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**BOUNDARY CONDITIONS – THE FUNDING OF
COURTS WITHIN A CONSTITUTIONAL
FRAMEWORK**

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Introduction

The funding of courts is important and difficult. It is important because it is necessary to the rule of law which lies at the heart of our representative democracy. It is difficult because it must respect the independence of the judicial branch and because it requires judgments about needs and efficiency where criteria to guide such judgments are difficult to define with precision.

The topic can be framed metaphorically with the concept of the boundary condition. In the mathematics of differential equations, a boundary condition is a stated restriction that limits the range of their solutions. There is a range of solutions to the question – How are the courts to be funded? – but the range is limited by boundary conditions defined by the constitutional character of the courts, the nature of their functions and their relationship to the Legislative and Executive branches of Government. It is within the range which they permit that economic or quantitative criteria may be deployed to determine resourcing and outputs measured for the purpose of assessing how the resources have been used.

In the age of international economic interdependence, dramatically demonstrated by the global financial crisis, the state of a nation's judicial system is relevant to its competitiveness. In a book published last year entitled *Courts, Justice and Efficiency*, Professor Hector Fix-Fierro wrote¹:

... policymakers around the world seem to agree more and more that, in view of the ruthless struggle for markets and investment opportunities that economic globalisation imposes, judicial reform, and consequently court efficiency, are increasingly important.

The existence of an efficient, high quality judicial system may be seen as enhancing confidence on the part of international investors. Nevertheless, the economic benefits which that confidence delivers are not readily quantified. The same is true about the benefit domestically for a given resource input. Counter-factuals may be involved which are difficult to define.

Questions about the efficiency of courts and whether it is possible to measure their outputs against resource inputs in a useful way have been discussed in Australia. They have also been much discussed in common law and civil law jurisdictions around the world. Economic criteria, including quantitative measures, have an important part to play in determining levels of funding appropriate to enable courts to carry out their functions. But it is difficult to envisage an exhaustive economic justification for any given level of funding. The provision of public moneys to the courts is necessarily founded upon value judgments about their functions in the maintenance of constitutional arrangements, the rule of law and the provision of access to justice for individuals, organisations and governments.

If these larger considerations are not taken seriously a reductionist approach characterised by a kind of simplistic economic rationalism may cause inappropriate

¹ Fix-Fierro, *Courts, Justice & Efficiency – A Socio-legal Study of Economic Rationality in Adjudication*, (2008) at 19.

funding decisions to be made or inappropriate conditions to be attached to funding. Any model which treats the courts as competitors in a market for the provision of dispute resolution services requires particularly close scrutiny. That having been said, the community, through its elected representatives, has every right to require that measures are in place to ensure that public resources allocated to the courts are used efficiently and that their use is capable of intelligible explanation and justification.

This paper seeks to identify some key factors relevant to public policy about the allocation of resources to the courts. These factors are:

1. The separation of powers and the independence of the judiciary.
2. The constitutional position of the courts
3. Efficiency, productivity and performance.
4. The appropriate locus of responsibility and accountability for funding.

The doctrine of separation of powers

Public policy about the funding of courts in Australia should be informed by a general awareness of the history and nature of the separation of powers and the associated concept of judicial independence which is an important part of our national constitutional structure and otherwise part of our constitutional heritage.

The idea that there are distinct legislative, executive and judicial powers can be traced back to Greek philosophers, including Plato and Aristotle. Aristotle identified deliberative, magisterial and judicative elements in State power. He did not propose different institutional repositories for those elements. But a necessary preliminary to a doctrine of separation of powers was the identification of the powers to be separated.

In the 15th century, the Chancellor to King Henry VI, John Fortescue wrote of

"the advantages consequent from that political mixed government which obtains in England"². The King could not lay taxes, subsidies or impositions of any kind upon the subject. He could not change the laws or make new ones without the express consent of the whole kingdom and parliament assembled. His subjects could only be sued at law before a judge where they would be treated with mercy and justice according to the laws of the land. They could not be impleaded in point of property or arraigned for any capital crime however heinous except before the King's judges and according to the laws of the land³.

Writings of the 16th and 17th centuries put more emphasis on the separation of the functions of the King-in-Council and the King-in-Parliament. But the notion of separation of judicial and executive power was still developing. King James I believed in the divine right of Kings to govern. On 10 November 1612, Sir Edward Coke, Chief Justice of the Court of Common Pleas and the other judges of that Court were summoned to the King. The Court had issued prohibition to prevent a purported expansion of jurisdiction by a "court of high commission" created by the King. The judges were told by the Archbishop of Canterbury that they were the King's delegates and the King could decide any cause for himself. Coke told the King that all cases concerning the life or property of his subjects were to be decided "... by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognisance of it". He was later removed from office.

