

Court Delay and Judicial Wellbeing: Lessons from Self-determination Theory to Enhance Court Timeliness in Australia

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Drawing on the experience in Australia of media criticism of judicial timeliness, this article uses the lessons of psychology and self-determination theory to suggest how judicial performance mechanisms should be designed to align intrinsic and extrinsic judicial motivation. Most crucially, measures of judicial performance need to be crafted with an acceptance of the fact that extrinsic motivation can lead to a reduction in the intrinsic motivation of judges. This means that court structures and processes should look to service judges' psychological needs of competence, relatedness and autonomy. These can, for example, influence more collaborative ways of assigning cases, self-regulated performance goals and mechanisms to promote judicial collegiality and mentoring. Approaches which solely concentrate on externally-derived key performance indicators (KPIs) are likely to be deleterious to judicial productivity and wellbeing over the long term, and will negatively impact on the timeliness of courts.

Introduction

Court timeliness is not a new concern. The importance of matters being dealt with as quickly and economically as possible for the sake of the parties and others waiting their turn is a vital part of justice delivery.¹ However, the recent frenzy of media commentary on judicial performance, particularly of the Federal Court of Australia, is uncommon. This has been accompanied by comments by the federal Attorney-General, Christian Porter, critical of delay in the Family Court and the need for reform to improve efficiency.² These criticisms of Australian judicial productivity have provoked a swift response from the bench and the profession.

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¹ *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, [92]-[93].

(Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, [51] (French CJ, Kiefel, Bell, Gageler and Keane JJ). See also OECD, *Judicial Performance and its Determinants: A Cross-Country Perspective* (2013).

² Christian Porter, 'Legislation to reform Federal Courts introduced into Parliament' (Media Release 23 August 2018), <https://www.attorneygeneral.gov.au/Media/Pages/Legislation-to-reform-federal-courts-introduced-into-parliament.aspx>

While regulation of the trial process has long been part of court policy, the incentive for its expansion has only increased in recent years with the rise in complexity, length and costs of civil matters.³ This is particularly the case in what has been termed ‘trolley load’⁴ litigation. For example, Justice Ronald Sackville, then a judge of the Federal Court of Australia, meticulously recounted that in the *C7 case*:

The trial lasted for 120 hearing days... Ultimately, 12,849 ‘documents’, comprising 115,586 pages, were admitted into evidence...Quite apart from the evidence, the volume of written submissions filed by the parties was truly astonishing. Seven produced 1,556 pages of written Closing Submissions in Chief and 812 pages of Reply Submissions... The Respondents managed to generate some 2,594 pages of written Closing Submissions between them. The parties’ Closing Submissions were supplemented by yet further outlines, notes and summaries. In addition, the pleadings amounted to 1,028 pages. The statements of lay witnesses that were admitted into evidence run to 1,613 pages. The expert reports in evidence totalled 2,041 pages of text, plus many hundred pages of appendices, calculations and the like. The transcript of the trial is 9,530 pages in length. I have not been idle these past nine months.⁵

The complexity and copiousness of matters is intersecting with greater trial technology (which both helps and impedes the judicial task) and unprecedented levels of outside speculation as to whether justice is being done efficiently enough and whether its achievement is simply taking too long. With this comes debate as to if and how judicial performance can be fairly measured without compromising the quality of judicial work or the independence of the bench.⁶ As the Hon Murray Gleeson AC, then Chief Justice of the High Court of Australia, observed, nearly 20 years ago, now:

Crude measures of performance, based on turnover of cases, regardless of their length or complexity, or based upon comparisons between courts, regardless of their comparative workloads and resources, are clearly inappropriate...Reconciling the

³ See, eg Justice Geoffrey Davies, ‘The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of our System’ (Speech, 20th AIJA Annual Conference, Brisbane, 12-14 July 2002); Justice Ronald Sackville, ‘From Access to Justice to Managing Justice: The Transformation of the Judicial Role’ (2002) 12 *Journal of Judicial Administration* 5; Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2011).

⁴ Justice Clifford Einstein, ‘Reflections on the Commercial Litigation Landscape – Lessons from the Past – Moving Forward’ (2005) 26 *Australian Bar Review* 145, 146 where his Honour describes: ‘armies of lawyers and their phalanxes of document trolleys have met in courtrooms which traditionally, and typically, have not had to deal with such large matters’.

⁵ *Seven Network Limited v News Limited* [2007] FCA 1062 (27 July 2007), [4]-[7] (Sackville J).

⁶ See, eg, Sharyn Roach Anleu and Kathy Mack, ‘Judicial Performance and Experiences of Judicial Work: Findings from Socio-legal Research’ (2014) 4(5) *Oñati Socio-legal Series [online]* 1015-1040. Available from: <http://ssrn.com/abstract=2533861>

judicial emphasis on process with the bureaucratic emphasis on outcomes is a problem for those who seek ways to measure court performance.⁷

This article explores the increasing pressure on, and concomitant monitoring of, the judiciary to be ever more efficient and the negative impacts such external pressure can have on judicial wellbeing and performance. We argue that much can be gained by shifting the focus from the current approach of monitoring judicial and court system performance⁸ to enhancing judicial performance using strategies for motivating judges in a way that aligns intrinsic and extrinsic motivation factors. We ground our argument in a body of research emanating in psychology that holds that motivation is influenced by ‘extrinsic’ factors (such as external rewards, punishments or pressures) and ‘intrinsic’ factors (such as the satisfaction gained from being effective and expert in a role).⁹ However, it is only when ‘extrinsic’ motivators cultivate judges’ psychological needs of competence and autonomy that they will add to, rather than detract from, intrinsic motivation. When they also foster relatedness, there is the potential for judges to internalise the goals of those extrinsic factors.

Part I considers the recent media debates about judicial efficiency and the ranking of judges in terms of the timeliness of their performance along with the pressure this puts upon an already stressed profession. Part II explores the various avenues through which judicial and court system performance are currently monitored, placing the call for timeliness key performance indicators (KPIs) – measurable targets – in the context of institutional and other performance measures. It considers the lessons gleaned from

⁷ Chief Justice Murray Gleeson, ‘Current Issues for the Australian Judiciary’ (Address to the Supreme Court of Japan, Tokyo, 17 January 2000) http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_Japanj.htm

⁸ Mack and Roach Anleu, ‘Judicial Performance and Experiences of Judicial Work’ n (6) 1018, fn1 make the point that ‘Sometimes JPE [Judicial Performance Evaluation] includes data about what is more properly considered performance of the court system, for example numbers of cases filed, processed, delays, numbers of judgements ... Court level data can only directly apply to individual judicial performance in an individual docket system and has little validity in a master calendar system, which is the dominant mode of case/work allocation in Australian courts’ [references omitted]. We note however that the Federal Court of Australia works on an individual docket system.

⁹ See, eg, Carol Sansone and Judith M Harackiewicz, ‘Looking Beyond Rewards: The Problem and Promise of Intrinsic Motivation’ in Carol Sansone and Judith M Harackiewicz (eds), *Intrinsic and Extrinsic Motivation: The Search for Optimal Motivation and Performance* (Academic Press, 2000) 2-5; Marylene Gagne and Edward Deci, ‘The History of Self-Determination Theory in Psychology and Management’ in Marylene Gagne and Edward Deci (eds), *The Oxford Handbook of Work Engagement, Motivation and Self-Determination Theory* (Oxford University Press, 2014) 1; J Heckhausen and H Heckhausen, ‘Motivation and Action: Introduction and Overview’ in Jutta Heckhausen and Heinz Heckhausen (eds), *Motivation and Action* (Cambridge University Press, 2008) 1, 4-5. Kruglanski views intrinsic and extrinsic motivation slightly differently as endogenously motivated (where the task performance appears an end in itself) and exogenously motivated (where the motivation is some non-task related end): Arie Kruglanski, ‘The Endogenous-Exogenous Partition in Attribution Theory’ (1975) 82(6) *Psychological Review* 387, 393-8.

research in psychology and self-determination theory that explain the need to calibrate external and internal motivation for effective performance management. Part III considers how the lessons from self-determination theory can be deployed to structure courts to best align extrinsic and intrinsic motivating forces, and enhance court timeliness.

