Benchmarking and Productivity for the Judiciary

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Contents

Much has been written about judicial independence and judicial accountability. The two concepts are not incompatible. Judicial accountability is addressed in various ways and is the obligation of the judiciary to the community. Although judicial accountability has been recognised for some time there are significant and rapid changes occurring in modern society that require consideration of the extent of judicial accountability and how it is achieved. In the context of judicial accountability qualitative aspects of judicial behaviour and activity have been recognised for some time. In this paper the issue of the quantitative aspect of judicial activity is considered and in particular judicial productivity and judicial benchmarking.

Introduction

Recently the Senate Legal and Constitutional Legislation Committee - Consideration of Budget Estimates[1] asked a range of questions in relation to judicial activity and productivity, including:

- the number of days each judge sat and heard cases in the 1999 calendar year;
- the identity of judges who were on leave;
- the number of outstanding judgments, broken into periods of less than three months, between three and six months and more that six months and the name of each judge (both appeal and general division); and
- details of all days, other than public holidays, court vacations and weekends, when more than half of the court did not sit and whether there is a reason for that failure to sit.

The subject of this paper is benchmarking for judicial activity and judicial productivity. It is the result of the experiences gained by the Family Court of Australia, in the development and implementation of a Resource Planning Model and in particular the establishment of quantitative benchmarks for judicial activity.

The Family Court of Australia

[1] 29 May 2000.

The Family Court of Australia is the largest superior court in Australia. It is a high volume specialist Court with 11 Registries, 50 judges, 200 professional mediators, including lawyers and behavioural scientists, and 450 other staff. It provides litigation, mediation and information services through 22 significant locations and a large number of circuit locations throughout Australia (except for Western Australia, which has its own family court operating under the same federal legislation). Co-located with the Family Court adjudicative functions are counselling, conciliation, mediation and forensic assessment services. It thus adopts a multi-disciplinary approach.

Family law impacts upon the community to a much greater degree than general law because it covers a wider field than decisions about the breakdown of marriage and the disposition of children and property. The Family Court operates in a rapidly changing societal (and family) environment. It has to deal with high levels of personal conflict and the emotions of family separation, while at the same time dealing with changing, and often poorly defined stakeholder requirements. Disputes involving family members not only generate deep emotional responses, but on a wider plane they frequently lay bare issues of power, gender, public and private responsibility and concepts of ownership.

The Family Court, as with other federal courts, is completely self-managed. As a Commonwealth budget funded agency, the Family Court is required to embrace, and has, all of the management, accountability, financial and employment framework changes introduced by successive governments.

Statistics and Information

The Family Court has had in place for some years systems for the collection of data relating to the volumes of applications filed, the types of application and the outcomes of various activities such as settlement conferences, case management events and importantly trials. The extent and reliability of this data has been influenced by changing methods of input, collection and collation of the data which in turn has depended upon the level of technology available and the willingness of relevant personnel to participate. In 1976 Professor Ian Scott wrote:[2]

> "If the resources of the court system, both human and physical, are to be used at an optimum efficiency it is essential that the administration be able to monitor its day to day performance. The collection of data requires the co-operation of all persons involved, judges, lesser judicial figures, administrators and supporting personnel. It is an irksome chore and some judges have

[2] "Court Administration" (1976) 50 ALJ 30.

> resented having to participate in it by, for example, keeping a note of the time taken to dispose of each case and matters of that kind."

The resentment of Judges to participate continues and the responses range from questioning why the information is required, a lack of understanding of the information required, concerns on the quality of the data captured, to interference with "judicial independence".[3] However, what has happened, as with all aspects of modern day life, is that technology has significantly advanced the ability to collect and collate data and this capacity will continue to improve. Justice Geoffrey Davies recently said:[4]

> "If I were to nominate the factors which I thought would be most likely to affect both the substance and procedure in civil justice systems during the course of this century I would unhesitatingly say information and communication technology….Technological changes in recording, storing and finding information and in communication have already had a substantial effect on procedure, and it is not difficult to see that the extent of that effect will grow rapidly."

In 1997 the Family Court introduced what is called the Defended Hearing Statistics ("DHS") which sought to capture, in relation to applications for final orders, such data as:

- total cases listed for trial;
- total number of days listed;
- total actual days taken;
- number of trials vacated and reasons why;
- number of trials listed that settled and when;
- number of trials adjourned and why;
- number of trials finished;
- number of judgments delivered; and
- time elapsing from completion of trial and delivery of judgment.

The information captured by the data was important for a number of reasons, one of which was the ability the Court to be accountable for judicial activity to the community. However, the data was not analysed and any assessment of what the data revealed, and conclusions reached, was ad hoc and thus unreliable.

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[3] It is important not to confuse judicial independence with what Professor Ian Scott called judicial individualism or others called judicial idiosyncrasy.

[4] "Justice in the 21st Century" a paper delivered at the Family Court Conference, Sydney, 7 July 2000.

The Family Court also developed, and has been trialing, a statistical system for capturing data in relation to other work done by judges that does not fall within the category of applications for final orders. This 'other work' system is called Interim Procedural Summary Statistics ("IMPSS") and addresses such work as Reviews of decisions of Registrars, Appeals from Local Courts, enforcement applications, applications for interim orders and case management. It captures the following:

- total matters listed;
- days spent in list;
- total time taken;
- type of application;
- adjournments;
- applications dismissed;
- reviews/appeals upheld;
- settlements;
- applications finalised by order; and
- total outcomes.

As well, the Family Court is currently establishing a statistical system for judicial activity of the Full Court of the Family Court called Appeals Information System ("AIS"). The ambition is that the Family Court will have only one set of statistics that will encompass DHS, IMPSS and AIS so that quantitative aspects of judicial activity will be captured. The work has not been finalised, however it is hoped that it will be completed by the end of 2000. This work does not capture many subjective aspects of judicial activity.

Resource Planning Strategy

In 1998 the Family Court implemented a Resource Planning Strategy. This strategy was dependent upon the Family Court understanding its current performance before it could set performance targets. The Court undertook this task for three reasons. Firstly to meet Government Output Costing requirements and the move to accrual budgeting. Secondly it was necessary for the court to distribute finite resources, both people (judiciary and staff) and money, equitably between the Registries. Thirdly, to further advance the work already commenced with the DHS, IMPSS, AIS and earlier data collection attempts.

To achieve this KPMG was engaged to map core service processes and develop a Resource Planning Model. The Resource Planning Model estimates the number and mix of resources required to undertake core activities identified to deliver completed events within a year. The model achieved the result of enabling the Court to distribute resources equitably amongst its Registries and meet the Government's Output Costing requirements.