Following the *Bill of Rights of 1689*, legislative and executive powers were separated. Under the *Act of Settlement 1701* judges were given security of tenure during good behaviour and the King's power to remove a judge could be exercised

² Fortescue, *De Laudibus Legum Angliae* (trans: F Gregor) (c 1470) (Reprinted by Legal Classics Library, 1984) at 144

³ Op cit at 139-146.

only on an address of both Houses of Parliament. The protection for the judges affected by the *Act of Settlement* is reflected in s 72 of the Constitution of the Commonwealth of Australia and like provisions in State Constitutions. It underpins judicial independence from the Executive.

The organic and pragmatic evolution of the unwritten English Constitution yielded a less than perfect separation particularly between the judiciary and the other arms of government. Judges of England's highest appellate court, the appeal judges of the House of Lords, were also members of that Legislative Chamber. The highest judicial officer in England, the Lord Chancellor, was also a member of Cabinet and Speaker in the House of Lords. These arrangements have been changed as a result of the *Constitutional Reform Act 2005* (UK). The Supreme Court of the United Kingdom will be established and take over from October 2009 the judicial functions of the House of Lords. So the practice will move closer to principle.

A clear cut doctrine of separation of powers was enunciated by Montesquieu in his *The Spirit of Laws*, in which he wrote:

... there is no liberty, if the power of judging be not separated from the legislative and executive powers.

His was an enunciation of principle far stronger than the pragmatic approach of the English and has been said to reflect a French misinterpretation of the position. A similar misinterpretation is said to have informed the drafting of the Constitution of the United States.

As appears below a sharp separation of the judicial from the legislative and executive powers is established under the Constitution of the Commonwealth. There is no corresponding justiciable constitutional principle governing the position of State courts under the Constitutions of the States. There are, however, conventions which underpin a degree of political respect for the concept of separation of powers and independence of the judiciary.

The constitutional position of the Australian Courts

There are three key provisions of the Commonwealth Constitution that define the constitutional positions of the High Court and federal courts and their demarcation from the Legislature and the Executive. The first is s 1 which vests "the legislative power of the Commonwealth" in "a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives". The second is s 61 which vests the executive power of the Commonwealth in the Queen and states that it is exercisable by the Governor-General as her representative. The third is s 71 which vests the judicial power of the Commonwealth "in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". These three sections of the Constitution separate out the powers of the Commonwealth into legislative, executive and judicial elements and distribute them between the key institutions of the Commonwealth, the parliament, the executive and the courts.

In the *Boilermakers'* case, Dixon CJ and McTiernan, Fullagar and Kitto JJ said⁴:

If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps I, II and III and the form and contents of ss 1, 61 and 71.

Professor Geoffrey Sawer in his text *Australian Federalism in the Courts*, traced the origin of the separation of powers under the Commonwealth Constitution. There was no precedent for it in the pre-Federation colonies although their constitutions contemplated independent judiciaries appointed by the Executive

⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275.

Government. Sawyer surmised that Sir Samuel Griffith and Andrew Inglis Clark, who were aware of the separation of powers principle in the Constitution of the United States, may have viewed it as "in some sense connected with federal ideas"⁵. He wrote⁶:

It is likely that they intended their drafts to create a more rigid separation of powers than applied under the colonial constitutions, and the early commentators assumed this to be so.

In the *Wheat* case in 1915, Isaacs J referred to "the fundamental principle of the separation of powers as marked out in the Australian Constitution"⁷. The principle was central to the *Boilermakers'* case, which precluded the admixture of executive and judicial power in the same body⁸.

The position of the High Court under the Constitution was described by Deakin in his Second Reading Speech for the Bill that became the *Judiciary Act* 1903 (Cth). He called the Court "... the competent tribunal which is able to protect the constitution ... the keystone of the federal arch". He foreshadowed, by his remarks, the High Court's function as interpreter of the Constitution. But that is not its only function. It was to become the final court of appeal for the whole of Australia in matters arising under the statute law of the Commonwealth and the States and under the common law. And although it sits at the apex of Commonwealth judicial power, it is not the only repository of that power. For, as contemplated by s 71 of the Constitution and authorised by s 77, that power is able to be exercised by federal courts and other courts invested with federal jurisdiction.

⁵ Sawyer, *Australian Federalism in the Courts*, (1967) at 153.

⁶ Op cit at 153.

⁷ *New South Wales v Commonwealth* (1915) 20 CLR 54 at 88.

⁸ (1956) 94 CLR 254.

For present purposes the separation of power means that the federal courts cannot validly undertake executive functions not incidental to their judicial functions. Section 72 of the Constitution, which protects the tenure and remuneration of federal judges, protects them from subjugation to the Executive in the discharge of their judicial responsibilities. This supports their independence. The two principles, separation of powers and judicial independence, make the High Court and federal courts a distinctive and distinct branch of government, one of the three pillars upon which our polity rests.

The courts of the States derive their existence from the State Constitutions or from laws made under those Constitutions. There is no constitutional separation of the judicial power of the States from their legislative and executive powers⁹. That said, the want of a constitutional rule applicable to State courts is not the end of debate about that topic in those jurisdictions. As Professor Gerard Carney has observed¹⁰:

Despite the absence of a binding document separation of powers at the State level, that doctrine is nonetheless recognised as a powerful *political* doctrine of good government. It is the one constitutional principle often used by media and opposition parties to attack government violations.