PART I

1.1 Efficiency and its Speculators

The media commentary on judicial performance has been particularly concentrated on the Federal Court of Australia. In 2018, the *Australian Financial Review* paid for a post-2009 study of ‘11,000 Federal Court single-judge decisions’ to be undertaken by a Melbourne business, Scraping Solutions, stating it was ‘one of Australia’s largest independent analyses of judicial output’.¹⁰ It noted that:

[t]he data suggests that judges could finish their cases more quickly by better time management. After a hearing ends, the average judge writes 14 paragraphs a week of their judgments, or 181 words a day, suggesting many are trying to juggle commitments. Given that the average judgment is 57 paragraphs long, the data suggests the court could operate a lot faster if judges set aside time immediately after a hearing to write their judgments.¹¹

It identified that the most speedy judgment writer on the Federal Court was Justice James Edelman, who was appointed to the High Court in 2017, taking an ‘average four days to complete his judgments’ on the Federal Court.¹²

Another article in the *Australian Financial Review* referred to a study of a sample of Federal Court decisions which found that over 56% of judges spent more than 12 months in penning decisions.¹³ It commented that ‘one took 934 days to be finalised after the hearing ended – and six took more than two years to write’.¹⁴ The report

¹⁰ Aaron Patrick, ‘Federal Court Speed of Justice Can be a Lottery’, *The Australian Financial Review*, 26 October 2018, 32.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Aaron Patrick, ‘Justice delayed: Federal Court judgments can take years to write’, 26 October 2018, *Financial Review*, <https://www.afr.com/business/legal/justice-delayed-federal-court-judgments-can-take-years-to-write-20181026-h174tj>. The article notes that the assessments even resulted in one judge, Justice Wigney hearing the *Rush* litigation, commenting on their alleged performance in court.

¹⁴ *Ibid.*

does note the complexity of decision making and the considerable convolution of matters, that assessing performance based on the time taken for judgment was seen by some as unreasonable, and that some of the most delayed judgments were dependent on the resolution of other litigation.¹⁵

Regardless, a lot of the media critique stemmed from what were alleged to be significant disparities in timeliness between judges. This led to judges being ranked against each other in terms of their judgment productivity. As Patrick notes '[t]he variance was large, suggesting the speed of justice depended on who was sitting in the high chair'.¹⁶

The response to the *Australian Financial Review* reporting was swift and plentiful. The Law Council of Australia criticised the 'tarnish[ing]' of the judiciary by the use of misleading data.¹⁷ Its President, Morry Bailes, stated that:

The problem with such data scrapes is not the act of judging judges per se. Judges are no strangers to scrutiny. Australia's justice system is built on the pillars of accountability and transparency, and the principle of open justice has long been reflected through our open courts where anyone can watch justice being done.

The issue with seeking to gauge a court's performance by statistics is that quantitative data alone cannot provide a meaningful measure of either judicial productivity or the justness of litigants' outcomes without due consideration of qualitative factors.¹⁸

These sentiments were echoed by Chief Justice Tom Bathurst, the Chief Justice of New South Wales,¹⁹ the Australian Bar Association²⁰ as well as the President of the Victorian Bar who claimed the reporting 'demeans the court and maligns the integrity of its judges'.²¹ The President of the Judicial Conference of Australia, Justice Judith

¹⁵ Ibid.

¹⁶ Aaron Patrick, "'The Admiral' Nurtures A Federal Court Empire', *The Australian Financial Review*, 15 February 2019, 36.

¹⁷ Morry Bailes, 'Opinion Piece: Federal Court deserves a fair hearing', 2 November 2018, <https://www.lawcouncil.asn.au/media/speeches/federal-court-deserves-a-fair-hearing>

¹⁸ Ibid.

¹⁹ Chief Justice Tom Bathurst, 'Who Should Judge the Judges, and How Should They be Judged' (2019 Opening of Law Term Address, Sydney, 30 January 2019), [45] http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Chief%20Justice/Bathurst_20190130.pdf

²⁰ Australian Bar Association, 'The ABA rejects the recent analysis of Federal Court judges' productivity', 30 October 2018, https://austbar.asn.au/uploads/pdfs/media-releases/ABA_MEDIA_RELEASE_federal_court.pdf

²¹ Matt Collins QC, 'Criticisms maligns integrity of judges', *Australian Financial Review*, 30 October 2018, 43, <https://www.vicbar.com.au/sites/default/files/Media%2030%20October%202018%20Criticism%20maligns%20integrity%20of%20judges.pdf>

Kelly, dismissed ranking judges against each other by their judgment word-count when it ignored so many contributing factors such as the time sitting on Federal Court appeals or the nature of the matters each judge was assigned.²²

The Australian newspaper reported that the company that was paid to compile the court statistics disavowed any knowledge of how to assess judicial performance on the basis that '[m]aking assumptions about the productivity of judges is not something we would do as this is the first time we have been asked to get data on that...we provided the data specified...and the reporter used that to make his own assertions'.²³

However flawed such statistics are, the courts are sometimes criticised for not been transparent enough in relation to KPI achievement.²⁴ The difficulty becomes how to accurately measure judicial performance beyond very broad benchmarks when no two cases are the same.²⁵ For Chief Justice James Allsop, Chief Justice of the Federal Court of Australia, the Achilles' heel of the criticism of the court was the way that the data was analysed. In a statement he retorted that:

The recent articles in the Australian Financial Review are fundamentally biased and unfair both to the Court and to extremely hard working individual judges. The so-called rankings of "productivity" are compiled from a narrow and less than accurate data set, which captures only one part of the work of the Court and judges and then fails to put it in its proper context, context which the journalist was given. The result is both misleading and grossly unfair. The simplistic metrics of so-called words and paragraphs per day, and days taken for judgments, give no sense, and take no account, of the overall work of the Court or of the individual judges... Further, the singling out of 20 past and present judges as those who have taken the longest time to deliver judgment is particularly unfair. A number of judgments were deferred with the consent, or at the request, of the parties pending resolution of litigation and the determination of issues in other cases on appeal in the Court, or in other Courts including Courts of Appeal and the High Court... The compilation of the list – failing

²² Justice Judith Kelly, 'Judicial Association says Analysis of Federal Courts Work is Fundamentally Flawed', 30 October 2018, <https://www.jca.asn.au/judicial-association-says-analysis-of-federal-courts-work-is-fundamentally-flawed-30-october-2018/>

²³ Chris Merritt, 'AFR's Ranking of Judges Flawed', *The Australian*, 29 October 2018.

²⁴ Professor Michael Legg was quoted in Patrick, 'Justice delayed' (n 13) as saying, 'One of the reasons people conduct these studies, even if it's not accurate as you might like, is because the courts don't provide this information themselves'.

²⁵ Richard A. Posner, *How Judges Think* (Harvard University Press, 2008) 125, 131. See also Justice Debra Mullins, 'Judiciary and KPI – Where is the Balance?' (Revised paper presented at 24th LawAsia Conference, Seoul, Korea, 10 October 2011) 5, <http://www5.austlii.edu.au/au/journals/QldJSchol/2011/43.pdf>.

as it does to recognise the factors in those cases which might legitimately result in time between hearing and judgment, and without any consideration of the circumstances of the judges concerned in those years, including, but not limited to their work and workload – appears calculated simply to embarrass individual judges.²⁶

In response, Aaron Patrick in the *Australian Financial Review* said that there was arguably some ‘unfair[ness]’ in the data as it might have been that a judge was away due to illness but he explained that the piece had not set out to denigrate the bench and while the statistics ‘didn’t tell the whole story’ that ‘[t]hey didn’t pretend to’.²⁷ Instead, they were published to contribute to the discussion about judicial productivity, rather than being the end of it.²⁸

Criticism of judicial performance is not confined to non-judicial quarters. Retired High Court Justice, the Hon Dyson Heydon AC wrote of judges in an article published in 2018 that:

Some are appallingly slow, through inefficiency or laziness or indecisiveness...The whole system is rotten with excessive delay, some of which, but certainly not all of which, judges are responsible for. It is in the public interest for these failings, whether they are widespread or not, to be exposed with a view to their eradication.²⁹

In a 2018 speech reproduced in *The Weekend Australian*, Mr Heydon unfavourably compared the timeliness of Federal Court and Supreme Court of New South Wales decisions against United Kingdom comparator courts observing that:

The Australian performance, particularly the Federal Court performance, is a matter of shame...Slow Australian judges must try to avoid corruption by a torpid culture of slackness, languor and drift...If all other solutions fail, the only remedy may be the persistence, intensity, even savagery, of judicial, professional and public criticism.³⁰

He did, however, qualify his criticism by noting that:

²⁶ Chief Justice Allsop, ‘Statement by Chief Justice Allsop’, Federal Court of Australia, 29 October 2018, <https://www.fedcourt.gov.au/news-and-events/29-october-2018>.

²⁷ Aaron Patrick, ‘Federal Court is not Above Public Scrutiny’, *The Australian Financial Review*, 6 November 2018, 36.