The Process of Establishing Benchmarks

In order to establish a benchmark Registry (12th Registry), a series of workshops were conducted with Registrars, Operations personnel, Counsellors and Judges. This paper is concerned with the outcome for Judges of what has been the third objective of the Resource Planning Model.

During the exercise a selection of Judges actively worked on setting benchmark times for activities such as trials of applications for final orders, judgements, general case management time, and other performance factors such as adjournment rates. Once these were established the Resource Planning Model was able to then provide the Chief Justice with an estimate of the judicial capacity required at each of the 11 registries for the coming year.

The very notion of asking individuals representing defined roles within the Court to workshop and discuss what might be appropriate benchmarks and productivity outcomes was the subject of concern on the part of both those who made the decisions and those who were left out of the discussion. This was particularly so for Judges. Judges were concerned about putting a time on an activity, the variances between individuals and the concept of benchmarking. They were also concerned about the potential use to which the data may be put. Possible disciplinary issues are of concern to Judges and others.

To assist each role, including Judges, data on performance of how activities are currently conducted was provided. For example, the Family Court knows approximately how many cases proceed to trial as a percentage of the applications filed. Further, it knows how many of these cases settle at the "door of the court" by Registry location. Further, it knows how long certain types of cases take to judgment. It also knows how many trials are adjourned. However, what the Family Court does not know specifically is the time spent on preparing for a trial, the time spent on judgment writing or how much time is spent on managing particular cases.

It is the combination of what is known and what is not known in respect to time undertaken per activity that makes benchmarking and productivity outcomes sensitive. It may be argued that without specific knowledge of all aspects of judicial activity it is not possible to set benchmarks. However, the answer probably lies in the ability of an experienced group of individuals discussing and identifying what is fair and reasonable for areas such as preparing for a case and completing a judgment. Again, these benchmarks may challenge some individuals, but when viewed at a national or Registry level, they balance out and provide the necessary information for the Court to plan future workload.

The benefits of conducting such an initiative are as much about breaking down the barriers of 'sacred cows' as they are about better planning and understanding of the needs and demands on the Court. Examples of the outcomes are the expected time to prepare for trials, to conduct trials and to complete judgments, both ex-tempore and reserved.

All this information has provided the Family Court with an ability to predict the impact and requirements on the operational areas of the Court, as well as predicting the flow on effect to areas of concern namely the backlog of cases and time to finalisation (delays). Another benefit that has emerged is the change in behaviour in certain lists where adjournments were running higher than expected. The focus on a benchmark for adjournment rates has changed dramatically the numbers of adjournments in some registries.

The consequence of what has been done is that there are benchmarks for judicial activity and the level of collective and individual judicial productivity can be ascertained and measured. All activities of the Court's operation are subject to benchmarks, and allow, when coupled with the forecasted filings (applications) for a coming year, the identification of the approximate number of resources required at each of the Court's location. The benchmarks are for effort to undertake an activity but do not address the time within which an activity should be completed. For example, the benchmarks do not address the time from filing to disposition for certain types of application, eg. a property case to be disposed of within 6 months. This is the subject of other standards applied by the Court.

In addition to specific benchmarks for judicial activities, the work has also established and factored in appropriate allowances for holidays, long service leave, chamber time and other specific activities. By doing this, the Resource Planning Model is able to identify shortfalls or available resources for the Judiciary based on expected number of trials. It was important for the Judiciary to understand that the benchmarking factored in these non-specific activities. The benchmarking can now reflect an overall workload and productivity perspective for the Court – for any group of resources.

The Resource Planning Model

The Resource Planning Model is based on the assumptions that inputs are converted to outputs (a completed event) through a series of activities. It firstly looks at the volume of applications filed, then the activities involved in dealing with the application and finally the volume of completed applications. It thus captures the work effort necessary to complete the activities undertaken.

The objectives of the Resource Planning Model are:

- to drive process improvement through benchmarking between registries;
- to enable future planning of staffing levels across registries based on workload;
- to improve the distribution of resources based on objective and quantifiable information;
- to provide a basis for equitable allocation of budgets;
- to provide a more accurate basis of costing to meet Government Output funding requirements; and
- to improve the understanding by management of the impact of proposed process changes.

Scope of Resource Planning Model

The Resource Planning Model in its current form covers:

- work undertaken in the 11 Registries and their sub-registries;
- core positions within the Registries except Aboriginal Torres Strait Islander representatives in Townsville and Darwin and the Ethnic Liaison Officers in Melbourne;
- approximately 90% of core workload within the Registries; and
- community liaison and sundry management / supervisory duties through the use of allowances applied to specific roles.

The Resource Planning Model does not take into account:

- non-core work undertaken by Registry Support eg, Registry Manager's duties;
- project work eg, blitzes, delay reduction strategies, clearance of backlogs (unless captured in normal workload volumes);
- inefficiencies arising within the Registries due to sub-registries and building layouts etc.;
- work undertaken to implement process changes to the court; and
- committee work.

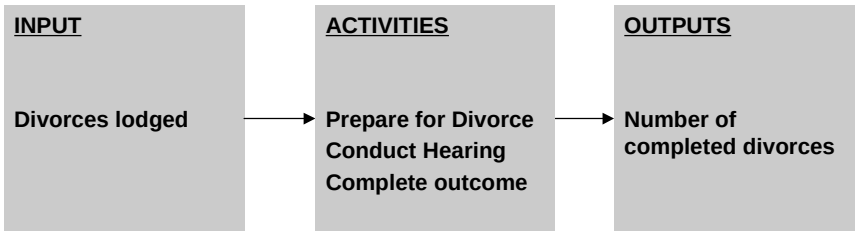
General Principles

In developing the Resource Planning Model the following principles were adopted:

- activities to be included in the model would cover at least 80% of core workload;
- that only events and activities based on a "typical" case path be included in the model;
- activity times would be based on the time a competent employee would take to perform the task;
- activity time variations are acknowledged and captured, where the variance is due to different clients of the Court (for example, dealing with solicitors versus self represented litigants); and
- activity time excluded time spent on rework arising from internal corrections.

Overview of the Resource Planning Model

As outlined above the Resource Planning Model is based on the assumption that inputs are converted to outputs (in this case an output is a completed event) through a series of activities. This process can be illustrated as follows:



Inputs drive the activity necessary to deliver outputs. The volumes of inputs are known as work drivers. The model captures the work effort necessary to complete the activities undertaken within the Registries.

