaviour' because it is perceived that in ordinary parlance 'misbehaviour' sometimes has more trivial connotations.[185]

The meaning of 'serious misconduct' is defined in terms of 'instances of professional misconduct that are gross and inexcusable and that also bring the

[177] Ibid 414–18 [58]–[68] (Wild, Miller and Lang JJ). See above Part IV(B)(1).

[178] *Wilson (NZ)* (n 174) 415 [59], 416 [64].

[179] See *Special Report* (n 151) 45.

[180] *Wilson (NZ)* (n 174) 417 [66] (Wild, Miller and Lang JJ).

[181] Ibid 418 [71].

[182] Commonwealth Secretariat et al, *Commonwealth (Latimer House) Principles on the Three Branches of Government* (April 2004) 9–10, 20 ('*Latimer House Principles*'). See also Bingham Centre for the Rule of Law, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report, 2015) xx, 81 ('*Appointment, Tenure and Removal of Judges under Commonwealth Principles*').

[183] *Appointment, Tenure and Removal of Judges under Commonwealth Principles* (n 182) 82, quoting *Latimer House Principles* (n 182) 20.

[184] *Appointment, Tenure and Removal of Judges under Commonwealth Principles* (n 182) 82.

[185] Ibid 82 n 10.

judiciary into disrepute',[186] and which incorporate the International Bar Association's *Minimum Standards of Judicial Independence*, in turn couched in terms of a judge who 'by reason of a criminal act or through gross or repeated neglect … has shown himself/herself manifestly unfit to hold the position of judge'.[187]

The *Latimer House Principles* further emphasise a statement of Lord Phillips in the Privy Council matter concerning the removal of the Chief Justice of Gibraltar, that removal 'can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function'.[188] This statement is said to show that the bar for removal is set fairly high.[189]

In its report concerning the *Latimer House Principles* and Commonwealth judges, the Bingham Centre for the Rule of Law emphasised that a finding of misconduct should never be based on 'the content of [the judge's] rulings, verdicts, or judicial opinions, judicial mistakes or criticism of the courts'.[190] Judicial decisions made in good faith should only ever be challenged on appeal, and mechanisms of appeal and review are the appropriate means by which the judiciary is collectively accountable under the law.[191]

V Process and Procedure of Removal

A *Justiciability*

As has been seen, the framers of the *Constitution* intended that a decision of the Parliament praying for the removal of a judge should not be subject to judicial review.[192] As Professor Enid Campbell has observed, they were aware of

[186] Ibid 83, citing Gabriela Knaul, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN Doc A/HRC/26/32 (28 April 2014) 16 [87].

[187] International Bar Association, *Minimum Standards of Judicial Independence* (at 22 October 1982) r 30, quoted in *Appointment, Tenure and Removal of Judges under Commonwealth Principles* (n 182) 83.

[188] *Re Chief Justice of Gibraltar* [2010] 2 LRC 450, 465 [31] (Lord Phillips for Lords Phillips, Brown, Judge and Clarke).

[189] *Appointment, Tenure and Removal of Judges under Commonwealth Principles* (n 182) 87.

[190] Ibid 83, citing Knaul (n 186) 16 [87].

[191] *Appointment, Tenure and Removal of Judges under Commonwealth Principles* (n 182) 80, 83.

[192] See above Part II(C)(1)–(2), (4).

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the right conferred under *Burke's Act* to appeal to the Privy Council and intentionally avoided including any such provision in s 72(ii) of the *Constitution*.[193] Their principal concern was to ensure that the Houses of Parliament alone should 'be the judges of misbehaviour in case of removal of a judge',[194] and to 'exclude any possibility of judicial review of the removal of a judge by the parliamentary process'.[195] But the framers' subjective intention as to the justiciability is not determinative.[196] Hence, although Moore postulated in 1902 that

> [t]he Ministry of the day and the two Houses of Parliament would, it cannot be doubted, be the sole judges of what constituted misbehaviour or incapacity, and when or how such misbehaviour or incapacity was 'proved'; their action would not be subject to review in any court of law …[197]

by 1910, Moore was expressing a more nuanced view to the effect that, although the two Houses of Parliament would determine the issues of fact, 'their action would not be subject to review in any Court of law, except perhaps in a case where the procedure was flagrantly unjust'.[198] And as Isaacs had anticipated during the Convention Debates, the specification of a particular procedure for removal; the inclusion of the misbehaviour and incapacity criteria; and the stipulation that these criteria must be 'proved',[199] risked providing 'footholds' for judicial review from the outset.[200]

The United States Supreme Court held in *Nixon v United States* that, under the *United States Constitution*, the removal of a judge by impeachment is not judicially reviewable.[201] Writing the opinion for the Court, Rehnquist CJ con-

193 Enid Campbell, 'Judicial Review' (n 82) 342, 348. See *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 947–9 (Isaac Isaacs, Sir John Downer, Henry Higgins).