²⁸ *Ibid.*

²⁹ Dyson Heydon, ‘Does Political Criticism Of Judges Damage Judicial Independence?’ (2018) *Policy Exchange* 16, <https://policyexchange.org.uk/wp-content/uploads/2018/03/Does-Political-Criticism-of-Judges-Damage-Judicial-Independence.pdf>

³⁰ Dyson Heydon, ‘Court in the Crosshairs’, *The Weekend Australian - Inquirer*, 29-30 September 2018, 17.

It is true that numbers alone say nothing about the quantity of work done or its quality or the fate of judgments on appeal. And the figures also reveal that many cases were decided speedily. But the quantum of those that were not suggests a mentality of procrastination.³¹

Chief Justice Allsop responded to this in a speech saying that the statistics cited were unfair and failed to fairly reflect the actual productivity of the Federal Court, including the majority of judgments by single judges which were delivered within a week of a hearing.³² His Honour, while acknowledging that some judgments were significantly overdue, lamented that ‘there [was] not basis from that fact alone for the kind of institutional or personal criticisms that was made’ when it put other intervening factors out of the view.³³ He also highlighted the need for court data to not be used in such a way that it fails to recognise the ‘human’ elements of courts; with judges as individuals meeting their judicial vows to their ability.³⁴ This resonates with the position of Chief Justice Bathurst that while courts as public institutions must expect to have their performance appraised:

the appropriate measure of accountability cannot be determined solely by some form of quantitative analysis of a court’s output. What must be considered is whether the courts are performing their role of fairly and impartially administering justice according to law, a function essential to the rule of law, and to the maintenance of a just and democratic society.³⁵

Even leaving aside the appropriateness of the statistics, ultimately, and analogously to the ‘tournament of judges’ discussed in this article, the *Australian Financial Review* study involves extrinsic motivation of judges. The key is to ensure that any benefits are not outweighed by the loss of intrinsic motivation.

1.2 Putting on the Pressure

The performance of judges cannot be discussed in isolation from judicial stress and wellbeing. The workload of judges has the potential to significantly increase the work

³¹ Ibid.

³² Chief Justice Allsop, ‘Courts as (Living) Institutions and Workplaces’ (Speech, 2019 Joint Federal & Supreme Court Conference, Hobart, 23 January 2019) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20190123>

³³ Ibid.

³⁴ Ibid.

³⁵ Bathurst (n 19).

pressure faced by the bench.³⁶ This is compounded by external criticism of their performance when judges are not in a position to defend their performance and have traditionally relied on the Attorney-General to defend their record.

Mr Heydon, in the *Weekend Australian* article cited earlier, was critical of the retort that judicial depression could be an explanation for judicial tardiness when the role necessitates an ability to work under considerable pressure.³⁷ For Heydon, allowing such judges to remain on the bench represents too much of a threat for those relying upon the speedy resolution of their disputes.

The Hon Michael Kirby AC, former Justice of the High Court of Australia, has openly discussed the impact of being a judge on an individual's stress levels. He has observed that criticism of the media and other external actors is a key source of anxiety and stress for judges,³⁸ particularly in the forms of heightened 'accountab[ility]'.³⁹ While on the bench, Justice Kirby noted the extra load in this regard that is carried by Chief Justices.⁴⁰ One of the key obstacles to addressing high rates of judicial stress is the unrelenting workload⁴¹ and what Justice Kirby identified as the 'feeling of helplessness in reducing it'⁴² when 'nothing that the judicial officer can do will much affect the unrelenting workflow and the crushing backlog'.⁴³

These sentiments were echoed in findings of the 2007 National Survey of Australian Judges, completed by 309 judges (a national response rate of 54.5%).⁴⁴ The survey

³⁶ Carly Schrever, 'Australia's First Research Measuring Judicial Stress and Wellbeing: A Preview of Findings' (2018) 92(11) *Australian Law Journal* 859, 860; Carly Schrever, Carol Hulbert and Tania Sourdin, 'The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing' (2019) 28 *Journal of Judicial Administration* 141; Francois Kunc, 'A Judiciary Under Stress' (2018) *Australian Law Journal* 855, 855; Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (2013, Australasian Institute of Judicial Administration); Michael Pelly, 'Judges' union pleads for end to "unreasonable" workloads', *Financial Review*, 11 October 2018. <https://www.afr.com/business/legal/judges-union-pleads-for-end-to-unreasonable-workloads-20181010-h16h6y>

³⁷ Heydon, 'Court in the Crosshairs' (n 30).

³⁸ Justice Michael Kirby, 'Judicial Stress – An Unmentionable Topic' (1995) 13 *Australian Bar Review* 101, 108, 110.

³⁹ *Ibid* 110.

⁴⁰ *Ibid* 112.

⁴¹ Schrever cites that from her extensive interviews of the judiciary almost, without exception, workload issues were raised as significant judicial 'stressors': Carly Schrever, 'Out in the Open' (2018) December *Law Institute Journal* 29, 29-30. See also Gabrielle Appleby, Suzanne Le Mire, Andrew Lynch and Brian Opeskin, 'Contemporary Challenges Facing the Australian Judiciary: an Empirical Interruption' (2019) 42(2) *Melbourne University Law Review* 299, 339ff.

⁴² *Ibid* 114.

⁴³ *Ibid* 113.

⁴⁴ National Survey of Australian Judges 2007 (website); Kathy Mack and Sharyn Roach Anleu, 'The National Survey of Australian Judges: An overview of findings' (2000) 18 *Journal of Judicial Administration* 5-21. <http://www.flinders.edu.au/ehl/law/research-activities/judicial-research-project/national-surveys/national-survey-of-australian-judges-2007.cfm>

found that 74% of judges believed the volume of cases is unrelenting.⁴⁵ One judge remarked:

The cases are more complex because the law is more complex & the Appeal Court is too large, not consistent & continues to extend areas of its review. No time is allotted to prepare judgments, to reflect or to study the ever growing body of the law.⁴⁶

Another highlighted the impact the pressure to write judgments has on his/her wellbeing:

it has had a major effect on my lifestyle in that, unless I am on holidays, any time I am not working (just about) I feel guilty – as I always have judgments outstanding.⁴⁷

Research on Australian Magistrates has also pointed to the high levels of emotional labour required by the work on the bench and the associated elevated stress levels this can induce.⁴⁸ Similarly, a recent survey of 152 judicial officers from five Australian courts has found that secondary trauma and burnout were sources of occupational stress experienced by many judicial officers, although noting that experiences of ‘burnout symptoms are likely to be characterised by feelings of emotional depletion and loss of meaning, rather than feelings of incompetence and ineffectiveness’.⁴⁹ However, Australian survey also found that of those judges identifying they were usually affected by stress, 60% self-reported high levels of ‘personal wellbeing and satisfaction’⁵⁰ and that their stress levels as judges compared favourably with their pre-judicial roles.⁵¹

Measures that monitor and motivate judicial performance that unduly increase judicial stress have the potential to undermine rather than enhance court timeliness and the fair administration of justice. Professor Stephen Colbran has highlighted that the difficulty with keeping judges accountable through mainstream news sources is that critiques of ‘individual judicial performance’ are far from ‘systematic’ and are instead

⁴⁵ Kathy Mack and Sharyn Roach Anleu, *Time for Judgment Writing: Final Report* (17 May 2010) 27 http://jca.asn.au/wp-content/uploads/2013/11/P41_02_08-Final-report-14-May-2010.pdf

⁴⁶ Mack and Roach Anleu, ‘The National Survey of Australian Judges’ (n 44) 19.

⁴⁷ Mack and Roach Anleu, *Time for Judgment Writing* (n 45).

⁴⁸ Sharyn Roach Anleu and Kathy Mack, ‘Magistrates’ Everyday Work and Emotional Labour’ (2005) 32(4) *Journal of Law & Society* 590, 612.

⁴⁹ Shrever, Hulbert and Sourdin (n 36) 151-2, 163-4. See also, Chief Justice Quinlan, ‘What you are doing is not good!’ Jethro’s Advice to Judges’ (Speech, Perth Hebrew Congregation, Law Week 2019, 14 May 2019) 14.

⁵⁰ *Ibid* 153.

⁵¹ *Ibid* 154. See also Posner, *How Judges Think* (n 25) 166.

bound up with the hyperbole that makes media commentary attention-grabbing and financially viable.⁵² The next sections explore current mechanisms through which judicial and court system performance are monitored and court timeliness motivated, including KPIs and other performance measures. Part II also considers lessons from research in psychology and self-determination theory for effective performance management.