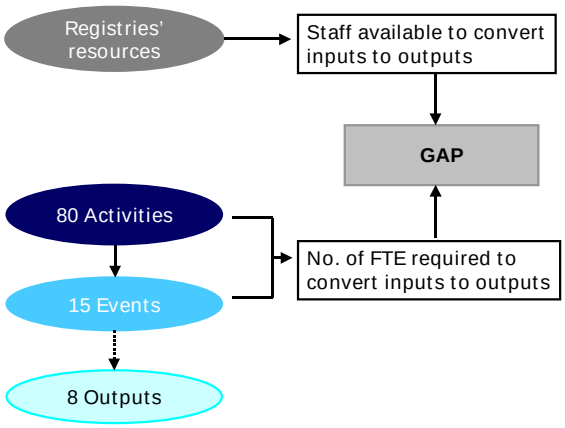
The formulas for determining work effort and resource requirements are:

- Work effort (hours) = Σ (Input volumes x activity time x weighting)
- Resources required (FTE) = Σ (Work Effort ÷ Work availability per resource category)

These formulas assume that work comes in at a constant rate. As this may be unrealistic in practice, a system to appropriately schedule resources is used by the Registries. A scheduling system helps

determine the appropriate mix of full-time, part-time or casual resources needed to meet work demands.

The Court's current events and activities form the basis of the model. The following figure shows the relationship between these events, activities and Registry resources.



The Resource Planning Model identifies the number of Full Time Equivalents required to undertake the work necessary to deliver outputs. This calculation does not include allowances for annual leave and other entitlements. To identify the actual number of Full time Equivalents required to resource a Registry, the resources predicted by the model are factored up to cover these allowances.

The difference between staff available (less holidays and other allowances) and the number of resources determined by the model is known as "the gap". The gap between the actual number of Full Time Equivalents employed and that estimated by the model may vary across Registries because:

- business rules, assumptions, times and volumes adopted for model are at variance with current practice;
- the Registry may not be resourced by competent staff (staff may need training);
- the Registry may incur overtime and the forfeiting of flex leave;
- staff within the Registry may be identified as one resource group but undertaking work attributed to another resource group; and, or
- the Registry may be inappropriately resourced.

How does the Resource Planning Model work

The Resource Planning Model estimates the number and mix of Registry resources (Full Time Equivalents) required to undertake the core activities of the Court in order to deliver the expected volume of work within a year. The model in its present form allows the Court to:

- identify, based on management information collected:
    - work effort spent on core activities within each Registry in the delivery of their services; and
    - the gap between existing available staff (including the judiciary) and that utilised in the delivery of services;
- identify benchmarks set and predict future Registry staffing level requirements for any year;
- enable 'what if' simulations based on anticipated changes in activity volumes (eg. shift in work due to the Federal Magistrates Service), adoption of best-demonstrated practices (eg. lower adjournment rates) and policy changes (eg. reduced voluntary counselling levels).

Forecasting future staff requirements and 'what if' simulations is limited by the accurate and appropriately formatted historical data. Improved and consistent data collection over time will enable better trend analysis and the settling of future targets for individual Registries. The Resource Planning Model does not:

- provide work effort spent on a per case basis;
- provide an indication of staffing levels for business support activities eg, Registry administration and non routine work eg, project work;
- track turn-around time for cases;
- track work in progress, which has been identified as a future consideration;
- determine the most appropriate scheduling of resources;
- track true activity costs; and
- provide a panacea for all staffing level decisions within a Registry.

Key Elements

Seven key elements are necessary to model staff requirements. These elements are outlined in the figure below:

Detail	Description
Activity descriptions	**Dictionary of over 80 activities for the Court**
Activity times / weighting	**Benchmark time to complete one unit of activity**
Input volumes / weighting	**The number of times activity is performed**
Position Groups	**Level / type of staff required for an activity**
Calendar	**No of working days available**
Work availability	**Hours available for work per day per role**

Further detail on the seven key elements is as follows:

Activity Descriptions

There are 80 activities identified in the model and these are defined in the Activity Dictionary, which is maintained by the Court. There is a generic activity definition supported by additional notes for each resource group contributing effort to the activity. The dictionary also identifies the activities' corresponding input (work driver).

Activity Times and Weightings

A survey of each Registry provided the time identified to currently undertake the activities as described in the Activity Dictionary. These current times were used in the baseline. Through four workshops the time identified for the 12th Registry was provided.

Weightings are applied to the time standards to vary:

- the input volume from the usual work driver; and, or

- the time allocated based on identified underlying circumstances where these circumstances could be quantified.

Time may vary due to underlying circumstances e.g, Counselling – more time is required to undertake court ordered counselling than voluntary counselling. The number of court ordered and voluntary counselling interventions can be identified as a percentage of total counselling interventions. By using these percentage splits as weightings the workload calculation can vary according to the type of intervention.

Generally the total of the weightings will equal 100%. However, where the activity is not undertaken for 100% of the time eg, Judicial Associates sit in court only 30% of the time, then a weighting of less than 100% may occur.

Conversely where an activity may include additional tasks, two activity times with individual weightings are used. The sum of these weightings may then be in excess of 100% eg, 10% of divorces require additional time for the maintenance of name and addresses and a 100% require time for the issue of decree nisi therefore, the total of the weightings is 110%.

Input Volumes

The quantity of inputs have been derived from a variety of sources as listed below:

INPUT TYPE	ORIGINAL DATA SOURCE.
Set time parameters	These are given input based on number of days, months, quarters etc. in the reporting period (the current models are based on a full year).
Application forms	Forms 4, 7, 8, 12As and others captured in Blackstone (the current case management system). The definition of these forms is consistent with Management Information and Research (MIR) statistics.
Completed Events	Based on actual volumes captured in Blackstone or manually collected in the Registries. For the 12th Registry these completed events were derived as a percentage of application forms (service level).
Adjournments	The number was derived from Blackstone or statistics manually collected in the Registry by MIR. This number was used in the baseline only.
Adjournment rate	In the baseline the rate equalled (the number of completed events ÷ number of adjournments) in the 12th Registry the rate is set as a target.

Listings	Completed events x (1 + adjournment rate).
Sundry Inputs	These were originally derived from the Registries (in the baseline) but are generally based on assumptions for the 12th Registry. These are documented in the model. Examples are number of enquiries, circuits, days spent assisting other Registries, supplementary documents (documents lodged to support an application eg, affidavits, marriage certificates etc.).