Because ss 71 and 77 of the Commonwealth Constitution contemplate the use of the State courts as repositories of federal jurisdiction, their institutional integrity is protected from laws that would compromise the constitutional scheme. The rationale for that protection has been enunciated by the High Court by reference to its characterisation of State courts as "part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power"¹¹. It is not open to a State Parliament to confer powers on State

⁹ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 79.

¹⁰ Carney, *The Constitutional Systems of the Australian States and Territories*, (2006) at 349.

¹¹ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 114 and 115.

courts which are "repugnant to or incompatible with their exercise of the judicial power of the Commonwealth"¹². In their joint judgment in *Forge v Australian Securities and Investments Commission* Gummow, Hayne and Crennan JJ said¹³:

...the relevant principle is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

The consequence of these considerations for the funding of federal and state courts might be thought obvious. Whether by constitutional rule, implication or convention, courts have a fundamental and distinctive role to play as essential infrastructure of our representative democracy. They are not merely providers in a market for dispute resolution services. Let me elaborate that general proposition by reference to their functions.

The functions of the Courts

The core function of all courts is to hear and decide cases which come before them. The decision-making process involves the following basic steps:

1. The judge determines the legal rules or standards applicable to the facts which are in contention.
2. The judge (or a jury directed by the judge) considers the evidence and finds what the facts are.

¹² (1996) 189 CLR 51 at 103 and 104 per Gaudron J; see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J, Hayne J agreeing at 648 [198].

¹³ (2006) 228 CLR 45 at 76.

3. The judge applies the legal rule or standard to the facts as found to determine the rights and liabilities of the parties and to award legal remedies or not as the case may be.

This simple model represents the core of the judicial function undertaken by most judges on a day-to-day basis. It is not the whole story. Historically the elements of controversy between subjects and the determination of existing rights and liabilities were "entirely lacking from many proceedings falling within the jurisdiction of various courts of justice in English law"¹⁴. Examples include directions as to the administration of trusts, orders relating to the maintenance and guardianship of infants and declarations of legitimacy. The issue of warrants of execution is an incidental administrative function. It has always been accepted that non-judicial functions may be conferred as an incident of judicial power¹⁵. It follows that the range of judicial functions is not entirely confined within a neat dispute resolution paradigm. It is also defined by reference to the historical functions of the courts¹⁶. Nevertheless the simple syllogistic model is a useful working guide to the judicial process in the great bulk of cases.

Within that model the courts decide different classes of case. These may broadly be described as follows:

1. Disputes about the limits of legislative or executive power under the Constitution. Such disputes typically arise between the Commonwealth and the States or between the Commonwealth or a State and a private individual or firm.

¹⁴ *R v Davison* (1954) 90 CLR 353 at 368 per Dixon CJ and McTiernan J.

¹⁵ (1956) 94 CLR 254 at 278; see also *R v Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 per Deane J.

¹⁶ *Dalton v New South Wales Crime Commission* (2006) 226 ALR 570 at 575-577 per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.

2. Disputes about the limits of official power conferred by a statute or the validity of its purported exercise. Such disputes typically arise between an official of a Commonwealth or State government (including ministers) with a private individual or firm.
3. Disputes about compliance with regulatory regimes. Such disputes will usually arise between a statutory regulator and a private individual or firm.
4. Prosecutions for offences against the criminal law.
5. Private disputes between individuals and/or firms arising under the common law of contract or tort or in equity or involving statutory rights and liabilities.

These classes are not exhaustive. Nor are they mutually exclusive. A dispute between a regulator and a firm may involve questions of administrative law about the extent and purported exercise of the regulator's power and sometimes constitutional issues about the legislation conferring those powers. Disputes between private individuals or firms can raise issues of statutory interpretation and the constitutional validity of statutes under which contested rights or liabilities arise. The boundary between public and private law is permeable. Private commercial relationships and rights and liabilities inter se are frequently affected by statutory or regulatory regimes giving effect to public policy objectives. An example of this kind of intersection is to be found in s 52 of the *Trade Practices Act 1974* (Cth) which prohibits corporations in trade or commerce from engaging in misleading or deceptive conduct. Similar provisions are to be found in the *Fair Trading Acts* of the various States. It has long been accepted that the availability of private actions for contraventions of s 52 is a way of supporting enforcement of the Act in the public interest.

Particular cases or classes of case may raise legal issues of general public importance. But even in the most routine of cases, the court always discharges a significant public function. For not only is it required to decide the dispute before it, but it is required to decide it in a principled manner. Compliance with that requirement carries with it a reaffirmation of the rule of law generally and of the particular legal rules and standards which govern the relationship between the parties and all parties in like situations. The importance of this aspect of the courts' functions was emphasised 25 years ago in a well known article by Professor Owen

Fiss in the Yale Law Journal entitled "Against Settlement"¹⁷. In sounding a caution about the rising tide of enthusiasm for private alternative dispute resolution, he said¹⁸:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.