PART II

2.1 Existing mechanisms that monitor and motivate timely judicial performance

Court timeliness is currently monitored through a patchwork of internal and external processes, ranging from KPIs and other performance measures, internal court governance and complaints mechanisms, parliamentary scrutiny and external complaints mechanisms. Increasingly, Australian courts are adopting the *International Framework for Court Excellence* (IFCE)⁵³ to improve court performance and performance management. The utility of these measures has not, however, been evaluated. In Part 2.2 we explore the lessons from self-determination theory that might be applied to judicial performance management to enhance court timeliness, and assist in assessments of which measures should be favoured over others.

It must be noted at the outset that opportunities for judicial promotion provide a means of rewarding ‘good’ judicial performance,⁵⁴ albeit with the inevitable intervention of politics in the appointment process. In the United States, some have even proposed a structured judging ‘tournament’ of sorts by which the judicial competition for promotion to higher courts, incentivises judicial performance while also rendering judicial promotion more transparent.⁵⁵ However, in Australia, Professor Russell Smyth has identified that promotional prospects, as least to the High

⁵² Stephen Colbran, ‘The Limits of Judicial Accountability: The Role of Judicial Performance Evaluation’ (2003) 6(1) *Legal Ethics* 55, 57.

⁵³ ‘The International Framework for Court Excellence’ *International Consortium for Court Excellence* (Web Page) <http://www.courtexcellence.com/>

⁵⁴ The Hon. Justice Michael Kirby, ‘Judicial Accountability in Australia’ (2003) 6(1) *Legal Ethics* 41, 49-50.

⁵⁵ Stephen Chi and Mitu Gulati, ‘A Tournament of Judges?’ (2004) 92(1) *California Law Review* 299.

Court, are likely to create only a small incentive to perform when such appointments are so limited in number.⁵⁶

The role of the head of jurisdiction

The role of the Chief Justice can be particularly important in anticipating issues in the Court and ensuring suitable timelines are met.⁵⁷ A combination of legislation, convention and practice in Australian jurisdictions confer authority on chief judicial officers to administer courts.⁵⁸ In many jurisdictions, the Chief Justice has express statutory authority to ensure the orderly and expeditious discharge of court business.⁵⁹ One study has found that judicial performance does feature in the way cases are allocated, a process managed by court staff under the supervision of the chief judicial officer.⁶⁰ This ‘implicit evaluation process’ which involves assessment as to judicial performance, does not, however, involve consultation with individual judges.⁶¹ Professor Shimon Shetreet,⁶² and Emeritus Professor Kathy Mack and Professor Sharyn Roach Anleu,⁶³ highlight the fact that this court administrative role can impact upon judicial independence, in particular internal judicial independence. For example, Mack and Roach Anleu, explain, ‘[d]irections which are administrative in form can indirectly constrain adjudicative independence.’⁶⁴

The chief judicial officer also has power to respond to complaints about judicial conduct including complaints about delay. For example, amendments in 2012 to the *Federal Court of Australia Act 1976* (Cth) formally vested the Chief Justice of the Federal Court with the ability to address judicial complaints.⁶⁵ Written complaints about delay in the delivery of a judgment can be made directly to the Chief Justice or

⁵⁶ Russell Smyth, ‘Do Judges Behave as Homo Economicus, and if So, Can We Measure Their Performance? An Antipodean Perspective on a Tournament of Judges’ (2005) 32 *Florida State University Law Review* 1299, 1304-5.

⁵⁷ Colbran (n 52) 65-67; Kathy Mack and Sharyn Roach Anleu, ‘The Administrative Authority of Chief Judicial Officers in Australia’ (2004) 8(1) *Newcastle Law Review* 1.

⁵⁸ Mack and Roach Anleu, ‘The Administrative Authority’ (n 57) 8.

⁵⁹ *County Court Act 1958* (Vic) s 8E; *Courts Administration Act 1993* (SA) s 27C(1); *Family Law Act 1975* (Cth) s 21B(1); *Federal Court of Australia Act 1976* (Cth) ss 15(1); *Federal Circuit Court of Australia Act 1999* (Cth) s 12(1); *Supreme Court Act 1933* (ACT) s 7; *Supreme Court of Queensland Act 1991* (Qld) s 15(1); *Supreme Court Act 1986* (Vic) s 28AAA(1).

⁶⁰ Anne Wallace, Sharyn Roach Anleu and Kathy Mack, ‘Evaluating Judicial Performance for Caseload Allocation’ (2015) 41 *Monash University Law Review* 445.

⁶¹ *Ibid* 466.

⁶² Shimon Shetreet, ‘The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986’ (1987) 10 *UNSW Law Journal* 4.

⁶³ Mack and Roach Anleu, ‘The Administrative Authority’ (n 57).

⁶⁴ *Ibid* 6.

⁶⁵ *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth). See: Federal Court of Australia, *Judicial Complaints Procedure*, <https://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>

via the President of the Bar Association or Law Society in the relevant jurisdiction, who will convey the matter to the Chief Justice without identifying the complaining party.⁶⁶ The Chief Justice will investigate the matter and ‘if appropriate, take it up with the judge concerned.’⁶⁷ This presumably involves, as Professor Gabrielle Appleby and Professor Suzanne Le Mire state in relation to ethical conduct more broadly, ‘a discussion of the appropriate ethical standard and the consequences of its breach’.⁶⁸

In the Western Australia, complaints about members of the judiciary may be made in writing to the Chief Justice. This process is, however, governed by the *Protocol for Complaints Against Judicial Officers in Western Australian Courts*, approved by all chief judicial officers in the State and signed by the Chief Justice. The Protocol relevantly provides that while reserved judgments ‘should be delivered as soon as practicable’, ‘[n]o firm time limits can or should be established for the delivery of reserved judgments. The delay between the last day of hearing and delivery of reserved judgments may vary according to the urgency with which a decision is required, the complexity of the issues to be considered and the current workload of the judicial officer or officers responsible for the preparation of the judgment’.⁶⁹ The Protocol does, however, provide indicative targets, including two months from the last day of hearing for criminal appeals.⁷⁰

Parliamentary oversight and external complaints mechanisms

Complaints can also be brought against individual judicial officers to independent statutory bodies/officers in many jurisdictions. The Judicial Commission of New South Wales provides, through the *Judicial Officers Act 1986* (NSW), an avenue for judicial complaints to be brought, and in extreme cases, recommendations for parliamentary removal. A similar process exists in Victoria.⁷¹ In 2017, the ACT Judicial Council was established under the *Judicial Commissions Act 1994* (ACT) to consider complaints about the behaviour or capacity of a judge, including timeliness

⁶⁶ *Federal Court of Australia* (n 65)

⁶⁷ *Ibid.*

⁶⁸ Gabrielle Appleby and Suzanne Le Mire, ‘Ethical Infrastructure for a Modern Judiciary’ (2019) 47(3) *Federal Law Review* 335, 339.

⁶⁹ Chief Justice of Western Australia, *Protocol for Complaints Against Judicial Officers in Western Australian Courts* (27 August 2007) 1,

https://www.supremecourt.wa.gov.au/files/2007_Complaints_Protocol_31082007.pdf

⁷⁰ *Ibid.* 2.

⁷¹ *Judicial Commission of Victoria* (Web Page), <https://www.judicialcommission.vic.gov.au/>

in providing judgments.⁷² In South Australia, complaints can be made to the Judicial Conduct Commissioner, established under the *Judicial Conduct Commissioner Act 2015* (SA). Federally, there have been calls for a similar complaints mechanism for the Australian federal courts.⁷³

Parliamentary oversight of curial delay provides another accountability mechanism and can be multi-faceted. The existence of formal processes of removal,⁷⁴ while seldom used, provide an important means of addressing judicial incompetence.⁷⁵ Less extreme mechanisms can include parliamentary reports,⁷⁶ committees,⁷⁷ papers⁷⁸ and parliamentary processes such as question time.⁷⁹ Federally, the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) deals with the most serious complaints about misbehaviour and incapacity that can result in removal from office. It provides for the establishment, by resolution of both Houses of Parliament, of a Commission – a joint parliamentary body constituted by three members nominated by the Prime Minister – to assist Parliament in consideration of removal of a judge as provided for by s 72 of the *Commonwealth Constitution*.⁸⁰

KPIs and other measures of court performance

These mechanisms are accompanied by more commonplace processes of accountability such as reputation within the legal profession, professional bodies, academic commentary⁸¹ and reports of law reform agencies.⁸² More focused scrutiny

⁷² ‘Complaints about ACT judges or magistrates’ *ACT Judicial Council* (Web Page) <http://www.actjudicialcouncil.org.au/>

⁷³ Gabrielle Appleby and Suzanne Le Mire, ‘Judicial Conduct: Crafting a System that Enhances Institutional Integrity’ (2014) 38(1) *Melbourne University Law Review* 1; Michael Pelly, ‘Law Council “very troubled” by errant circuit court judge,’ *Australian Financial Review* (Online, 26 February 2019) <https://www.afr.com/companies/professional-services/law-council-very-troubled-by-errant-circuit-court-judge-20190226-h1bpxs>; Hagar Cohen, ‘Almost 99 per cent of protection visa review applications fail when heard by controversial judge, new figures reveal’ *ABC News* (Online, 6 September 2019) <https://www.abc.net.au/news/2019-09-06/almost-99-per-cent-fail-when-heard-by-judge/11457114>

⁷⁴ See, eg. *Commonwealth Constitution*, s 72; *Judicial Officers Act 1986* (NSW).

