CRITIQUE AND COMMENT

JUST VERSUS QUICK: CONSTRUCTIVIST AND ECOLOGICAL RATIONALITY IN A COMMON LAW SYSTEM

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Justice Gageler explores how lessons from behavioural economics are reflected in the institutional structure in which the judicial function is performed. The structure has what the economist Vernon Smith would call an 'ecological rationality', an internal logic that minimises errors in human judgement. Features of the structure which combine to have this effect include the appointment of judges from senior ranks of the legal profession, the security of judicial tenure and remuneration, the decisional independence of the judge, the personal discipline of the judge, the requirement to give reasons, and the appellate process. These structural features also carry risks to the quality of adjudication, calling for what Smith would call 'constructivist' intervention. Delay in the production of judgments is one of those risks. The challenge in designing a constructivist solution to the problem of delay in the production of judgments is that of striking an appropriate balance between speed and correctness without compromising decisional independence.

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* Justice of the High Court of Australia. Earlier versions of this article were delivered as the 2019 Hotung Public Lecture, at Victoria University of Wellington on 18 July 2019 and at the University of Canterbury at Christchurch on 23 July 2019, and as the 2020 Sir Anthony Mason Oration, to the Blue Mountains Regional Law Society at Medlow Bath on 12 September 2020. My thanks to Duncan Wallace, James Monaghan, Frances Leitch and Selena Bateman for their contributions to, and comments on, various versions. Misstatements and misconceptions are entirely my own.

I An Australian Conversation about Judicial Productivity

From time to time, we engage in Australia in spontaneous national conversations on matters pertaining to the judicial function. The conversations tend to be sparked by some public utterance of a senior practising lawyer or former member of the judiciary, to gain immediate but fleeting attention in the mainstream media, and then to fester at length amongst members of the judiciary. The conversations are not conducted by the participants speaking to each other, or even in the presence of each other, but by them separately delivering learned speeches to learned audiences. We have for some time been engaged in a conversation about judicial productivity.[1] This is my contribution.

Over a decade ago, the High Court of Australia made a decision that marked a hardening of judicial attitude against delay in the conduct of litigation.[2] On the third day of the four-week trial of a civil proceeding that had been pending in the Supreme Court of the Australian Capital Territory for nearly two years, the plaintiff had applied for an adjournment and for leave to amend its statement of claim to add a substantial new claim against the defendant.[3] The primary judge had granted the adjournment and the amendment.[4] The Court of Appeal of the Australian Capital Territory had upheld that decision.[5] The High Court unanimously reversed.[6] The plurality in the High Court said that the primary judge and the Court of Appeal had given insufficient attention to the overriding procedural objective identified in the modernised rules of the Supreme

[1] For a fuller account of the conversation, see Sarah Murray, Ian Murray and Tamara Tulich, 'Court Delay and Judicial Wellbeing: Lessons from Self-Determination Theory to Enhance Court Timeliness in Australia' (2020) 29(3) *Journal of Judicial Administration* 101, 103–6.

[2] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 ('*Aon Risk Services*').

[3] Ibid 195–6 [39] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[4] Ibid 180 [1] (French CJ), 196 [40] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[5] Ibid 196 [40] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[6] Ibid 218 [117] (Gummow, Hayne, Crennan, Kiefel and Bell JJ, French CJ agreeing at 195 [37], Heydon J agreeing at 229 [157]).

Court of the Australian Capital Territory of facilitating the just resolution of the real issues in civil proceedings with minimum delay and expense.[7]

In a concurring judgment, another member of the High Court drew a parallel between the plaintiff's delay of two years in attempting to amend its statement of claim and the Court of Appeal's delay of some six months in delivering judgment after hearing the appeal to it from the decision of the primary judge.[8] He concluded:

> The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another.[9]

The current conversation about judicial productivity is a belated attempt to grapple with the questions posed in those remarks. The conversation began three years ago when the author of the remarks delivered a post-judicial speech, the substance of which was reproduced in a national newspaper.[10] The speech was based on a statistical analysis, undertaken by the author himself, which compared for sample periods the average time between the conclusion of a hearing and the delivery of judgment taken by judges at first instance in the Commercial Court and in the Chancery Division of the High Court of Justice of England and Wales, in the Equity Division of the Supreme Court of New South Wales and in the Federal Court of Australia. The comparison, according to the author, suggested 'that the two Australian courts are slower than the English courts and that the Federal Court is the slowest of all'.[11] 'The Australian performance, particularly the Federal Court performance', the author went on to opine, 'is a matter for shame'.[12] Something needed to be done about the delay, the author said, and '[i]f all other solutions fail, the only remedy may

[7] Ibid 215–17 [105]–[110] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), discussing *Court Procedures Rules 2006* (ACT) r 21.