A sentiment similar to that of Professor Fiss was expressed by Professor Judith Resnik in another well known article published in the Harvard Law Review in 1982¹⁹. Professor Resnik was concerned with another enthusiasm, namely case management and what she called the rise of judicial managerialism in the conduct of litigation. She saw the involvement of judges in case management as undermining the judicial function. She said²⁰:

Seduced by controlled calendars, disposition statistics, and other trappings of the efficiency era and the high-tech age, managerial judges are changing the nature of their work. The old judiciary was doing something different from the modern managerial ideal, something quite out of step with the world of time and motion studies. Among all of our official decision-makers, judges – and judges alone – are required to provide reasoned explanations for their decisions. Judges alone are supposed to rule without concern for the interests of particular constituencies. Judges alone are required to act with deliberation – a steady, slow, unhurried task.

¹⁷ Fiss, "Against Settlement", (1984) 93 *Yale Law Journal* 1073.

¹⁸ Op cit at 1085.

¹⁹ Resnik, "Managerial Judges", (1982) 96 *Harvard Law Review* 376.

²⁰ Op cit at 445.

In an age in which case management and court-annexed alternative dispute resolution are well established incidents of the judicial system, generally regarded as beneficial, the comments of Fiss and Resnik may seem dated. Their principled scepticism about alternative dispute resolution and case management may be at odds with the prevailing convention or wisdom. But the points they make about the essential character of the judicial function remain valid. That essential character is rooted in our history and tradition and is supportive of our liberties. We bureaucratise the judiciary at our peril. This is particularly so if we fail, in resource allocation, to recognise the tension that can arise between efficiency and just dispositions.

Efficiency, productivity, performance indicators and quality in the Courts

There has long been public discontent with delays and inefficiencies in the judicial process. There are many examples in world literature from civil and common law systems. Rabelais' character, Judge Bridlegoose, decided his cases by throw of dice and reserved for a long time before doing so. His impeachment proceedings related to a perverse judgment against a tax assessor. Defending the delay between commencement and disposition, he quoted a maxim:

"Time is the father of truth."

The example of Bridlegoose throws up nicely the tension between efficiency and quality. If it were not for his delay, his technique of deciding cases by throw of dice might be said to be highly efficient in terms of productivity and cost per case. However, the accuracy of the outcomes would be random.

Kafka's famous novel "The Trial" has many layers of meaning. One of those layers involved a critique of the Austro-Hungarian Court of his time. At the end of an incomprehensible legal process Joseph K, about to be executed, asks himself:

"Where was the judge whom he had never seen? Where was the High Court to which he had never penetrated?"

It is perhaps of some significance that these two examples come out of the civil law system. Reformers have sometimes looked to Europe for ways of improving the common law judicial process. The civil law system has lessons for us, but it is not the solution to problems of delay and cost with which that system itself grapples. Concerns about costs and delay in litigation cross national boundaries and the boundaries of different legal systems.

Efficiency has been defined as the "best use of resources" and has been related to "elasticity of supply of court services, procedural time and clearance rates"²¹. Elasticity of supply of court services has been defined as the percentage change in the number of cases finalised produced by a one per cent change in the level of the court's funding. Clearance rates are the proportion of cases filed in a year that are disposed of in that year.

Fix-Fierro writes of the ideas of efficiency and effectiveness applied to courts²²:

When translated into the judicial arena, this means that courts should settle disputes in a 'just, speedy and inexpensive manner', as a well known formula has it. However, trouble begins as soon as we attempt to define terms such as 'dispute settlement', 'just', 'speedy' and 'inexpensive' with more precision. And matters are further complicated by the realisation that the simultaneous fulfilment of these values requires trade-offs and compromises: 'speediness' may come at the expense of 'justice' ... unlimited access to the courts may result in considerable backlogs and delay; 'justice' may demand the possibility of a slow, costly appeal process; while a court proceeding, even if it is regarded as just, speedy and inexpensive, may not be able to 'settle' the underlying dispute at all. Evidently, complex social choices are at stake here.

²¹ Op cit at 8 citing Buscaglia/Dakolias, *Judicial Reform in Latin American Courts: The Experience in Argentina and Ecuador* (Washington DC The World Bank), World Bank Technical Paper at 350.

²² Op cit at 8.

The economics of the court system cannot be the only determinant of its funding levels. Fix-Fierro accepts that economic rationality has penetrated the legal and judicial systems at all levels. However, as he says, economic rationality is not the prevalent value or the overriding concern in the context of legal decision-making:

On the contrary, economic rationality is subject to all kinds of constraints deriving from the legal tradition, the political environment, even the social climate.

As in Australia, there are models in place and under development around the world for the assessment of the performance of courts. The Council of Europe has established a European Commission for the Efficiency of Justice. The aim of the Commission is the improvement of the efficiency and functioning of justice in the Member States. It was established on 18 September 2002. It comprises experts from all 47 Member States of the Council of Europe.