⁷⁵ Kirby (n 54) 48-9.

⁷⁶ See, eg. Commonwealth Parliament, Senate Standing Legal and Constitutional Affairs References Committee, *Australia’s Judicial System and the Role of Judges Report* (2009), <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2F51643%22;src1=sm1>

⁷⁷ Justice Stephen O’Ryan and Tony Lansdell, ‘Benchmarking and Productivity for the Judiciary’, AIJA Conference on Judicial Accountability (July 2000), 3, discussing the work of the Senate Legal and Constitutional Legislation Committee in Budget Estimates in May 2000.

⁷⁸ See, eg. Honor Figgis, *Dealing with Court Delay in New South Wales*, Briefing Paper no 31/96 (1996); Rachel Callinan, *Court Delays in NSW: Issues and Developments*, Briefing Paper No 1/02, (2002).

⁷⁹ Colbran (n 52) 59.

⁸⁰ <https://www.lrc.justice.wa.gov.au/files/P102-JudiciaryFR.pdf> p35

⁸¹ Colbran (n 52) 63-64.

occurs through the Annual Reports on Government Services which has KPIs including court ‘backlog’, ‘on-time case processing’ and case ‘clearance’.⁸³ These measures vary between different levels of courts but provide a comparative snapshot of the number of cases concluded within a reporting period across Australian jurisdictions. Departmental and Court Annual Reports, and Court websites, which record the number and rate of case ‘disposal’ and other key performance indicators including the number of undecided matters.⁸⁴ For example, New South Wales undertook a project to develop court-formulated KPIs for their court system, which included markers such as ‘backlog’, ‘overload’ ‘clearance ratio’ and ‘appearance indicator’.⁸⁵ Similarly, Justice Debra Mullins has discussed that for the Supreme Court of Queensland, judges have standard reserved judgment benchmarks which can be used to put in place scheduling changes if need be.⁸⁶

It is not uncommon for a court to have a strategic statement/directions outlining the purpose and aspirations of the court.⁸⁷ For example, the Supreme Court of the Australian Capital Territory’s strategic statement identifies, amongst other things, that the Court achieves its purpose:

1. By delivering impartial, high quality and timely decisions
2. By resolving each case by the process most suited to achieving a just, quick and effective outcome⁸⁸

In line with this, the Court ‘aims to deliver each judgment within three months from the date on which the judgment was reserved, unless the presiding judge has indicated

⁸² See, eg, Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System – Report No 89* (2000), <https://www.alrc.gov.au/report-89>; Law Reform Commission of Western Australia, *Project 102: Complaints Against Judiciary* (2012), <https://www.lrc.justice.wa.gov.au/files/P102-DP.pdf>

⁸³ See, eg, Steering Committee for the Review of Government Service Provision, *Report on Government Services 2019* (Productivity Commission, 2019), Chapter 7 <https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/justice/courts/rogs-2019-partc-chapter7.pdf>. For a discussion of Chief Justice Spigelman’s criticisms of these reports see O’Ryan and Lansdell (n 77) 23-4.

⁸⁴ See, eg, Mullins (n 25) 2-3.

⁸⁵ Laurie Glanfield and Ted Wright, *Model Key Performance Indicators for NSW Courts* (Law Foundation of NSW 2000), Ch 2.

⁸⁶ Mullins (n 25) 5-6.

⁸⁷ See, eg, Supreme Court of Victoria, ‘Strategic Statement’, *Supreme Court of Victoria* (Web Page) <https://www.supremecourt.vic.gov.au/about-the-court/strategic-statement>; County Court of Victoria, ‘Strategic Directions’, *County Court of Victoria* (Web Page) <https://www.countycourt.vic.gov.au/learn-about-court/strategic-directions>.

⁸⁸ Supreme Court of the Australian Capital Territory, *Strategic Statement* https://www.courts.act.gov.au/_data/assets/pdf_file/0013/1002631/Strategic-Statement-Supreme-Court-2019-2020.pdf

otherwise'.⁸⁹ Similarly, Practice Direction 2 of 2014 states that the Court aims to have civil cases completed within 12 month of commencement, and expects parties to assist the court to meet this standard.⁹⁰

The Western Australian Department of Justice has similarly developed *Key Effectiveness Indicators* to meet its KPI of an efficient, accessible court and tribunal system. These include 'measures of time to trial, time to finalise matters and time to finalise non trial matters'.⁹¹

What is clear is that prioritising speed over all else compromises other key aspects of a court's performance.⁹² Professor Tania Sourdin and Naomi Burstyner⁹³ have concluded that what is essential are court statistics which allow for distinctions to be drawn between 'avoidable' and 'unavoidable delay', which cannot always readily be drawn,⁹⁴ while also appraising the subjective experience of litigants.

The model of court governance and funding provision also affects the independence of the court from the executive and the level of regulation of judicial performance and efficiency. Justice Michael Moore identifies five models of court governance in Australia, ranging from the 'federal model' wherein each court has control of administration to the traditional model where administrative services are provided by the executive.⁹⁵ In 1986, the Fitzgerald Inquiry made clear:

One of the threats to judicial independence is an over-dependence upon administrative and financial resources from a Government department or being subject to administrative regulation in matters associated with the performance of the

⁸⁹ Supreme Court of the Australian Capital Territory, 'Inquiries About Reserved Decisions and Complaints about Judges', *Supreme Court of the Australian Capital Territory* (Web Page) https://www.courts.act.gov.au/supreme/about_the_court/inquiries-about-reserved-decisions-and-complaints-about-judges

⁹⁰ Supreme Court of the Australian Capital Territory, *Practice Direction No.2 of 2014: Case Management in proceedings commenced by originating claim*, 16 September 2014.

⁹¹ Department of Attorney General, *Annual Report 2015-16: Key Performance Indicators for the Year Ended 30 June 2016* (2016) 4 <http://www.ar.dotag.wa.gov.au/files/KPIs.pdf>.

⁹² Jennifer K. Elek and David B Rottman, 'Improving Judicial-Performance Evaluation: Countering Bias and Exploring New Methods' (2013) 49 *Court Review* 140, 143.

⁹³ Tania Sourdin and Naomi Burstyner, 'Justice Delayed is Justice Denied' (2014) 4(1) *Victoria University Law & Justice Journal* 46.

⁹⁴ *Ibid* 59, cite Freiberg's observations that such a call is inevitably 'value laden'.

⁹⁵ Justice Michael Moore, 'Judicial independence - Breaking free from the Executive Branch' (FCA) [2010] *FedJSchol* 27.

judicial role. Independence of the Judiciary bespeaks as much autonomy as is possible in the internal management of the administration of the courts.⁹⁶

Former Chief Justice Terence Higgins of the ACT Supreme Court lamented, on a number of occasions,⁹⁷ the ACT court governance structure. His Honour explained:

...the recent introduction of ‘Customer Service Surveys’ undertaken in both the Supreme Court and Magistrates Court. The surveys purport to measure administrative efficiency, as viewed by practitioners and litigants. Survey results are then reported in the JACS Annual Report and in ‘Business Plan performance indicators’ and as such, have some impact upon court administration, be it in terms of budgeting or personnel management. On one view these surveys are symptomatic of what Chief Justice Spigelman has described as a ‘managerialist ideology’ that is both inappropriate and degrading to the judicial process.⁹⁸

This is not an exclusively ACT complaint, in 2012, it was reported in *The Age* that:

Chief Justice Marilyn Warren...issued a withering reproach to the Justice Department, saying its relentless focus on productivity targets and financial goals was undermining the administration of justice. Chief Justice Warren said the department's constant efforts to measure and assess, and to pitch the courts' output against productivity ideals, treated the courts as little more than “a car factory”.⁹⁹

KPIs to assess the performance of each judge remain controversial.¹⁰⁰ Justice Mullins has recognised that any such endeavour can be jeopardised by the idiosyncratic nature of each matter which is influenced by the legal issues, counsel and the number of

⁹⁶ Ibid; G.E.Fitzgerald, *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, Pursuant to Orders in Council (Fitzgerald Report)* (Queensland Government Printer, 1989) 134.