[8] *Aon Risk Services* (n 2) 229 [155]–[156] (Heydon J).

[9] Ibid 229 [156].

[10] See Dyson Heydon, 'Court in the Crosshairs', *The Weekend Australian* (Sydney, 29 September 2018) 17.

[11] Ibid.

[12] Ibid.

be the persistence, intensity, even savagery, of judicial, professional and public criticism'.[13]

The particular subject of judicial productivity in the Federal Court of Australia was soon afterwards taken up in another national newspaper.[14] There it was reduced to a table, the online version of which was interactive.[15] The table ranked each of 69 then-current and recent Federal Court Justices not only by reference to the average number of days each of them took to deliver a written judgment, but also by reference to the average number of words and the average number of paragraphs each of them produced per day.[16]

Not unsurprisingly, the Chief Justice of the Federal Court[17] and the Chief Justice of New South Wales[18] weighed in on the conversation. Both accepted unreservedly the undesirability of delay in the delivery of judgments. Both nevertheless pointed out the crudeness of adopting a purely quantitative measure of judicial productivity,[19] echoing the memorable and oft-repeated observation of a former Chief Justice of New South Wales that 'not everything that counts can be counted'.[20] Both pointed to the inevitability of a degree of trade-off between the quantity and quality of judicial output.[21] Both also pointed to the need to take a system-wide perspective.[22] A judge working quickly to produce a large number of low-quality judgments only to have many of them set aside on appeal, they pointed out, cannot thereby be said to be contributing more to the administration of justice than a judge working more slowly and more carefully to produce a lesser number of high-quality judgments, few of which are set aside on appeal.[23]

[13] Ibid.

[14] Michael Pelly, 'Heydon Was Right: 12 Months Is Too Long for a Judgment', *The Australian Financial Review* (Sydney, 26 October 2018) 33.

[15] Aaron Patrick, 'In the Federal Court, Speed of Justice Depends on the Judge', *The Australian Financial Review* (online, 26 October 2018) <https://www.afr.com/business/legal/in-the-federal-court-speed-of-justice-depends-on-the-judge-20181014-h16mk9>, archived at <https://perma.cc/4LVD-LFKG>.

[16] Ibid.

[17] Chief Justice James Allsop, 'Courts as (Living) Institutions and Workplaces' (2019) 93(5) *Australian Law Journal* 375.

[18] Chief Justice TF Bathurst, 'Who Judges the Judges, and How Should They Be Judged?' (2019) 14(2) *Judicial Review* 19.

[19] Allsop (n 17) 376–9; Bathurst (n 18) 21.

[20] Chief Justice JJ Spigelman, 'Measuring Court Performance' (2006) 16(2) *Journal of Judicial Administration* 69, 70.

[21] Allsop (n 17) 381; Bathurst (n 18) 31–7.

[22] Allsop (n 17) 379–81; Bathurst (n 18) 34–5.

[23] Allsop (n 17) 377; Bathurst (n 18) 32.

My own contribution to the conversation picks up on those themes and develops them at a level of abstraction unrelated to criticism of the productivity of any individual court and unrelated even to consideration of the productivity of courts within any individual national or sub-national system. What I want to do is to explore the subject of judicial productivity at a conceptual level by focusing on the essential nature of the judicial function and on the institutional setting in which that function falls to be performed.

II Insights from Behavioural Economics

To do that, I want to draw on the field of behavioural economics to combine insights associated primarily with two people who shared the Nobel Prize for Economics in 2002.