A special advisor to the Commission, Dr Pim Albers, has provided a helpful overview of approaches to the development of performance indicators and evaluation for judges and courts in the European context²³. He proposes a simple "system-model" for courts differentiating between input, throughput and output. On this approach the input comprises resources and cases. The resources are the personnel, the material, the office equipment and the financial resources. Lack of any of these resources can lead to an increase in the length of proceedings and a backlog. The other input, the influx of cases, may be affected by factors such as economic growth or decline. An increase in the number of cases can lead to an increase in the length of proceedings and more court files on the "bookshelf".

²³ Albers, Special Advisor of the CEPJ Council of Europe, "Performance indicators and evaluation for judges and courts"
http://www.coe.int/T/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf at 15 May 2009.

The throughput of a court is defined as the process in which incoming cases are treated by judges and court staff resulting in a decision which is the output. Length of proceedings and backlogs are indicators for the measurement of the throughput of courts.

The systems model takes account of the effect of external inputs on performance indicators. Social changes and legislative change can obviously affect the number of cases coming to the court. So too can State finances. As these are factors which are beyond the control of individual judges upon whom they may impact, Dr Albers proposes an integrated approach to assessing the performance of judges and courts. The universality of the issues involved in every court performance appraisal is illustrated by the familiarity of the performance indicators he proposes:

1. the caseload per judge;
2. (labour) productivity;
3. the duration of proceedings;
4. cost per case;
5. clearance rate;
6. the budget of the courts.

These indicators have their own strengths and limitations.

The obvious difficulty with caseload per judge is that the application of raw figures makes no distinction between workload differences across different categories of cases and, more importantly, cases within the one category. An uncontested winding up petition in the Supreme Court of Western Australia would fall comfortably into the category of corporate insolvency. So too, might the *Bell* case, the longest civil case ever heard in that court which yielded a judgment well in

excess of 2,000 pages²⁴. The problem is true of each of the categories of case I mentioned earlier. The task of refinement by more precise categorisation is complicated by unavoidable category overlaps. This is not to say that caseload measures are irrelevant nor that they cannot be refined by some sort of complexity weighting. However as indicators of workload they require close scrutiny and fall to be considered along with other variables.

Labour productivity is calculated by dividing the total output of cases into the number of personnel engaged in them or the number of hours worked on them. Judge hours and support staff hours weighted by salaries might be an appropriate numerator although it is not one suggested by Dr Albers. It is of interest to note that productivity studies conducted in the Netherlands in 2002 suggested that the largest courts were the least productive and that medium-sized courts appeared to be the most productive.

A performance indicator of general application is that of the length of proceedings. In Italy, the Italian research centre IRSIG-CNR defined as an indicator of judicial performance the duration of trials, the probability of a disposition in a given time and the average expected delay between the actual and announced date of a hearing. Although it is said that the duration of trials in Italy depends upon lack of resources, Italian researchers are said to have found that the average length of proceedings varies significantly between judges.

The scale of the problem in that country was illustrated by a report in *Il Messaggero* Newspaper in March 2008. A man suffering from an inoperable spinal disease claimed 450,000 Euros in already agreed damages from his insurers to help ease his final months of life. He was told that he had six months to live. He turned to the Sicilian courts to put pressure on the slow-moving insurers but was told to return to court in 14 months to hear their decision.

²⁴ *The Bell Group Ltd (In Liq) v Westpac Banking Corporation* [No 10] [2009] WASC 107.

Another indicator used as a measure of efficiency is cost per case. This is a measure with which Australia is familiar. It is said that the lower the cost per case the more efficient a court or division of a court is. Cost per case is calculated by taking the overall cost for a particular class of case and dividing it by the number of cases of that class disposed of in the year. The same problems arise in relation to the measure of cost per case as arises in relation to case load per judge. The first is the variety of complexity in cases even within one category. The second is the overlap of categories.

A further well established performance indicator, also familiar in Australia, is clearance rate, being the number of outgoing cases as a percentage of incoming cases over a given period.

The use of performance indicators for courts as a mechanism for accountability for the application of public funds need not of itself involve any infringement of the separation of powers or of judicial independence. Spigelman CJ in a speech on judicial accountability and performance indicators in 2001 acknowledged that proposition and the propriety of such measures with the important qualification which I have already mentioned. He said²⁵:

The value of efficiency – of getting "value for money" – has received a greater, and often dominant, salience in competition with other values of government activity such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality. This change has affected all aspects of government including, inevitably, the courts. The judiciary cannot and should not, attempt to insulate itself from such changes. Courts have responded and must continue to do so.

²⁵ Spigelman CJ, "Judicial Accountability and Performance Indicators", 1761 Conference: The 300th Anniversary of the Act of Settlement, Canada, 10 May 2001.

The primary judicial response to the change of attitudes to which I have referred has been the general acceptance of a greater role for the judiciary in case management. Judges are now concerned to ensure the efficiency and effectiveness of court procedures and intervene in proceedings to a degree which was unheard of a few decades ago, outside specialist commercial lists.