Events

Fifteen events were identified and one group of non-event specific activities called Operational Support. Operational Support activities, for the purposes of Resource Planning Model, has not been assigned to the events but will be assigned within the Activity Based Costing system.

Resource Groups

Eleven resource groups, covering 17 positions, are separately identified in the model. This allows management to determine the appropriate mix of resources required in the Registries. The groups are:

1. Judges.
2. Judicial Registrars.
3. SES Registrars.
4. Judicial Support includes Judge and Judicial Registrar's Associate including Legal Associates.
5. SES Registrar Support.
6. Deputy Registrars (DR).
7. Counsellors.
8. Court Officers.
9. Client Services includes counter, listings, Orders and Outcomes and file management functions.
10. Primary Dispute Resolution Support includes DR Secretaries, Counselling Administration and child care officers.
11. Registry Support includes Registry Management including the Deputy Registry Manager, Secretaries and any administration officers, computer support and receptionists if not involved in core activities.

Work Availability

Full time staff are employed for 7 hours and 21 minutes per day. However, it would be unreasonable to expect staff to work on core activities constantly for this time. Industry benchmarks suggest that a personal allowance of 10 – 15% should be given for personal time. Other allowances are also given to cover such activities as training and community liaison eg, public seminars.

The allowances provided for in the model are:

- personal time of 10%;
- community liaison time of 1 – 2 % has been allowed for Judiciary, Registrars, Counsellors and their support staff. Although Judicial Support is set at 25% in recognition of those activities not uniquely identified in the model; and
- training of 3.75% equating to 15 minutes per day has also been allowed.

As an example, the work availability for Deputy Registrar is calculated as follows:

time employed is	7.35 hours per day
less personal time of 10%	- 0.73 hours per day
less community liaison time of 1%	- 0.09 hours per day
training time of 3.75%	- 0.25 hours per day
total work availability	= 6.30 hours per day

Staff Availability

Staff availability relates to the number of Full Time Equivalents hours available to process the work. Staff are entitled to annual leave (which varies according to their position entitlement), sick leave (10 days) and other leave eg, sabbatical leave. Therefore the time available for work is less than what the Family Court employs. These entitlements are outlined in the Resource Planning Model.

As discussed above, the number of Full Time Equivalents calculated by the model to undertake work within a Registry needs to be factored up to take into account each resource group entitlement. To calculate the factor required in determining the actual number of staff required to be employed it is necessary to calculate:

1. the hours available for work during the period (usually 1 year) are calculated taking into account each Resource Group's entitlement;

2. the hours worked by 1 Full Time Equivalent in the period is based on the number of business days in the period by the number of hours available for work in a day; and
3. then divide 1) by 2).

For example, using the example from above, Deputy Registrars are entitled to 4 weeks leave, 10 days sick leave and 10 days public holidays. Deputy Registrars are therefore available for 220 days per year while the number of business days in a year is 250 days. The formula to calculate the factor is:
(220 x 6.3 hours per day) * (250 x 6.3 hours per day) = 0.88

Therefore to identify the actual number of Full Time Equivalents to be employed as Deputy Registrars, the Resource Planning Model Full Time Equivalent calculation (based on workload) needs to be divided by 0.88. That is, if the Full Time Equivalents calculated by the Resource Planning Model is 8 then 9.09 Full Time Equivalents need to be employed.

Stages of Development and Implementation

The task was undertaken over a period of six months and involved three stages. The Process Mapping work identified the core activities and events for the Court. A prototype model was developed and preliminary costing analysis undertaken with certain Registries. A baseline was then developed for the 11 Registries based on activities completed during the 1998 calendar year. The performance data for 1998 for all Registries and sub Registries was captured and the effort calibrated against realistic estimates of staff numbers throughout this period.

Stage 1 - Prototype Developed

At Stage 1:

- the core 60-80 activities that staff and judiciary undertake to complete their workload were identified;
- the main roles within the Court that undertake these activities, for example, Judges, associates and counter staff were identified;
- the main drivers of workload, eg. number of divorces sought, the number of final applications sought, and the number of appeals lodged were identified;
- a prototype model based on data collected from two registries, testing the validity of the activities, roles and inputs was developed;

- the approach and results were confirmed with the senior Judge Administrator and Senior Management.

Stage 2 – Baseline Established

At Stage 2:

- the model based on findings from the previous stage to enable the population of model to 11 Registries was refined;
- data from 11 Registries was collected;
- data was analysed - rechecking and resolving inconsistencies with the Registry Coordinators;
- labour and administration costs were allocated to events based on the work effort and property and other costs to Outputs using estimates of other appropriate cost drivers;
- the results for the current operation were finalised – ensuring a fair reflection of the registries and roles within the Court.

Stage 3 – Benchmarks Established - 12th Registry

At Stage 3 there was developed the 12th Registry Model incorporating benchmark times and other performance factors by role, event and activity. It was at the third phase that benchmarking was undertaken. The 12th Registry establishes the performance targets and output volumes. The 12th Registry outcome was then applied to the 11 Registries. It thus enabled an equitable distribution of funds based on predicted increases and decreases in volumes of applications. The Resource Planning Model estimates the number and mix of registry resources required to undertake the core activities identified to deliver completed events within a year.

In particular at Stage 3:

- volume increases and decreases in applications for divorces (Form 4), final orders (Form 7), interim orders (Form 8) and consent orders (Form 12A) etc were predicted;
- a series of workshops to identify benchmarks with respect to the time to complete activities and adjournment rates were conducted. The workshops were held with Registrars, Operations, Counsellors and Judges. These performance targets and output volumes were identified as the 12th Registry:

- predicted, based on the above;
- the volume of completed events for the coming year;
- the number and mix of resources required for each Registry to complete the work required to deliver the workload at the given benchmarks; and
- the resource requirements as a basis for the financial year 1999 – 2000 budgets.

Making Use of the Resource Planning Model

The model itself is not complex, but rather built on key decisions arrived at by groups within the Court, including the Judges. As a tool assisting the decision making of the Court, it enables questions such as the following to be asked:

- what if the volume of applications filed increases?
- what if there are a greater number of settlements earlier?
- what if there is one less judge at a specific location?

There are areas where there will be future development of the Resource Planning Model that include:

- the ability to establish time benchmarks for judicial activity;
- the ability to predict resources necessary to reduce backlogs;
- the ability to track work in progress and measure the reduction in backlogs; and
- to examine work-effort by type of activity.