194 *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 952 (Isaac Isaacs).

195 Enid Campbell, 'Judicial Review' (n 82) 342.

196 See Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1, 20. See also Jeffrey Goldsworthy, 'The Constitution and Its Common Law Background' (2014) 25(4) *Public Law Review* 265, 272–4.

197 Moore, *The Constitution (1st ed)* (n 65) 279.

198 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (G Partridge & Co, 2nd ed, 1910) 203 ('*The Constitution (2nd ed)*').

199 See above Part II(C)(1)–(2).

200 See Enid Campbell, 'Judicial Review' (n 82) 348.

201 506 US 224, 228–38 (Rehnquist CJ for Rehnquist CJ, O'Connor, Scalia and Kennedy JJ, Stevens J agreeing at 238, White and Blackmun JJ agreeing at 239, Souter J agreeing at 252) (1993).

cluded that the appropriateness of the method adopted by the Senate to determine whether to convict an impeached federal judge was non-justiciable.[202] That conclusion was said to follow from the premise that the issue 'involve[d] a political question — where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it"'.[203]

By contrast, it appears that the process of removal of an Australian federal judge might be justiciable at several levels. To start with the clearest, authority suggests that the conduct of a commission of inquiry, such as that established in 1986 in connection with Justice Murphy,[204] or conduct by certain state supervisory bodies,[205] would be susceptible to judicial review as conduct in exercise of a statutory function.[206] Secondly, albeit less clearly, it might be that the Parliament's decision to request the removal of a judge would be justiciable (subject to the application of parliamentary privilege) on the basis that it is necessarily implicit in s 72(ii) of the *Constitution* that the Parliament's power to recommend removal must be exercised reasonably. That possibility is complicated by uncertainty as to the standard of proof that applies under s 72(ii),[207] but, presumably, as John Quick and Robert Randolph Garran wrote, a judge the subject of proceedings under s 72(ii) would be entitled to procedural fairness:[208] the argument being that, just as it may be legally unreasonable for an officer of the executive to make a determination without according the subject

[202] Ibid.

[203] Ibid 228, quoting *Baker v Carr*, 369 US 186, 217 (Brennan J for Warren CJ, Black and Brennan JJ) (1962). Cf *Re Reid; Ex parte Bienstein* (2001) 182 ALR 473, 478 [25]–[27] (Kirby J) ('*Re Reid*').

[204] *Parliamentary Commission of Inquiry Act* (n 147) ss 4–5.

[205] See, eg, *Judicial Officers Act 1986* (NSW) pts 3–4. See also *Bruce v Cole* (1998) 45 NSWLR 163, 183 (Spigelman CJ) ('*Bruce*').

[206] *Bruce* (n 205) 183–7 (Spigelman CJ). Chief Justice Spigelman determined a judicial review application in respect of an inquiry under the *Judicial Officers Act 1986* (NSW) into the conduct of Justice Vince Bruce, then a Justice of the Supreme Court of New South Wales: at 175, 202 (Mason P agreeing at 202, Priestley JA agreeing at 207, Sheller JA agreeing at 208, Powell JA agreeing at 208).

[207] See Moore, *The Constitution (2nd ed)* (n 198) 203.

[208] Quick and Garran (n 152) 729, discussing *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 308–18. See also Quick and Garran (n 152) 732; James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004) 67; 'Interpretation and Determination of Judicial "Misbehaviour" under Section 72 of the Commonwealth Constitution' (1984) 58(6) *Australian Law Journal* 309, 311–12, quoting Lord Hailsham, *Hamlyn Revisited: The British Legal System Today* (Stevens & Sons, 1983) 47.

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a fair hearing, or at least the opportunity to make submissions,[209] it would be legally unreasonable for Parliament to hold a judge guilty of proved misbehaviour or incapacity without hearing submissions from the judge. Thirdly, as has been seen, the Commissioners in the Justice Murphy inquiry were of the opinion that a decision of the Parliament that conduct which could not possibly be regarded as misbehaviour in the ordinary sense of the word was misbehaviour would be reviewable by the High Court.[210] Fourthly, although less certainly, it may be that a decision by the Governor-General in Council, to refuse to remove a judge that the Parliament has requested be removed according to s 72(ii), would be justiciable.[211] The uncertainty exists because the terms of s 72(ii) do not expressly impose an obligation on the part of the Governor-General in Council to which a writ of mandamus might be directed under s 75(v) of the *Constitution*.