His Honour drew a distinction between judicial accountability for the adjudicative function and accountability for the administrative functions of courts. The first is reflected in the requirement to give reasons for decision and the subjection of judges to appellate review. The second brings in concepts of case management in which, as we know, judges are increasingly involved. There is an overlap between the two and there is a possibility, which is not without risk, that one function of accountability may intrude upon the other.

The rather fuzzy boundaries between the administrative functions of courts and the adjudicative function is suggested by a reading of the Steering Committee for the Review of Government Service Provisions published on 30 January 2009 and, in particular, Ch 7 headed "Court Administration". That chapter was said to be focussed on "administrative support functions for the courts, not on the judicial decisions made in the courts". But the Framework of judicial performance indicators discussed in the Review clearly had the potential to impact upon the judicial function. The framework set out a statement of objectives for court administration as follows:

Objectives for court administration are:

- . to be open and accessible
- . to process matters in an expeditious and timely manner
- . to provide due process and equal protection before the law
- . to be independent yet publicly accountable for performance

In addition, all governments aim to provide court administration services in an efficient manner.

The Review also explored, without coming to a concluded view, key performance indicators including:

- backlog as an indicator of case processing timeliness;
- judicial officers as an "indicator" of the availability of resources;
- attendances as a proxy for input costs;
- clearance rates matching the number of lodgments with the number of finalisations in a given period;
- costs per finalisation.

These indicators are under development. There is no point in courts and judicial officers bristling at attempts to measure directly or indirectly what they do. What is important is that the limitations of measurement are acknowledged and the boundary conditions which affect their application accepted particularly in relation to levels of funding.

This leads on to the topic of the quality of judicial decision-making which is not measured by these indicators. To use the metaphor of choice in contemporary discourse, that is the elephant in the room. And it is here that debate is most often joined. As Dr Albers points out, quality systems have been introduced in courts based upon models used in private corporations. In Europe, one such system is the balance score card model which measures the quality of an organisation by considering its finances, its working processes, the knowledge and personnel of the organisation and its clients. A similar model has been developed by the European Foundation on Quality Management. Some of these ideas have been applied in developing models for the judiciary. The Trial Court Performance Standards Project, developed by the National Centre for State Courts and first published in 1990, identified five performance areas relevant to quality:

1. access to justice;
2. expedition and timeliness;
3. equality, fairness and integrity;
4. independence and accountability;

5. public trust and confidence.

There are some 68 measures for 22 standards forming part of that model. The model is complex and time consuming. Less complicated court tools have been developed by the National Centre for State Courts involving 10 practical measures and known as CourTools. These are²⁶:

1. Access and fairness.
2. Clearance rates.
3. Time to disposition.
4. Age of active pending caseload.
5. Trial date certainty.
6. Reliability and integrity of case files.
7. Collection of monetary penalties.
8. Effective use of jurors.
9. Court employee satisfaction.
10. Costs per case.

The Singapore subordinate courts introduced reforms between 1990 and 2000 including an "eJustice Score Card System" based on modified versions of the four areas of measurement used in the Balanced Score Card. These areas were: community, internal processes, learning, growth and finance. Key indicators were developed for each area.

In 2007 a Consortium for Court Excellence was established upon the initiative of the Singapore judiciary. It comprises the US National Centre for State Courts, the US Federal Judicial Centre, the Australasian Institute of Judicial Administration and the Singapore Subordinate Courts. The Consortium is working

²⁶ Albers, "Quality of Courts and Judiciary: European experiences and global developments", (2008) <http://sites.estvideo.net/laurens1/web-content/pdf/quality.pdf> at 15 May 2009.

on the development of a global "framework for court excellence" being a universally applicable quality system and an assessment tool for courts. Seven areas of measurement are identified in the proposed framework. They are derived by reference to experience with general quality models and quality systems otherwise developed for courts. The measurement areas, as described by Dr Albers, are:

1. Court management and leadership.
2. Court policies.
3. Human material and financial resources.
4. Court proceedings.
5. Client needs and satisfaction.
6. Affordable and accessible court services.
7. Public trust and confidence.

Plainly, the measures I have mentioned and those which are foreshadowed and under development, will play an important part in court management, accountability and funding for the foreseeable future.

Funding for the judiciary

Funding for the judiciary involves three elements:

1. The process for the formulation and approval of court budgets.
2. Policies applicable to the actual level of funding.
3. The control of the management of allocated funds.

The process for funding and approval of court budgets is similar in countries based on the Westminster system of responsible government. In that process the Executive plays the dominant role in seeking the necessary appropriation. Generally, the Attorney-General or Minister for Justice will prepare a budget proposal which may involve varying levels of consultation with input from the judiciary. That proposal will then be put forward and defended before Cabinet, perhaps an Expenditure Review Committee and, ultimately, before the Parliament.

There has, from time to time, been debate about the desirability of courts being funded on the basis of an appropriation negotiated directly with the Parliament and bypassing the Executive as in the United States. This is not necessarily entailed in the notion of a separate Appropriation Act which I have raised elsewhere.