The outputs of the model are numerous. However, there must clear guidelines for:

- the expected effort per activity (benchmarks);
- other performance factors, eg. adjournment rates (benchmarks);
- expected volume of hearings and finalised matters per location (productivity); and
- estimated number of judicial resources required per location (plan).

The benchmarks and productivity are aimed at a location (Registry) level, and while the information can be extrapolated down to an individual level, it is the collective productivity that the Court has focussed on. The monitoring of the benchmarks and productivity outputs can be done at either a location level, or on a personal level. It is important for the monitoring process to be transparent, and

acknowledge the individualism that any benchmarking exercise must allow for. Judges are not machines.

The process in developing benchmarks has been a consultative one, and built on historical data where possible, eg, known adjournment rates, or times per directions hearing. However, there are many activities where history is not readily available, and it takes peer discussion on what appropriate allowances, or benchmarks should be set. This was particularly relevant for Judges in terms of judgement writing.

The Resource Planning Model also enables the Court to achieve the following:

- identify, based on data collected, work effort spent on core activities within each registry;
- identify the gaps between existing resources and resources utilised in undertaking activities;
- predict future activity requirements; and
- enable limited "what if" simulations based on anticipated changes in activity volumes.

The work effort benchmarks that the Court has set do translate into expectations of productivity per judicial officer(s) – and it cannot be under-estimated as to the time and effort required to develop the benchmarks.

Actual Benchmarks

Of relevance to this paper is that the Family Court now has overall benchmarks by effort for the following events:[5]

- Divorces.
- Mediation interventions.
- Pre Trial conferences.
- Trials and Appeals.
- Operational support activities.
- Interim (Interlocutory) hearings.
- Chamber Work.

[5] Over 80 activities are covered, across 11 different resource groups

Benchmarked activities

Specifically, judicial benchmarks have been set for:

Trial Work

Preparation for Trial

- Time per this activity
    - differentiating between direct (less than one day trials), standard (two to five day trials) and complex (greater than five day trials).

Conduct of the Trial

- time per this activity
    - differentiating between direct (less than one day trials), standard (two to five day trials) and complex (greater than five day trials).
    - differentiating between matters that proceed through to judgment, those that settle during the course of the trial, and those matters that settle 'at the door'
- adjournment rates

Completion of Trial

- time per activity
    - differentiating between direct (less than one day trials), standard (two to five day trials) and complex (greater than five day trials).
    - differentiating between those cases that have settled (consent orders handed up), ex-tempe judgements and where the judgment is reserved

Interim (or Duty) Work

Preparation for a Duty List

- Time per this activity

Conduct of a Duty List matter

- time per this activity

- differentiating between matters that result in a contest, and matters dealt with expeditiously.

- adjournment rates

Completion of a Duty List

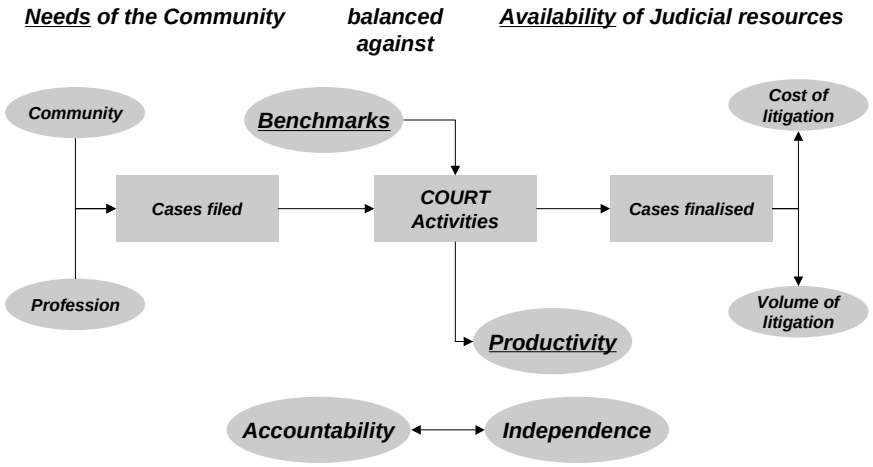
- time per activity

Case Management Work

Allowance per a percentage of cases requiring additional case management effort

- Time per this activity

The Environment



The Family Court experience was driven by budget, resource, management and accountability considerations. The environment in which Courts are operating is well known and unlikely to change in the future. To summarise, it is one of diminishing resources and increasing workload against a background of increasing acid consideration by both Governments and the broader community. Chief Justice Nicholson recently said:[6]

[6] A paper delivered at the International Society of Family Law, World Conference "Future Directions in Family Law", Brisbane, 10 July 2000.

> "Family Courts are inevitably high volume courts. This means that they have a greater need for appropriate financial support from Government. The experience of the Family Court of Australia suggests the contrary is the case and indeed a considerable amount of time is spent fending off attacks by Government."

The recent report of the Australian Law Reform Commission "Managing Justice - A Review of the Federal Civil Justice System"[7] is an example of the sort of review that Courts will probably continue to experience regardless of the professionalism of the inquiry. In the Executive summary to the Report it was said that the Commission was asked to focus particular attention on issues relating to the causes of excessive costs and delay, case management, alternative dispute resolution, pleadings and other court processes, expert evidence and unrepresented litigants. Regardless of the validity and integrity of the criticisms in such a report it can probably be assumed that Governments will support the outcomes because it is politically expedient to do so.

The development of performance measurements by means of benchmarking, operates under the auspices of the Council of Australian Governments. The present system continues an initiative of the Premier's conference of July 1993 in, what was called, the Review of Government Service Provision. This Review is supervised by a Steering Committee chaired by the chair of the Productivity Commission. Each area of government activity is supported by a working group, which, in the case of the legal system is the Court Administration Working Group. In 1999 the Productivity Commission published a survey called the *Report Government Services 2000*[8]. The outcome of the survey was that delays in finalising cases in the New South Wales Supreme Court were so extensive that it was way out of line with the average performance of superior courts. The survey revealed that there were consistent delays across both the civil and criminal jurisdictions. The results of the survey were given coverage in the national media.[9]

In an address *"Seen To Been Done: The Principle Of Open Justice-Part II"*[10] delivered in October 1999 Chief Justice Spigelman, referring to the Review of Government Service Provision, said:

> "All aspects of this process are being pursued with a single ideology and a single methodology. A system of performance benchmarking is established, pursuant to which performance indicators are developed and published. In the case of the judicial system, the

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7 Report no 89.

8 www.pc.gov.auservice/gspindex.html.