B *Sole Process*

Despite the absence of any previous application of s 72(ii) of the *Constitution*, it was accepted in *Waterside Workers' Federation of Australia v J W Alexander Ltd* ('*Waterside Workers*") — and has not since been doubted — that s 72(ii) is the only available procedure for the removal of a federal judge from office.[212] But the courts cannot compel Parliament to initiate consideration of removal of a federal judge from office, as it would 'amount to a constitutionally impermissible invasion [of Parliamentary process] by the judicial branch of government'.[213] It is likewise assumed in the United Kingdom that the sole process for the removal of judges of the senior courts is that provided by s 3 of the *Act of Settlement*, now expressed in s 11(3) of the *Senior Courts Act 1981* (UK).[214]

[209] For a discussion on the relationship between procedural fairness and legal unreasonableness in administrative law, see generally *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350–2 [26]–[30] (French CJ), 365 [71] (Hayne, Kiefel and Bell JJ), 371 [91]–[92] (Gageler J).

[210] See above Part IV(A).

[211] See generally Quick and Garran (n 152) 730, 732–3.

[212] *Waterside Workers'* (n 119) 442 (Griffith CJ), 457 (Barton J), 468 (Isaacs and Rich JJ), 474 (Higgins J), 478 (Gavan Duffy J), 480 (Powers J), cited in Thomson, 'Removal of High Court and Federal Judges (Pt 2)' (n 94) 36056. See also *Capital TV* (n 96) 611 (Windeyer J).

[213] *Re Reid* (n 203) 479 [25] (Kirby J).

[214] See Eric Barendt, 'Fundamental Principles' in David Feldman (ed), *English Public Law* (Oxford University Press, 2004) 3, 40.

C *Constitutional Limits on the Power to Performance Manage Judges?*

What then is the position in respect of de facto removal? Does the conclusion in *Waterside Workers'* bear on the administrative and management powers of ch III courts to 'performance manage' judges?

In *Chandler v Judicial Council of the Tenth Circuit* ('*Chandler*'), the United States Supreme Court considered a petition by a federal judge of the United States District Court for the Western District of Oklahoma, Judge Chandler, concerning the determination of the Judicial Council of the Tenth Circuit which stated that

> Judge Chandler [was] presently unable, or unwilling, to discharge efficiently the duties of his office … and that the effective and expeditious administration of the business of the [Court required the Council to order that Chandler should not take any] action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the [Court] shall be assigned to him for any action whatsoever.[215]

A majority of the Supreme Court declined to answer Judge Chandler's complaint, dismissing the petition for want of jurisdiction. Chief Justice Burger, however, did observe that

> [t]here can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. … [C]an each judge be an absolute monarch and yet have a complex judicial system function efficiently?[216]

The Chief Justice described with approval certain formal and informal rules concerning the allocation of matters to a judge's docket by reference to the volume of extant reserved judgments and stated that 'if one judge in any system refuses to abide by such reasonable procedures, it can hardly be that the extraordinary machinery of impeachment is the only recourse'.[217]

Justice Douglas and Black J both wrote strongly-worded dissenting judgments. By way of example, Douglas J stated:

[215] 398 US 74, 77–8 (Burger CJ for the Court) (1970).

[216] Ibid 84–5.

[217] Ibid 85.

> Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the [*United States Constitution*] the only leverage that can be asserted against him is impeachment …[218]

After summarising the types of case in which the conclusion might be affected by the identity of the judge in question, Douglas J concluded:

> These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good. … All power is a heady thing as evidenced by the increasing efforts of groups of federal judges to act as referees over other federal judges. … It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of 'hazing' having no place under the [*United States Constitution*].[219]

In agreement, Black J stated:

> While judges, like other people, can be tried, convicted, and punished for crimes, no word, phrase, clause, sentence, or even the [*United States Constitution*] taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment …[220]

In response to questions from Black J in oral argument in *Chandler*, counsel for the respondent sought to downplay the risk of transgressing a negative implication derived from the impeachment provisions of the *United States Constitution*, by observing that Judge Chandler retained his office and his salary.[221] In response, Black J asked: '[Do you think] that the only way [Judge Chandler] is granted independence is by getting his compensation[?] [D]o you think that is all [the *United States Constitution*] means about the independence [of judges?]'[222]

[218] Ibid 136 (Douglas J, Black J agreeing at 141).