Support for a direct relationship with the parliament has been expressed by previous Chief Justices of this Court and of the Supreme Court of Canada. In 1977 Chief Justice Barwick expressed a hope that steps to enact a statute placing the administration of the federal judicial system in a judicial committee or conference, funded directly by the parliament through the annual budget would be "pressed to early finality"²⁷. Similar sentiments were expressed by former Chief Justice Dickson of the Supreme Court of Canada²⁸:

Preparation of judicial budgets and distribution of allocated resources should be under the control of the chief justices of the various courts, not the ministers of justice.

In the same year, Sir Harry Gibbs, Chief Justice Barwick's successor, argued strongly against direct parliamentary appropriations and said²⁹:

Under the High Court of Australia Act 1979 the High Court now administers its own affairs ... what must be recognized is that the independence of the Court is not much strengthened by the new system. The Court must still depend on Parliament for its annual budget, and that means that in practice the Executive can still

²⁷ Sir Garfield Barwick, "The State of the Australian Judicature", (1977) 51 *Australian Law Journal* 480 at 492-493.

²⁸ Dickson, "The Rule of Law: Judicial independence and the separation of powers" (Address given at the Annual Meeting of the Canadian Bar Association, Halifax, Nova Scotia, 21 August 1985); cited Friedland, "A Place Apart: Judicial Independence and Accountability in Canada", (1985) at 179.

²⁹ Sir Harry Gibbs, "The High Court Today", (1983-1985) 10 *Sydney Law Review* 1 at 3-4.

effectively influence the decision of important matters of administration affecting the Court, such as staff ceilings. I do not mention this by way of complaint. Under the Westminster system of government, the Executive, through its control of Parliament, normally has the last say in matters involving the expenditure of public money, including that spent in providing the system of justice. To invoke American analogies in support of a different view, is to misunderstand the constitutional arrangements in the United States, where, although the courts must obtain their funds from Congress, the Congress is not necessarily dominated by the Executive.

Chief Justice Mason was open to the notion of direct negotiation but did not express the same degree of support for it as Chief Justice Barwick. In his State of the Judicature address in 1994 he said³⁰:

Court finances are fixed by parliamentary appropriations which give effect to budget decisions made by government. The budgets fixed by government set limits to the resources and facilities available to the court system. When critics demand better and greater court facilities, they should address their demands to government. In some other countries, the United States is one, courts negotiate their budgets with the legislature and its committee, not with the government. It is an alternative that may require consideration sometime in the future.

My predecessor, Chief Justice Gleeson, did not comment in detail on the subject of funding of the judiciary but acknowledged in his State of the Judicature address in 2000 that Executive governments fund the court system and play a major role in its administration and that Ministers bear political responsibility for aspects of the performance of courts³¹.

³⁰ Sir Anthony Mason, "The State of the Judicature", (1994) 68 *Australian Law Journal* 125 at 128.

³¹ Gleeson, "State of the Judicature", (2000) 74 *Australian Law Journal* 147 at 149.

There has been strong academic support in favour of ministerial responsibility for the funding of the judiciary. Professors Church and Sallmann writing in 1991, said³²:

Without such clear lines of accountability, the argument goes, no elected official would be responsible for the proper fiscal and managerial operation of the court system, and the public would have no readily accessible means of identifying, uncovering and remedying problems in the court system.

Professor Peter Hogg, writing in the Canadian context in 1993, said³³:

... such a system [of direct parliamentary appropriations] would be an abdication by government of its responsibility for an important part of the administration of justice.

And further³⁴:

To exempt the funding of the courts from the Treasury Board or other internal governmental controls would place the administration of the courts in a privileged position enjoyed by no other part of government... In my view, since only elected Ministers can be politically accountable for problems caused by the underfunding of the courts, it is elected Ministers who ought to determine funding levels.

Direct appropriation by the Parliament without ministerial intervention would be likely to require direct interaction between the judiciary and the Parliament with the relevant head of jurisdiction appearing before a parliamentary committee. Direct interface between the courts and parliamentary committees would necessarily

³² Church and Sallmann, *Governing Australia's Courts*, (1991) at 10.

³³ Hogg, "The Role of a Chief Justice in Canada", (1993-1994) 19 *Queen's Law Journal* 248 at 258.

³⁴ Op cit at 258.

have to deal both with allocation and accountability for use. This has two disadvantages. The first is that it creates a risk that judicial officers might be drawn into political controversies associated with the funding of the courts. More importantly, as the objectors to this process point out, there would be no elected official directly accountable for the level of funding of the courts and the management of resources allocated.

At present courts administering their own budgets, the High Court, the Federal Court and the Family Court are represented before the Estimates Meetings of the Senate Legal and Constitutional Affairs Committee by their Chief Executive Officers. Those officers and other officers of the courts appear, along with representatives of other organisations for which the Attorney-General has ministerial responsibility. In so saying, I acknowledge that in South Australia the Chief Justice who chairs the Courts Administration Authority of that State appears before the relevant parliamentary committee in relation to budgetary matters.