9 In the Australian Financial Review is was reported that the NSW Supreme Court had clinched the title as Australia's slowest superior court and had an iron grip on the justice system's "wooden spoon".

10 2000 Vol 74 ALJ 378 at 380.

> terminology is misleading, perhaps dangerously so. The courts do not deliver a "service". The courts administer justice in accordance with law. They no more deliver a "service" in the form of judgments, than the Parliaments deliver a "service" in the form of statutes."

In a more recent address[11] Chief Justice Spigelman said:

> "The courts are not immune from the change in public expectations with regard to accountability for public funds that has affected the entire gamut of government institutions. Nor are they immune from the restrictions on availability of resources to which all areas of government are subject. Furthermore, the courts, like all areas of the government over recent decades, have been subject to assessment in terms of the extent to which performance of their functions impose avoidable costs, relevantly on litigants and third parties.
>
> The last two decades have witnessed very substantial changes in many areas of public administration, with a view to improving the efficiency of their operation. Almost invariably such changes have involved alteration of long existing practices".

There were recent media reports about the number of hours per day Magistrates sat in the New South Wales Local Court.

[11] "Just, Quick and Cheap: A Standard for Civil Justice". 31 January 2000.

A judicial survey is presently being undertaken into judicial performance for the University of Queensland Law School by Stephen Colbran,[12] who is a Senior Lecturer at the Queensland University of Technology. This survey complements the national survey of barristers undertaken in 1999 and a series of judicial key informant interviews. The objectives of his research are to gather informed views concerning whether structured protocols for evaluating judicial performance ought to be developed. It is looking at legal ability, impartiality, independence and integrity, judicial temperament, communication skills, management skills and settlement skills. The outcomes of his study are not yet known. However, in the surveys both barristers and judges were asked to express a view as to the importance of such ideas as:

- Judicial performance should be measured.
- Individual judicial performance should be reported to the public.
- Judges should be held accountable for their performance by means additional to appellate review.
- Time limits should be imposed on judges to complete judgments.
- Maintaining judicial salary packages as offered on appointment, but offering bonuses based on performance. Performance being objectively and transparently measured against stated criteria.

The questions asked by the Senate Estimates Committee are illustrative of inquiry into matters that fall under the umbrella of productivity issues. However, the difficulty is that in the absence of benchmarks there is no way that reliable assessment, and constructive discussion, can be made of the answers.

All courts are or will be increasingly under greater public and private scrutiny of performance in terms of productivity both collectively and individually. The Justice Bruce issue in New South Wales in relation to outstanding judgments is another example. The future will be one of critique of outcomes and performance that will require all courts to assess benchmarking and productivity issues. If productivity issues become commonplace for judges then obviously benchmarking will also be important. The quantitative benchmarking will not however, identify such problems as perceived bias, poor communication or settlement skills.

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Judicial Independence - Judicial Accountability

Although it is not intended in this paper to exhaustively deal with, and attempt to answer, the questions that may be raised as a consequence of the idea of benchmarking and productivity for Judges it is important to understand that issues are raised that have to be considered.

Much has been written about judicial independence and judicial accountability but very little about judicial productivity and judicial benchmarking. The concepts should not be confused but it must also be understood that they are not mutually exclusive and addressing only one aspect of judicial role or workload must respect the other concepts.

In the 1999 Statement on review of judicial remuneration[13] the Remuneration Tribunal foreshadowed a major review of judicial remuneration in 2001, in the light of changes to the Federal justice system expected over 2000. The Tribunal advised that in that review it would consider productivity and performance because performance pay is an increasingly significant part of the remuneration of most other public officers. The then Secretary of the Attorney General's Department wrote to the President of the Remuneration Tribunal in which he said:

> "I think that some of the indicative comments and the suggested future directions raise some very serious issues and suggest that there may be a fundamental misunderstanding of the position and role of judges under the Constitution and in terms of their relationship with Government.
>
> I suggest it may be advantageous for the Tribunal to consider the constitutional position and role of federal judges before proceeding with any of the directions suggested in the Determination of 22 November 1999.
>
> In particular, in the Tribunal's statement for the 1999 review of judicial remuneration, it is said that the merits of extending performance pay arrangements to judges will be considered as part of a proposed major review of judicial remuneration in 2001. However, in view of section 72(iii) of the Constitution, which provides that judges "shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office", there would be significant constitutional impediments to the application of such arrangements to judges. This would, for example, raise the issue of whether pay which was variable at the discretion of the performance appraiser could properly be described as being 'fixed by the Parliament'. It could also result in a judge receiving less remuneration in one year than in the previous year due to varying performance appraisals. Moreover, having a judge's performance assessed by the relevant Chief Justice, another judge or a member of Government for the purpose of establishing the amount to be paid would have the most serious implications for judicial independence.

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[13] 22 November 1999.

> For these reasons I suggest the Tribunal may wish to reconsider the suggestion that it will consider the merits of extending performance pay to judges. (I also suggest that there are dangers in terms of seeking to equate the work of judges in terms of productivity gains.)
>
> The role of a judge is to dispense justice and to determine and resolve disputes between parties as an independent judicial officer. As I already indicated that role in relation to federal judges is entrenched in the Constitution. It is not clear to me what is meant by lawful instructions in relation to Federal Court judges and I do not believe that it would be competent for the Executive Government to provide instructions to judges.
>
> The reference to average hours also seems to be based on a significant lack of understanding of the judicial process and the obligations imposed upon judges.
>
> It is, of course, a matter for the respective Chief Justices to ensure the smooth operation of their Courts but I seriously doubt whether the proposals suggested in the decision would be of assistance in this regard. Indeed, I think the danger is that they would be totally counter-productive."

It is relevant to briefly consider what is judicial independence and judicial accountability. The reasons for judicial independence in a democratic system of government are well known. It is an imprecise term and Sir Ninian Stephen said:

> "…must always include…a state of affairs in which judges are free to do justice in their communities, protected from the power and influence of the State and also made as immune as humanly possible from all other influences that may affect their impartiality".[14]

In a paper titled *"Judicial Independence and Judicial Accountability; A hard job for Themis, or can the two principles be balanced?"*[15] D.J. Calabro wrote that judicial independence as a topic for discussion can be divided into two categories namely "structural independence" and "objective independence". He described structural independence as the objective test and referred to it as the mechanical aspect of judicial independence. He identified the following as falling under the structural independence; security of tenure; sufficiency of remuneration and freedom from interference with judicial function. As to the subjective test he said that many forms of constraints are felt by judges that interfere with independent adjudication and that from a judges point of view the only true independence which they have would turn on the amount of discretion which a judge has in a particular area. The issue that must always be considered is whether there are aspects of benchmarking and productivity that may impinge upon aspects of structural independence.