[219] Ibid 137–40 (Douglas J, Black J agreeing at 141).

[220] Ibid 141–2.

[221] Transcript of Proceedings, *Chandler v Judicial Council of the Tenth Circuit* (Supreme Court of the United States, Burger CJ, Black, Douglas, Harlan, Brennan, Stewart, White and Marshall JJ, 10 December 1969) 58 (Charles Wright).

[222] Ibid 58 (Black J). An audio recording of the hearing of oral argument on 10 December 1969 is available at 'Chandler v. Judicial Council of the Tenth Circuit: Oral Argument', *Oyez* (Supreme Court of the United States, 10 December 1969) <https://apps.oyez.org/player/#/burger1/oral_argument_audio/15299>, archived at <https://perma.cc/CFF5-DV6P>. The exchange occurs at 1:17:00–1:17:15.

Chandler therefore raises the possibility that, by construing s 72(ii) of the *Australian Constitution* as the sole mechanism for removal of a federal judge, the constitutional limit could be exceeded where, for example, no matters are allocated to a federal judge and the matters listed before him or her are re-allocated to other judges in order to leave the judge with nothing to do. In the context of this paper, it would be inappropriate to express an opinion as to whether that would be unconstitutional, but it may be observed that the rationale of s 72(ii), of protecting the federal judiciary from influence from the legislature or executive, is logically capable of extension to the protection of federal judges from other judges, or collections of judges.[223]

A possible counter argument consists in the dictum of Lord Keith in *Duport Steels Ltd v Sirs* that '[t]he one public interest which courts of law are properly entitled to treat as their concern is the standing of and the degree of respect commanded by the judicial system'.[224] Although not directed to the issue of internal judicial behavioural regulation, it is a statement of principle that might be seen as applicable to the internal management of judicial officers. But even so, it is difficult to resist the conclusion that s 72(ii) of the *Constitution*, as well as protecting the federal judiciary from influence from the legislature and the executive, is capable of extension to the protection of federal judges from the influence of other judges, or collections of judges.[225]

In that connection, it is to be recalled that, following the announcement of Justice Murphy's mortal illness and at a time when the inquiry into his conduct was still afoot, Chief Justice Gibbs informed Justice Murphy by letter of his intention to advise the media in the following terms:

> Mr Justice Murphy has informed me that he is gravely ill. He has also stated that he intends to exercise what he has described as his constitutional right to sit on the Court, notwithstanding that the Parliamentary Commission of Inquiry has not yet made its report. It is essential that the integrity and reputation of any Justice of this Court be seen to be beyond question. That being so, I regard it as most undesirable that Mr Justice Murphy should sit while matters into which the Commission is inquiring remain unresolved, and before the Commission has

[223] See Judith Rosenbaum and David L Lee, 'A Constitutional Perspective on Judicial Tenure' (1978) 61(10) *Judicature* 465, 471–2; Lord Taylor (n 130) 2.

[224] *Duport Steels* (n 135) 168.

[225] Cf *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 359–60 [29] (Gleeson CJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 586–7 [54]–[55] (Gummow and Hayne JJ), quoting *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 20 (McTiernan J) ('*Anthony Hordern*'); *Anthony Hordern* (n 225) 7 (Gavan Duffy CJ and Dixon J).

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> made its report. Nevertheless, in the circumstances to which I have referred, I do not regard it as appropriate to do more than express that view.[226]

However, Justice Murphy protested in reply:

> Your statement questions whether I have a constitutional right to sit on the Court. The plain constitutional position is that the Justices when appointed to the Court have a constitutional right to sit until death, resignation or removal under s 72 … It is not for the Chief Justice or any Justice to decide whether it is undesirable for any other Justice to sit on the Court. It is improper for one Judge to publicly express an opinion on the desirability of another to continue as a Justice or to exercise his functions as a Justice. This is at the foundation of the independence of the judiciary.[227]