The case for continuing ministerial responsibility in respect of the funding of courts is consistent with the case which I have previously advanced for a separate Appropriation Act for the High Court. It can be an appropriation sought by the Attorney-General, as responsible minister, from the Parliament. However, it would not lie within the general envelope of departmental funding. The virtue of a separate appropriation for judicial funding lies in its disconnection from funding for Executive agencies. In such a case, at least at a formal level, the finances of the court would not be affected by internal trade-offs between elements of the Executive arm of government. A separate appropriation can be effected consistently with Executive determination of the appropriate level of funding and ministerial accountability to the Parliament. The level of funding in such a case would also take account, as it properly should, of other important governmental priorities.

There is one important consideration relevant to this aspect of the funding of courts. The Minister responsible for seeking the necessary approval from the Parliament and accountable to Parliament for the use of funds by the courts should be a Minister advised by a department with an internal corporate knowledge, memory and culture that understands the boundary conditions to which I referred at

the beginning of this paper. Ordinarily that Minister will be the Attorney-General, the first law officer of the Crown. He or she should have access to advice which is sensitive to the interface between proper accountability for public funds management on the one hand and the constitutional functions of the courts and principles affecting their functions on the other. This does not imply a Minister or a department which is a "soft touch" when the courts come asking for money.

Other aspects of funding for the judiciary involve policies applicable to the actual level of funding and the control of management of allocated funds. So far as the control of the management of funds allocated to the courts is concerned there is an ongoing debate about the advantage of a court having the ability to administer itself and allocate resources from within its budget. For example, by virtue of the *High Court of Australia Act 1979* (Cth) the High Court is empowered to manage its own affairs and has some autonomy as to how moneys appropriated to the Court shall be allocated. The Federal and Family Courts are in a similar position. With the notable exception of South Australia where management of funds is vested in a Courts Administration Authority composed of the heads of jurisdiction in that State, Australian State courts are primarily administered by the Executive. The position is similar with many Canadian provincial courts. This has affected the focus of debate on the funding of the judiciary. Calls for reform have tended to focus upon the achievement of greater independence from the Executive with respect to the administration of the courts. Other aspects of the funding of the judiciary have received comparatively little attention. Recent Australian and Canadian reports have concentrated more on administrative independence than on changes to the way in which the judiciary's budget is formulated and approved. It is interesting that the first key overall conclusion of a 2006 Canadian report on the topic was that "Canada has fallen behind peer jurisdictions such as Australia in innovations in court administration" and cited the High Court as the lead model of such innovations³⁵.

³⁵ Canadian Judicial Council, "Alternative Models of Court Administration" (2006) at 15.

The final aspect concerns policies affecting the courts' funding. The need for a distinctive policy framework governing the funding of courts, which respects the constitutional and functional boundary conditions to which I have referred, is at the heart of this paper. In this respect, I refer to what Chief Justice Brennan said in his State of the Judicature address in 1998³⁶:

In times of financial stringency there is a risk that governments might regard the courts simply as another executive agency, to be trimmed in accordance with the Executive's discretion in the same way as the Executive is free to trim expenditure on the functions of its own agencies. It cannot be too firmly stated that the courts are not an Executive agency. The law... goes unadministered if the courts are unable to deal with ordinary litigation ... The courts cannot trim their judicial functions. They are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or declined to hear the cases that they are bound to entertain, the rule of law would be immediately imperilled. This would not be merely a problem of increasing the backlog; it would be a problem of failing to provide the dispute resolving mechanism that is the precondition of the rule of law. ... Constitutional convention, if not constitutional doctrine requires the provision of adequate funds and services for the performance of curial functions.

Conclusion

By way of summary this paper has tried to advance the following points:

1. Courts have a special function under the Constitution.
2. Acceptance of that function by successive governments and public officials responsible for funding cannot be taken for granted.
3. Economic and quantitative performance criteria may be of assistance in funding allocation, management, and accountability. They are a work in progress. They are difficult to apply to quality assessment.

³⁶ Brennan, "The State of the Judicature", (1998) 72 *Australian Law Journal* 33 at 35.

They must be consistent in their application with the constitutional character and functions of the courts.

4. Ministerial responsibility for the funding of courts is necessary in a responsible government.
5. The minister responsible for funding should have access to a departmental corporate memory and culture that knows what courts are for.
6. Policies governing the funding of courts should have regard to their particular constitutional position and the distinctive character of their functions.

V. defining the boundaries for proportionality review. A. Different Rights, Different Roles, Different Texts. B. Remedial Constraints. 30
They are playing a valuable judicial role—checking to assure appropriate attention to rights within a framework of constitutional justice.
Part I provides background for considering proportionality in the United States. 46 Under the Takings Clause, conditions for zoning
permits must have “rough proportionality” to the effects of the proposed use of the property. As these examples suggest, U.S.
courts have found the concept of proportionality increasingly attractive in resolving interpretive challenges, prompting scholars to identify
the roots of proportionality doctrines in U.S. constitutional law.