The first of them was Daniel Kahneman. Kahneman, with Amos Tversky, pioneered research on judgement under conditions of uncertainty in the 1970s. The central insights of that research have since been popularised with the publication by Kahneman in 2011 of his *New York Times* bestselling book *Thinking, Fast and Slow*.[24] The personal story of the collaboration between Kahneman and Tversky has since been popularised with the publication by Michael Lewis in 2016 of his *New York Times* bestselling book *The Undoing Project: A Friendship That Changed Our Minds*.[25] The pioneering work of Kahneman and Tversky has also since been taken up to found a whole new approach to the regulation of human behaviour by Richard Thaler and Cass Sunstein. Thaler and Sunstein in 2008 published their own *New York Times* bestselling book *Nudge: Improving Decisions about Health, Wealth, and Happiness*.[26] Thaler, in 2017, got a Nobel Prize of his own. Sunstein and Kahneman, in collaboration with Olivier Sibony, have only recently published a book, the one-word title of which is *Noise*.[27]

The central insight that I take from the combined work of Kahneman, Tversky, Sunstein, Thaler and Sibony for present purposes is that all humans are prone to errors of judgement. They are prone to systematic or predictable errors, which Kahneman and Tversky famously called 'biases'. Those predictable errors arise because of an innate human tendency to adopt mental shortcuts

[24] Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

[25] Michael Lewis, *The Undoing Project: A Friendship That Changed Our Minds* (WW Norton, 2016).

[26] Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008).

[27] Daniel Kahneman, Olivier Sibony and Cass R Sunstein, *Noise: A Flaw in Human Judgment* (William Collins, 2021).

or rules of thumb, which Kahneman and Tversky famously called 'heuristics'. Through recognising and isolating heuristics and their attendant biases, Sunstein and Thaler have shown the potential to design a decision-making environment which, for better or for worse, can be used either to exploit the decision-maker's reliance on heuristics and so capitalise on the attendant biases, or to minimise the decision-maker's reliance on heuristics and with that to reduce the impact of the attendant biases. But humans are also prone to make random errors, leading to an unwanted variability in judgements. That unwanted variability in judgements, Kahneman, Sunstein and Sibony have now called 'noise'. Unwanted variability in judgements can have a variety of sources. Some variability can be attributable to differences in the capacities, sources of knowledge and styles of reasoning of individual decision-makers. Other variability can be attributable to an individual decision-maker's capacity for making decisions being suboptimal on occasion. Even Homer nods. Although thinking about random errors is less developed than thinking about predictable errors, Kahneman, Sunstein and Sibony have provided reason to think that recognition and isolation of sources of noise can inform the design of a decision-making environment that conduces to its reduction.

The other person to receive the Nobel Prize for Economics in 2002 was Vernon Smith. Vernon Smith is hardly a household name. He has neither written a *New York Times* bestseller nor had one written about him. Smith is known in economic circles for pioneering in the 1950s the conduct of economic experiments. On receiving the Nobel Prize, he delivered in Stockholm in 2002 a lecture which he revised and published in the *American Economic Review* the following year under the heading 'Constructivist and Ecological Rationality in Economics'[28] and which he developed into a book with a similar title published in 2008.[29]

The central insight that I take from Vernon Smith's work is a generalisation of an insight of both Adam Smith and David Hume, whom Vernon Smith (an American) refers to as the 'Scottish philosophers'.[30] It is that one person can contribute to the welfare of other persons without needing to take deliberate action to further the perceived interests of those other persons. Human institutions, of which markets are just one example, can arise organically and can operate and evolve over time in the common interest and for the greater good, according to an inherent logic which is not the product of conscious design.

[28] Vernon L Smith, 'Constructivist and Ecological Rationality in Economics' (2003) 93(3) *American Economic Review* 465 ('Constructivist and Ecological Rationality').

[29] Vernon L Smith, *Rationality in Economics: Constructivist and Ecological Forms* (Cambridge University Press, 2008).

[30] See Smith, 'Constructivist and Ecological Rationality' (n 28) 470.

Drawing on a distinction which Vernon Smith attributes to Friedrich Hayek, there is, in the language of Smith, a 'constructivist rationality' which uses reason deliberately to create rules of action and to create institutions that yield outcomes that are seen by their designers to be preferable.[31] Indeed, Smith acknowledges constructivism as 'one of the crowning achievements of the human intellect'.[32] But there is also an 'ecological rationality' which can be found to inhere in established norms of conduct and in institutional structures forming part of our cultural and biological heritage that have been created from human interactions and not by conscious human design.

Combining those two insights, I want to explore how the institutional structure within which adjudication has evolved to occur in a common law system can be seen to have an ecological rationality which serves to minimise noise and bias and so contribute to the overall quality of adjudication. Then I want to explore how the same institutional structure can be seen to carry inherent risks to the quality of adjudication, mitigation of which might call for constructivist intervention. Finally, I want to mention and compare some forms of constructivist intervention that have occurred in common law systems outside Australia.