I express no view as to the propriety of that exchange of correspondence other than to observe that it exemplifies the delicate balance between a federal judge's constitutional right to occupy judicial office and ephemeral notions of propriety that undergird the legitimacy of constitutional office. As the dictum in *Chandler* implies, it is one thing for a court to organise itself for maximum efficiency by assigning judges to areas of work at which they are particularly adept, and thus limiting their exposure to other work. It is another and more objectionable thing for a court to limit the amount of work of a particular kind assigned to a judge because of a conscious or subconscious perception that the way in which the judge is likely to decide the matter will not accord with the views of some other, more influential, members of the court. At the same time, it is plainly productive of difficulties when a judge, who is incapable of, or unwilling to do, the kind and amount of work reasonably to be expected of a judge in his or her position, refuses to resign. What is a head of jurisdiction to do in such circumstances? Does he or she continue to assign cases to the judge, with the result that the judge's list of outstanding judgments grows ever longer, with consequent inconvenience for litigants and embarrassment for the court? Or does the head of jurisdiction limit the amount of work assigned to the judge, thus imposing a greater burden on judges already pulling their weight? What steps can be taken to deal with such a problem, short of a resolution of both Houses of Parliament for the removal of the judge from office?

[226] Letter from Chief Justice Harry Gibbs to Justice Lionel Murphy, 31 July 1986, reproduced in Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (Scribblers Publishing, 1995) 111.

[227] Letter from Justice Lionel Murphy to Chief Justice Harry Gibbs, 1 August 1986, reproduced in Priest (n 226) 112.

Finally, it is to be observed that, at the federal level, there is as yet little by way of gradation between judicial management of the kind considered in *Chandler* and the removal machinery under s 72(ii) of the *Constitution*. The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) ('*Judicial Misbehaviour and Incapacity Act*') makes provision for the latter by the establishment of a Commission of which the key function is the conduct of an inquiry to determine whether 'there is evidence of conduct by a judicial officer that may be capable of being regarded as misbehaviour or incapacity'.[228] Unlike the state legislation, however, existing Commonwealth legislation makes no provision for a complaints-handling mechanism[229] in respect of judicial misconduct falling short of misbehaviour or incapacity capable of enlivening s 72(ii) of the *Constitution*.[230] The commencement and conduct of an inquiry under the *Judicial Misbehaviour and Incapacity Act* might conceivably prompt a recalcitrant judge to ameliorate the perceived deficiencies in his or her ways. But by comparison to state legislation, it is a blunt instrument for addressing judicial misbehaviour or other opprobrious conduct falling short of the s 72(ii) standard.

VI Conclusion

By requiring the involvement of both Houses of Parliament in any decision to remove a federal judge from office for proved misbehaviour, s 72(ii) of the *Constitution* provides a level of protection of judicial tenure and, therefore, of the separation of powers, which prevents the executive from 'sacking the umpire'.[231] But, as has been seen, s 72(ii) is not without difficulties, particularly in the

[228] *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) ss 3, 9–10 ('*Judicial Misbehaviour and Incapacity Act*'); Explanatory Memorandum, Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (Cth) 2 [8]. Cf *Judicial Officers Act 1986* (NSW) s 14 ('*Judicial Officers Act*'); *Judicial Conduct Commissioner Act 2015* (SA) s 6 ('*Judicial Conduct Commissioner Act*'); *Judicial Commission of Victoria Act 2016* (Vic) s 33 ('*Judicial Commission Act*').

[229] Cf *Judicial Officers Act* (n 228) s 15; *Judicial Conduct Commissioner Act* (n 228) pt 3; *Judicial Commission Act* (n 228) pt 2. The Commonwealth Act does, however, permit a Commission formed under the Act to have regard to complaints made against a particular judicial officer: *Judicial Misbehaviour and Incapacity Act* (n 228) s 19(6).

[230] See Australian Judicial System Advisory Committee, *Australian Judicial System: Report of the Advisory Committee to the Constitutional Commission* (Parliamentary Paper No 307/1987, 16 September 1987) 79 [5.55]. See also Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice Judicial System* (Report No 89, 31 December 2000) 227–32 [2.261]–[2.272]; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 317 (Sir George Turner).

[231] Lane (n 1) 530.

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doubts that exist about the meaning of 'proved misbehaviour'. The constitutional context in which s 72(ii) sits suggests that the relevant conception of 'misbehaviour' is one of behaviour that renders a judge unsuitable as a repository of federal judicial power. But beyond that, there remain uncertainties, at least at the margin, as to the nature and gravity of misconduct necessary to have that effect. Previous experience in this country and abroad points to the conclusion that the standard of such misconduct must be calibrated to the gravity of the process and, therefore, grave. But that provides little if any assistance in addressing judicial misbehaviour or other opprobrious conduct falling short of the s 72(ii) standard.

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