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[14] "Judicial Independence". AIJA Annual Oration, 1989, p.5.

[15] Melbourne: Dominic Calabro. 1996. Australia Notes: Thesis submitted to Professor Peter Sallmann for assessment for Judicial Administration course, Faculty of Law, Melbourne University

There has been a great deal of discussion about judicial accountability in the context of the establishment and role of Judicial Commissions[16] and a Code for Judicial Conduct. As to judicial accountability Calabro identified formal accountability, informal accountability and the Chief Justice. He identified the appeal process as the only form of formal accountability and subjective anxiety to maintain good reputation as informal accountability. As to the role of a Chief Justice he said that convention regards the Chief Justice as carrying the responsibility of raising with a particular judge departure from expected standards and requesting that they be remedied. As to other forms of accountability he identified academic criticism, professional associations and media criticism. John Basten QC in a paper titled *"Should Judges have Performance Standards"*[17] identified other ways that judges are accountable namely: hearings are conducted in open court, judges must publish reasons for decisions, judges are subject to applications on the ground of bias and judges are required to retire at a specified age.

Chief Justice Spigelman said[18] that the central significance of public confidence in the administration of justice is mentioned in virtually every case, which refers to the principle of open justice, and that the principle of open justice is the basic mechanism of ensuring judicial accountability. He said that the cumulative effect of the requirements to sit in open court, to publish reasons, to accord procedural fairness, to avoid perceived bias and to ensure the fairness of a trial is the way that the judiciary is held accountable to the public.

The Justice Murphy, Justice Vasta and Judge Foord cases raised the issue of 'misbehaviour" and are often discussed in the context of judicial accountability. However, the allegation was that Justice Bruce failed to perform. Basten pointed out that the difficult area of "incompetence" deserves closer scrutiny and that whilst is may be said that incompetent judicial performance can be remedied by appeal or prerogative writ this answer is unsatisfactory because of the cost of such actions and that many modern tribunals are immune from correction on the basis of factual error. The outcome of benchmarking and productivity may be to highlight areas of judicial incompetence.

Justice Thomas wrote:[19]

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16 J. Basten, "Judicial Accountability: A Proposal for a Judicial Commission" [1980] AQ 468-485.

17 A paper delivered to the 1995 NSW Legal Convention.

18 "Seen To Be Done: The Principle of Open Justice-Part II" (supra) at 378.

19 Judicial Ethics in Australia, Law Book Company, 2nd Edition at 43-44.

> "It is a judge's professional duty to do all that is reasonably possible to equip himself or herself to discharge judicial duties with a high degree of competence. But not everyone can come top of the class. Competence is not an ethical issue, but it touches ethics in two ways. First, there is a duty to attempt to perform competently, and this probably includes a continuing duty to improve competence in areas where weakness is detected. This may raise some moral obligation to participate in suitable forums of judicial education. Secondly, once a judge realises that he or she is incurably incompetent, there is a duty to resign. The problem is that incompetent judges are nearly always the last to identify their failure.
>
> Inefficiency is not misconduct…"

He went on to explain why, for example, a fast judge is not always the best judge and said:

> "But there are limits. Litigants do not want their fortunes to ride on the backs of judicial tortoises. It must be acknowledged that some judges reserve their decisions for a ridiculously long time…judges who have reserved judgments for an unreasonably long time have a duty to stop hearing other cases or at least reduce their intake until they can handle the cases for which they have already taken responsibility."

The point is that there is discussion about judicial inefficiency and incompetence in the context of ethical duties. It follows that once such ideas are discussed in the context of ethical duties then judicial accountability comes into focus. Justice Thomas is suggesting a duty of self-performance and if this is correct then quantitative outcomes may be important.

Chief Justice Spigelman said[20] that there is an inevitable tension between the contemporary pressures on courts to maximise throughput and the principle that justice must be seen to be done. He said:[21]

> "I do not mean to suggest that improvements in judicial efficiency have not been required, nor that further improvements cannot occur. My proposition is that many advocates of such measures have an inadequate understanding of the way that such steps may adversely affect other values and of the incompatibility of some such measures with fundamental principles, including the principle of open justice.
>
> …
>
> I do not wish in any way to be understood to doubt the importance of courts accepting accountability for the use to which they put public funds of which they are the custodian. Nevertheless, there is a tendency to equate courts with bureaucracies in both the approach taken and the terminology employed with respect to these matters. This is a fundamentally pernicious development which ought to be resisted.

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[20] (supra) at 379-381.

[21] (supra) at 379-380.

He went on to elaborate emphasising that courts do not deliver a "service" and that one characteristic of open justice is its inefficiency when compared with private or what he called secret justice. Further, that some things take time and in particular the appearance of justice. He said:

> "I repeat, that the courts do not provide a public funded dispute resolution service to litigants as consumers. The courts perform a core function of government: the administration of justice according to law.
>
> …
>
> It is the qualitative dimension of open justice which requires one to treat with reserve the role of "performance indicators", which appear to treat courts as accountable for their performance only in quantitative terms."

Experience has shown that with the establishment of time standards (benchmarks), without a rigorous analysis and understanding of the ability to meet or exceed standards, Courts have been exposed by not fulfilling their commitments. This exposure, as seen by the profession, the community and the Government, has caused concern to several Courts, and highlights the need to be attentive and cautious in the development of any benchmarks – regardless of whether they have external or internal visibility.

A way of representing the relationships between these concepts is that benchmarking, amongst other factors, typically considers two key elements – time and effort. The focus of the work undertaken by the Family Court has been on work effort[22], and by developing benchmarks, it has allowed for the quantification of judicial productivity. Although, the Family Court does have certain benchmarks for the time within which certain activities should be completed it will continue to develop judicial benchmarks with emphasise on time. Judicial productivity sits underneath the overall accountabilities placed upon a Judge and it is suggested that benchmarking and productivity are an aspect of Judicial Accountability.

[22] Time standards (or benchmarks) have been set for the finalisation of matters, and are documented in the Case Management Guidelines

In establishing benchmarks for any or all aspects of judicial workload, the relationship between benchmarking, productivity, accountability and independence needs to be defined. What is not known is what the longer-term impact of benchmarking and productivity may have on the accountability, and independence for the Judiciary. The warnings of Chief Justice Spigelman must be recognised and considered. However, we do not suggest that courts are accountable for performance only in quantitative terms and that obviously qualitative performance is significant. Further, we do not suggest that judicial independence precludes performance evaluation either through quantitative or qualitative factors. For example, it might be that adherence to prescribed benchmarks should be included in a code of judicial conduct.