⁹⁷ See for example, Terence Higgins, ‘A Judicial Perspective on Supreme Court Developments’ (Speech, Australian Lawyers Alliance Conference, Canberra, 21 September 2012). https://www.courts.act.gov.au/_data/assets/pdf_file/0005/975965/ala_speech_by_chief_justice_higgins_21_september_2012.pdf; Terence Higgins, ‘The ways in which Self administration Improves Responsibility, Accountability and Efficiency’ (Speech, AJA Courts Governance Seminar, 31 May 2008) <https://ajja.org.au/wp-content/uploads/2017/11/Higgins.pdf>; Terence Higgins, ‘Court Governance and Judicial Independence in the Australian Capital Territory’ (Speech, Judicial Conference of Australia Colloquium 2006, Canberra, 7 October 2006) http://jca.asn.au/wp-content/uploads/2013/11/higgins_speech2006.pdf

⁹⁸ Terence Higgins, ‘Court Governance and Judicial Independence’ (n 97) 2-3.

⁹⁹ Leonie Wood and Josh Gordon, ‘Chief Justice backed for attacking managerialism’, *The Age* (Online, 11 May 2012) <https://www.theage.com.au/national/victoria/chief-justice-backed-for-attacking-managerialism-20120510-1yfoo.html>

¹⁰⁰ Mullins (n 25) 7. Roach Anleu and Mack, ‘Judicial Performance and Experiences of Judicial Work’ (n 6).

cases each judge is resolving.¹⁰¹ Justice Stephen O’Ryan and Mr Tony Lansdell have noted that:

it cannot be consistent with the principles of judicial independence for the process to be used to scapegoat or place undue pressures on individual judges...this should not be a discussion for the media or individual politicians, but for the Court itself.¹⁰²

One common push is for courts to self-regulate to ensure that KPIs are appropriately formulated and applied and so as to appropriately prioritise quality decisions as well as judicial independence.¹⁰³ Such an approach can still impinge upon internal independence of the judiciary where pressure on judges can result in ‘subservience to judicial superiors;’¹⁰⁴ however consultation and collegiality can provide bulwarks against misuse.¹⁰⁵

Court-led performance evaluation: the International Framework for Court Excellence

Australian courts have also looked at international best practice and benchmarking to improve court performance and performance management. The Supreme Court of Victoria was the first Australian court to join the International Framework for Court Excellence (IFCE), ‘a quality management system designed to help courts to improve their performance’¹⁰⁶ that was developed in consultation with judicial officers and court administrators and ‘represents a form of *court-led* performance evaluation’.¹⁰⁷

The IFCE identifies ‘Seven Areas of Court Excellence’, including Court Proceedings and Processes covering timeliness, and provides a self-assessment tool to enable courts to assess themselves against the seven areas with guidance on improving performance in areas of need.¹⁰⁸ In relation to timeliness, the IFCE provides:

¹⁰¹ Ibid. See also John V. Orth, ‘Who Judges the Judges?’ (2005) 32 *Florida State University Law Review* 1245, 1256; Smyth (n 56) 1317-1319.

¹⁰² O’Ryan and Lansdell (n 77) 33.

¹⁰³ Ibid 31.

¹⁰⁴ Shetreet 67-71, quoted in Mack and Roach Anleu, ‘The Administrative Authority’ (n 57) 10.

¹⁰⁵ Mack and Roach Anleu (n 57) 10; Appleby and Le Mire (n 68) 338.

¹⁰⁶ International Consortium for Court Excellence, ‘The International Framework for Court Excellence’ *International Consortium for Court Excellence* (Web Page) <http://www.courtexcellence.com/>

¹⁰⁷ Liz Richardson, Pauline Spencer and David Wexler, ‘International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing’ (2016) 25(3) *Journal of Judicial Administration* 148, 149.

¹⁰⁸ International Consortium on Court Excellence, *The International Framework for Court Excellence* (National Center for State Courts, 2nd ed, 2013) 24 <http://www.courtexcellence.com/~media/Microsites/Files/ICCE/The%20International%20Framework%20E%202014%20V3.ashx>

Excellent courts use a set of key-performance indicators to measure the quality, efficiency, and effectiveness of their services. Courts should, at the very least, collect and use information on the duration of proceedings and other case-related data. Excellent courts aim at shifting their data focus from simple inputs and outputs to court user satisfaction, quality of service and quality of justice... court performance from a quantitative perspective tends to distort the full picture, as in the example of “justice hurried” being in some cases “justice buried”. It is therefore important to take qualitative aspects of the functioning of courts into account as well since aspects that are not measured are aspects that are rarely fixed. The challenge is that it is easier to quantify efficiency than it is to measure the kind of quality justice that transcends pure efficiency.... The Framework, by taking a ‘whole of court’ approach seeks to ensure these broader justice issues are also captured by measuring the quality of the court as a whole. ... If a court is performing at a high level in all seven areas of court excellence then it is fair to conclude that the court itself is delivering a high quality of justice.¹⁰⁹

In line with this, the Supreme Court of Victoria makes extensive performance data available on its website, covering Whole of Court performance and the performance of each division of the Court including clearance rates and case backlog.¹¹⁰In the spirit of continuous assessment and improvement of the IFCE, the Victorian Court ‘regularly assesses its performance against the IFCE’.¹¹¹

Efforts have been made to adopt the ICFE in a number of Australian jurisdictions, including the Supreme Court of Queensland,¹¹² the Family Court of Australia,¹¹³ the Federal Circuit Court,¹¹⁴ the Land and Environment Court of NSW,¹¹⁵ and the Law Courts of the ACT.¹¹⁶

¹⁰⁹ Ibid 29.

¹¹⁰ See, eg, Supreme Court of Victoria, ‘Court Performance’, *Supreme Court of Victoria* (Web Page) <https://www.supremecourt.vic.gov.au/about-the-court/court-performance/whole-of-court-performance>

¹¹¹ Ibid.

¹¹² Justice R W Gotterson, ‘The International Framework for Court Excellence’ (Speech, Globalization of Legal Practice Conference, Paris, 9 January 2014) <http://classic.austlii.edu.au/au/journals/QldJSchol/2014/40.pdf>

¹¹³ See, eg, Family Court of Australia, *Annual Report 2015/16* (Commonwealth of Australia, 2016) 28.

¹¹⁴ See, eg, Federal Circuit Court of Australia, *Annual Report 2015/16* (Commonwealth of Australia, 2016) 7, 14-15.

¹¹⁵ Justice Brian J Preston, ‘Implementing the International Framework for Court Excellence: The experience of the Land and Environment Court of New South Wales’ (Speech, the Asia-Pacific Courts Conference 2010, Singapore, 5 October 2010); Justice Brian J Preston and Registrar Joanne Gray, ‘Achieving Court Excellence: The need for a collaborative approach’ (Speech, ‘Judiciary of the Future’, International Conference on Court Excellence, Singapore, 28 January 2016).

¹¹⁶ Australian Capital Territory Law Courts and Tribunal, *Corporate Plan 2017-2020* (July 2017) https://www.acat.act.gov.au/_data/assets/pdf_file/0005/1088780/ACT-Law-Courts-and-Tribunal-Administration-Corporate-Plan-2017-2020.pdf

This patchwork of mechanisms, augmented by the media ranking of judicial performance, is primarily focused on monitoring judicial and court system performance. We argue that much can be gained, drawing on lessons from psychology research, by focusing instead on enhancing judicial performance using strategies for motivating judges in a way that aligns intrinsic and extrinsic motivation. By examining judicial performance management through the lens of self-determination theory, we can assess whether current mechanisms align intrinsic and extrinsic motivation, and which measures should be favoured over others.

2.2 Court Timeliness and the Lessons of Psychology

There is a strong body of research in psychology which suggests that motivation is influenced by ‘extrinsic’ and ‘intrinsic’ factors.¹¹⁷ Extrinsic factors consist of external rewards, punishments or pressures, such as the use of KPIs or surveillance.¹¹⁸ Intrinsic factors are inherent in undertaking an activity itself or else the goals of the activity are thematically congruent with that activity.¹¹⁹ For instance, the interest that a person experiences from engaging in an activity, satisfaction due to positive feelings of being effective and being the originator of the behaviour or of furthering one’s own goals, or learning about an area of knowledge because the person wants to know and understand more about a topic. The research also demonstrates that extrinsic and intrinsic motivations are not simply additive. That is, the application of extrinsic drivers can reduce intrinsic motivation in some circumstances, albeit some divergence remains over the scope of those circumstances.¹²⁰

This work has been applied to judicial motivation in some limited contexts, largely in United States settings. Several writers have noted the particular importance of intrinsic motivation for judges, especially appellate judges, whether due to the more

¹¹⁷ See, eg, Sansone and Harackiewicz (n 9) 2-5; Gagne and Deci, ‘The History of Self-Determination Theory’ (n 9); Heckhausen and Heckhausen (n 7) 4-5; Kruglanski (n 7) 393-8.

¹¹⁸ Richard Ryan and Edward Deci, ‘Intrinsic and Extrinsic Motivations: Classic Definitions and new Directions’ (2000) 25(1) *Contemporary Educational Psychology* 54-67.

¹¹⁹ F Rheinberg, ‘Intrinsic Motivation and Flow’ in Jutta Heckhausen and Heinz Heckhausen (eds), *Motivation and Action* (Cambridge University Press, 2008) 323, 325-30; Sansone and Harackiewicz (n 7) 2; Edward Deci and Richard Ryan, *Intrinsic Motivation and Self-Determination in Human Behavior* (Plenum Press, 1985) ch 2.

¹²⁰ Edward Deci, Richard Koestner and Richard Ryan, ‘A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation’ (1999) 125(6) *Psychological Bulletin* 627; Rheinberg (n 119) 330-1; Sansone and Harackiewicz (n 9) 2-5 (outlining the core research that led to this conclusion). It is sometimes asserted that the conditions under which intrinsic motivation will be affected are narrowly applicable in the real world. For instance, because the relevant activity must be interesting, the reward or punishment must be material not verbal and must be expected: Rheinberg (n 119) 331. However, these conditions would typically apply in the context of KPIs attached to productivity in writing judgments.

restricted universe of external factors that can be used,¹²¹ or due to the inherently interesting or satisfying act of judging.¹²² Richard Posner's work has reflected on the 'intrinsic satisfaction' that accompanies judging.¹²³ Likewise, Australian judicial surveys evidence high levels of satisfaction from the role of judging (with 76% of those surveyed finding that the job provided 'personal wellbeing and satisfaction' 'most or almost all of the time').¹²⁴ It has been surmised from this data that 'sources of fulfilment, accomplishment and purpose within judicial work compensate or offset for the sources of stress, providing for a demanding but meaningful professional life'.¹²⁵ As Posner has observed in the US context, for most judges:

They must be deriving utility from the work of being a judge, and not just from the status of being a judge, which they could retain while doing very little and sometimes – when they have reached retirement age - nothing. Their utility function must in short contain something besides money income (from their judicial salary) and leisure.¹²⁶

Accordingly, this section explores how to motivate judges without detracting from their intrinsic motivation. That is not to dispute that it is possible to apply extrinsic incentives to judges and to use economic models to design those incentives as writers such as Posner have suggested.¹²⁷ Indeed, the imposition of KPIs, whether set by courts or outside agencies, provides an example of extrinsic motivation. Of course, the multi-causal nature of the factors affecting the time taken to produce judgments is likely to make some forms of extrinsic motivation, such as the application of specific benchmarks, ineffective, even if they result in some changes in behaviour.¹²⁸ The risk is also that KPIs, and the difficulty of appropriately and fairly measuring case timelines, may incentivise judicial officers to focus on clockwatching, rather than acting in pursuit of institutional goals, such as achieving a just, as well as timely and cost-effective resolution of disputes. This article places those issues to one side, but

¹²¹ Lawrence Baum, 'Motivation and Judicial Behavior' (Workshop Paper, Workshop on Exploring the Judicial Mind, University of Virginia, 30-31 March 2007) 7-8.

¹²² Cf Lawrence S. Krieger and Kennon M. Sheldon, 'What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success' (2015) 83 *George Washington Law Review* 554, 582, 589-90, 614.

¹²³ Posner, *How Judges Think* (n 25) 166.

¹²⁴ Schrever, Hulbert and Sourdin (n 36) 153.

¹²⁵ *Ibid* 167.

¹²⁶ Richard A. Posner, 'What Do Judges and Justice Maximize? (The Same Thing Everybody Else Does)' (1993) 3 *Supreme Court Economic Review* 1, 13.

¹²⁷ *Ibid*. Posner himself acknowledges the relevance of cognitive and psychological theories to an accurate description of judicial behaviour: Posner, *How Judges Think*, (n 25) ch 1.

¹²⁸ Steven G. Gey and Jim Rossi, 'Empirical Measures of Judicial Performance: An Introduction to the Symposium (2005) 32 *Florida State University Law Review* 1001, 1004, 1011.

makes the point that there is a psychological dimension that should also be considered and that may favour some external incentives over others.

This section explores the contribution of self-determination theory to calibrating external and internal motivation. It is a widely adopted theory, including in the management and organisational behaviour domain, that focuses on work motivation as a result of the satisfaction or blocking of psychological needs.¹²⁹ Self-determination theory proposes that only extrinsic motivation which maintains a person's autonomy rather than making them feel controlled, will add to, rather than detract from, intrinsic motivation.¹³⁰ To maintain intrinsic motivation, it is also necessary for a person to feel competent – to have a sense of control and mastery of knowledge.¹³¹ Self-determination theory also suggests that some external factors can result in a person internalising values, beliefs and behaviours so as to make them their own.¹³² The greater the level of autonomy that accompanies the external factors, the greater the degree of potential internalisation and hence the closer to intrinsic motivation a person may move. For instance, where external rewards/punishments involve some pressure such as the prospect of public or semi-public shame for completing a behaviour (such as being named as having completed/failing to have completed the hearing of a case at a weekly judges' conference) a person may 'introject' the importance of the behaviour by using achievement of the behaviour as a measure of their own worth.¹³³ There can become an internal driver to a degree, even though it is not intrinsic motivation. If a value or behaviour is externally raised in a way that permits greater autonomy to a person, there is the prospect that the individual will 'identify' with that value or behaviour as a personal value or self-selected goal.¹³⁴ For instance, a judge is assigned a challenging case and despite the onerous workload, manages it efficiently and expeditiously because they value the

¹²⁹ See, eg, Marylene Gagne and Edward Deci, 'Self-determination Theory and Work Motivation' (2005) 26 *Journal of Organizational Behavior* 331; Edward Deci and Richard Ryan, 'The Importance of Universal Psychological Needs for Understanding Motivation in the Workplace' in Marylene Gagne and Edward Deci (eds), *The Oxford Handbook of Work Engagement, Motivation and Self-Determination Theory* (Oxford University Press, 2014) 13, 14.

¹³⁰ Gagne and Deci, 'Self-determination Theory and Work Motivation' (n 129) 333-4.

¹³¹ Gagne and Deci, 'The History of Self-Determination Theory' (n 9) 2.

¹³² *Ibid* 3.

¹³³ *Ibid*.

¹³⁴ *Ibid*. Note that a number of self-determination theorists treat identification as a form of extrinsic motivation rather than intrinsic motivation on the basis that while it is driven largely by internal factors, the motivation arises because an activity is instrumentally important for internal goals, rather than the person being interested in the activity itself, although both types are then typically treated together as forms of autonomous motivation: Deci and Ryan, 'The Importance of Universal Psychological Needs' (n 129) 16-17.

parties' rights of access to justice or because the judge's self-identity includes valuing the rule of law.¹³⁵ To support internalisation of values, self-determination theory suggests that people should feel not just autonomous and competent, but also connected to others in the undertaken activity.¹³⁶

Thus, self-determination theory indicates that there are three psychological needs that must be satisfied in order for extrinsic motivation to add to, rather than detract from intrinsic motivation: competence; relatedness – a sense of interaction, connection with others; and autonomy – a sense of control (over the process of judging). Studies of legal professionals support the importance of these needs. Professor Lawrence Krieger and Professor Kennon Sheldon's multiple studies of United States legal students and professionals focuses on wellbeing, but framed in large part from the perspective of self-determination theory. They found these three dimensions fundamental to lawyer satisfaction alongside internal motivation due to work that is 'inherently interesting and enjoyable' or 'meaningful because it furthers one's own values'.¹³⁷ In the Australian context, Carly Schrever, Carol Hulbert and Tania Sourdin have likewise employed self-determination theory as a component of their recent research into judicial wellbeing, but are yet to report on the psychological motivation component of the research.¹³⁸ Smyth has also recognized the importance of 'social context' to judges' motivation, with that context resulting in social norms that 'influence behavior and, important in the context of measuring judicial performance, the pursuit of goals'.¹³⁹

PART III Enhancing judicial performance

In Part II, the discussion of self-determination theory suggested that court structures and management approaches should integrate extrinsic motivators that cultivate judges' psychological needs of competence, relatedness and autonomy. That discussion also favours extrinsic factors that bolster the degree to which judges internalise institutional values so as to approach their roles with a greater sense of autonomy and in line with their own values and sense of self. This could, for

¹³⁵ For an example of internalisation of the value of due process by judges, see, eg, Carly Schrever, 'Australia's First Research Measuring Judicial Stress and Wellbeing: A Preview of Findings' (2018) 92 *Australian Law Journal* 859, 861.