In this paper it is suggested that judicial accountability should not only address qualitative aspects of judicial behaviour but also quantitative aspects which in turn raises consideration of productivity and benchmarking. Courts must consider internal benchmarking so that there can be accountability to the public of the collective productivity of the judiciary. The benchmarking however, must be driven from within the judiciary. If this does not happen then there may be uninformed and idiosyncratic external benchmarking, which would threaten and undermine judicial independence.

Conclusion

All courts, regardless of size, are under increasing pressure to complete more cases with equal or less resources, and judges are not spared in this era of economic rationalism. On top of this, the visibility of judicial remuneration and expected behaviours are now in view of the general public and Government. The Remuneration Tribunal for example foreshadowed the possibility of productivity being a relevant factor and the questions then raised are whether the point will be reached where there is a concept of "bonus" payments for individual judges or a "freezing" of salary to reflect poor performance.[23] The idea of such interference undoubtedly raises issues of judicial independence. However, as a collective body, judicial output may be a critical component in future remuneration determinations.

Benchmarks cannot be set in isolation and without due regard to the changing environment and an example for the Family Court is the impact of the Federal Magistrates Service. Benchmarks cannot be simply reduced and may be increased to reflect the outcomes sought. For example, more settlements

[23] Thomas J referring to the rules of certain American States that stop pay of a judge if a judgment is reserved for more than three months said that some strong disincentive may be needed to avoid long delays in giving judgment.

earlier. So also with Productivity there may be a finite limit, but to understand it, and what drives it allows the Court and Judge Administrators to best plan for the future.

The Family Court initiative has not been taken lightly, nor has it been an easy exercise and the lessons learnt are numerous. However, if a court is going to better understand the outcomes, and outputs, the harsh reality of volume and time need to be quantified to a reasonable level. It is no longer sufficient to say "…last year 100 cases were heard and this year we expect the same".

The ideas of benchmarking and productivity are not just about funding and remuneration. The operation of courts depend on their intimate knowledge of implicit benchmarks and individual productivity. Without such knowledge listing registrars or managers would be unable to schedule lists in advance and manage lists on a daily basis balancing the needs and demands of the judges and the needs and demands of the community

If a Court has openly embraced benchmarks and productivity it can then analyse a number of scenarios as to what might happen. This ability will quickly demonstrate the trade off and pressures that judges have in completing their daily delivery of trials, appeals, mentions and judgments.

When the time comes to seek and justify additional resources the court has established basic management principles, and disciplines, without comprising the independence and accountability of the Judiciary. Although it can never guarantee a receptive ear from Government or the Remuneration Tribunal it may assist in the negotiation.

The teaming of Judges and Registry Staff is becoming increasingly important and the idea that Judges and staff are establishing benchmarks and productivity outcomes helps establish the unified front that has often been lacking. Further, open discussion about Benchmarks and Productivity has established a language and openness that put judicial performance in a collective sense, open for discussion and from an internal perspective this may be important.

It is useful to consider what Basten wrote in 1995:

> "In Australia in 1995, I do not believe that calls for improved judicial accountability are either unexpected or even controversial. The system for delivering justice in our community is under strain and must adapt. Whilst we are rightly proud of our tradition of judicial integrity, that tradition will only survive if we adopt appropriate principles in its defence. These principles apply both at a structural level and at an individual level. Over-worked judges can make mistakes and delay in bringing down judgments. It is nevertheless clear that some judges perform better than others. Similarly, judges will bring a range of views, experience and

> abilities to their work. We must continue to develop systems to limit incompetence without outlawing variety and to improve performance without inappropriately altering the balance between the judiciary and the executive. However, if the judges are required to perform, they must know in advance what standards are required of them. Those standards should encompass both personal and judicial behaviour. As a society we must decide whether a judge who regularly reserves judgments for more than, say, nine months is performing properly. We must also decide whether a judge convicted of tax evasion or for domestic assault is to continue in office. Such cases have arisen in the past and will undoubtedly arise again. If at all possible, standards should be established without the public clamour for resolution of a particular scandal. The Judicial Commission should be restructured as recommended by Mr Morabito and should set about the task of preparing a code of judicial conduct".

In reflecting on the establishment of judicial benchmarks, and productivity outcomes, it is fair to say that it has not been a universally accepted process. Analysing the detail of judicial workload, and attempting to put effort and output benchmarks on judicial activities is seen by many as attacking the heart of judicial independence and accountability. The Family Court has begun a process that will require patience and perseverance as the benchmarks are refined, and monitored. It will also require careful monitoring to ensure that no inroads are made into the fundamental concepts identified by Chief Justice Spigelman. However, the pressures and visibility that are now on the Judiciary has ensured that Courts cannot avoid the scrutiny that the Government and community will continue to place on the outputs.

There are issues raised such as how will a Chief Justice and Administrative Judges encourage better performance if a Judge fails to meet benchmarks? Should there be some sort of internal compliance process? To what extent will individual judges' results be released, and in what form? Further the role of the Chief Justice and Administrative Judges with respect to other Judges and Judicial Independence needs clarification.

However, 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. Information of this type publicly available, when taken out of context, and referrable to individuals can be extremely damaging, not just to the individual judge, but to the Court as a whole. Different considerations may apply when dilatoriness or delay is so serious as to amount to judicial misconduct,[24] but this should not be a discussion for the media or individual politicians, but for the Court itself. Justice Susan Denham said:[25]

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[24] Thomas J. said at p.45 "… ethical concerns arise when the delay suggest laziness or cynical disregard of litigants."

[25] "The Diamond In A Democracy: An Independent. Accountable Judiciary" delivered at the Annual Conference of the Australian Institute of Judicial Administration", July 2000.

> "Accountability takes different forms for people holding office in different organs of State. Thus, systems of accountability appropriate for those holding positions in the executive and legislature are not appropriate to the judiciary."

It is not suggested that a system of quantitative accountability of judicial activity be unsophisticated; it must be principled and accurate. Although not dealing with quantitative accountability Justice Susan Denham also said:[26]

> "An additional modern system of accountability will strengthen the confidence of the people in the judiciary. In these elements, strength, clarity, transparency, we see an independent, accountable, modern judiciary, the diamond in a democracy."

[26] (supra).