¹³⁶ Gagne and Deci (n 129) 336-7; Deci and Ryan, *Intrinsic Motivation and Self-Determination* (n 119).

¹³⁷ Krieger and Sheldon (n 122) 564, 580, 582-5.

¹³⁸ Schrever, Hulbert and Sourdin (n 36) 147-8.

¹³⁹ Smyth (n 56) 1321.

example, favour workflow judicial meetings at which judges work together with the Chief Justice to assign cases, rather than cases being assigned by court staff under the supervision of the head of jurisdiction. Giving judges control over their own case-list is also likely to be beneficial as well as allowing judges to self-report judgment delivery and case progress or obstacles.

However, it is possible to go further by creating or bolstering explicit social norms around efficient and effective judging that judges could then be supported to internalise as their own values. The Hon James Thomas, retired judge of the Supreme Court of Queensland, has, for example, advocated the existence of ethical obligations on judges to ‘*attempt to perform competently*’, including seeking out means to improve or leave judicial office if they are not able to do what is required.¹⁴⁰ Procedures such as monitoring and self-reporting judgment times could be used to help judges internalise such values and goals and even, at a meta-level, the need to pursue such values and goals. For example, it appears that most Australian superior courts have now set a three month target for the delivery of reserved judgments, with judges who have not met the target asked to justify this at a regular judges’ conference meeting.¹⁴¹ Likewise, judges could be asked to self-report on and justify their behaviour against pertinent IFCE benchmarks adopted by their court.

The benefit of this approach is that it leaves a degree of flexibility with judges, so as to maintain autonomy, although that will also depend on the leadership approach used by the Chief Judge.¹⁴² Depending upon how judges’ conferences are run, there is also the potential for relatedness to be maintained or enhanced – though also the potential for harm if the meeting is essentially to name and shame. Justice Thomas does not refer to measures to increase competence in relation to the application of such a judgment delivery timeframe, but it would be consistent with self-determination theory to provide appropriate supports to judges who are falling behind the three month goal, or who would like assistance in meeting IFCE benchmarks.

¹⁴⁰ James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 56 [4.53].

¹⁴¹ *Ibid* 57-8 [4.54].

¹⁴² As to the importance of autonomy-supporting leadership approaches in various domains, see, eg, Anders Dysvik and Bard Kuvass, ‘Self-Determination Theory and Workplace Training and Development’ in Marylene Gagne and Edward Deci (eds), *The Oxford Handbook of Work Engagement, Motivation and Self-Determination Theory* (Oxford University Press, 2014) 218, 222-3.

Depending on the method adopted, providing further training and support to judges can also be an incentive consistent with intrinsic motivation.¹⁴³ It almost goes without saying that the training and support should be meaningfully linked to a judge's job so as to improve competence. More fundamentally, training/support should be, to some extent, voluntarily undertaken by judges and should ideally also involve collaboration. Given the institutional importance of judicial independence and the likely internalisation of this value by judges, we suspect that it is this third factor that may require greater focus.¹⁴⁴ In this regard, there may be further scope to consider informal supports such as mentoring programmes.¹⁴⁵

Solid evidence exists of collegiality in Australian courts and thus the potential for informal support. A National Survey of the Australian Judges found that on over half of typical days, judicial officers spent on average 43 minutes conferring with judicial colleagues and court staff.¹⁴⁶ Eighty-eight percent (88%) of judges surveyed reported satisfaction with their working relationships with other judges.¹⁴⁷ Appleby and Le Mire suggest, 'The regular and satisfactory nature of these interactions may mean that judicial officers are able to canvas ethical dilemmas with fellow judges.'¹⁴⁸

Continuing judicial education is a 'relatively novel concept in common law countries' due to the false assumption that 'experience as a legal practitioner obviates the need for training as a judge'.¹⁴⁹ While most judicial education is 'judge-led' and occurs at the court level,¹⁵⁰ national bodies also exist including National Judicial College of Australia (NJCA) established in 2002. The NJCA is an independent entity that provides training/professional development to all Australian judges, which includes a National Judicial Orientation Program and Judgment Writing Program.¹⁵¹ Voluntary

¹⁴³ As to the desired characteristics of such training and support, see, eg, Dysvik and Kuvass (n 142) 221-4.

¹⁴⁴ See, eg, Justice Dyson Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205, although this paper has not been uncritically received: Sir Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102.

¹⁴⁵ See, eg, Dysvik and Kuvass ((n 142) 222) as to the sense of investedness and relationship created by such programmes; National Judicial College of Australia, 'Submission to the ALRC Issues Paper – Review of the Family Law System', 14 June 2018, 14, <https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law-113-national-judicial-college-of-australia-submission.pdf>

¹⁴⁶ Mack and Roach Anleu, *Time for Judgment Writing* (n 45) 13.

¹⁴⁷ Mack, Wallace and Roach Anleu (n 36) 30.

¹⁴⁸ Appleby and Le Mire (n 68) 338.

¹⁴⁹ Chief Justice Wayne Martin, 'Judicial Education' in Australasian Institute of Judicial Administration, *Australian Courts: Serving Democracy and its Publics* (AIJA 2013) 83.

¹⁵⁰ *Ibid* 86.

¹⁵¹ <https://njca.com.au/wp-content/uploads/2017/12/Judicial-Education-in-Australia-revised-2012-NJCA.pdf>, 4

training is the norm, given concerns about judicial independence.¹⁵² However, in Victoria, legislative changes in 2007 provide that the ‘Chief Justice is responsible for directing the professional development and continuing education and training of judicial officers’, and may direct that judicial officers participate in ‘specified professional development or continuing education and training activity’.¹⁵³ To the extent that this approach reduces autonomy, it poses risks for intrinsic motivation and should be carefully monitored.

A more radical suggestion that on its face appears to support competence and autonomy is Professor Stephen Choi and Professor Mitu Gulati’s proposal for a ‘tournament of judges’, mentioned above, that identifies the most efficient and effective appellate judges as promotion candidates to the final court of appeal.¹⁵⁴ Smyth has suggested refinements for the Australian context and to limit opportunistic gaming of such a system, however, he also identifies (and does not provide a solution for) the negative effects of the likely increase in competition between judges.¹⁵⁵ Unless counteracted in some way, judicial competition could pose problems for judicial collegiality and risks decreasing relatedness between judges. This approach is therefore less likely to result in internalisation of any institutional values of efficiency and effectiveness or result in additional intrinsic motivation and relies more on introjected ego-linked internal drivers. Nevertheless, if expanded to also include promotion to intermediate appellate courts, so as to increase the promotion incentive, this is likely to be an extrinsic mechanism that at least does not materially detract from intrinsic motivation.

Conclusion

One aspect that was sidelined in the commotion brought on by the *Australian Financial Review* commentary on judicial timeliness was how it was likely to impact on judicial motivation. This article has argued that judicial performance mechanisms should be designed to promote an alignment of intrinsic and extrinsic motivation, such as through prioritising judges’ psychological needs of competence, relatedness and autonomy. These can, for example, influence more collaborative ways of

¹⁵² Martin (n 149) 86.

¹⁵³ *Supreme Court Act 1986* (Vic) s 28A, inserted by *Courts Legislation Amendment (Judicial Education and Other Matters) Act 2007* (Vic).

¹⁵⁴ See (n 55) and accompanying text.

¹⁵⁵ Smyth (n 56) especially at 1326.

assigning cases, self-regulated performance goals and mechanisms to promote judicial collegiality and mentoring. Most crucially, measures of judicial performance need to be crafted with an acceptance of the fact that extrinsic motivations can lead to reductions in the intrinsic motivation of judges which is likely to impede judicial productivity and satisfaction over the long term. Lessons from psychology and self-determination theory have the potential to ensure court structures and processes are designed to prioritise forces that motivate judges and promote court timeliness without sacrificing judicial wellbeing. As Chief Justice Allsop has emphasised, we can only hope to see the best from our courts when we ‘place the human character of the institution at the centre of considerations’.¹⁵⁶

¹⁵⁶ Allsop, ‘Courts as (Living) Institutions’ (n 32).