III Two Definitions and One Explanation

First, I need to define what I mean by 'adjudication' and a 'common law system'. I also need to explain what I mean in referring to a common law system having 'evolved'.

By 'adjudication', I mean the core judicial function of conclusively resolving a dispute between citizen and citizen, or citizen and the state, through a process which involves finding disputed facts and applying the law to the facts as found. Assumed in that standard definition of the function, and unquestioned until advances in artificial intelligence in this century have made the alternative imaginable, has been that the function is performed by humans. Making a noun of the verb, those performing the function have been known as 'judges'.

The core judicial function is reflected in the standard form of judicial oath sworn by an Australian judge. The form of the judicial oath derives from an English statute enacted during the reign of King Edward III in 1346.[33] In taking

[31] Ibid 465–6.

[32] Ibid 468.

[33] See *Oath of the Justices 1346*, 20 Edw 3, c 6.

the judicial oath, a judge swears or affirms: 'I will do right to all manner of people according to law without fear or favour, affection or ill-will'.[34] To be faithful to the oath requires a judge to perform a specified function with a specified state of mind. The requisite state of mind is an absence of a category of conscious prejudice which might cause the judge to favour one disputant over another. Taking for granted that a judge will adjudicate sincerely, I am not here concerned with that state of mind but with the identification of the function to which it is required to attach — to do right according to law.

The critical point is that the core judicial function is not simply to resolve a matter in dispute. Flipping a coin would do that, as would splitting the difference. Nor is it to resolve the matter in dispute in a manner that is acceptable to the parties. Adjudication is not mediation or conciliation. The core judicial function is to reach the resolution of the matter in dispute that is correct or preferable according to law. Performance of that function requires that the outcome of adjudication be free of error of fact or law to the extent that error can be humanly avoided.

By 'a common law system', I mean the system of justice which began in England with the appointment of the first royal justices towards the end the 12th century, that took its early modern form as a result of the constitutional settlement which followed the English Civil War in the 17th century, and that was exported as an incident of British settlement to the colonies, including to Australia when it came to be colonised in the wake of the American revolution towards the end of the 18th century. Since the end of the 19th century in civil matters, and since the beginning of the 20th century in criminal matters, a common law system has typically provided for two levels of appeal for the correction of error. There is an appeal, generally as of right, from decisions of judges at first instance to an intermediate appellate court. There is then capacity for another appeal, generally only by leave or special leave, from decisions of an intermediate appellate court to an ultimate court of appeal.

The description I have just given of a common law system is perhaps enough to make clear that my reference to a common law system having 'evolved' is not intended to deny that aspects of the system have been attributable to conscious reforms. My simple point is that the current operation of a common law system is the product of incremental adjustments to traditional practices that have occurred over the better part of a millennium without the system having been mapped out in advance.

[34] See, eg, *High Court of Australia Act 1979* (Cth) s 11, sch ('*High Court Act*'). See also *Federal Court of Australia Act 1976* (Cth) s 11, sch ('*Federal Court Act*'); *Oaths Act 1900* (NSW) ss 5, 8–9, sch 4. Cf *Constitution Act 1975* (Vic) s 88AA, sch 3 ('*Victorian Constitution Act*').

IV The Ecological Rationality of a Common Law System

A common law system, in the language of Vernon Smith, has an ecological, as distinct from a constructivist, rationality. Embedded within it are anachronisms and redundancies, and inefficiencies that are relics of the past. But holding it together is an internal logic that contributes to the quality of the performance of its central function of attempting to get to legal outcomes that are as right as they can be. Amongst the features which I think operate to mitigate against an adjudicatory outcome that is affected by random error (or noise) and predictable error (or bias) are those I am about to mention. There are six in total. They are not meant to be exhaustive. The common law approach to precedent, for example, might be justified in part as an ecologically efficient means of reducing noise in the identification and application of legal principle.[35] Some common law rules of evidence might also be explained as measures which serve to moderate bias and in so doing to align a judge's perception of what is likely to have occurred more closely with a statistically objective assessment of what probably occurred.[36] Those are perhaps topics for another day.

The first of the six systemic features serving to mitigate error that are of relevance for present purposes is the practice of appointing judges from the senior ranks of a competent and independent legal profession. Although the only formal qualification for appointment as a judge is ordinarily no more than that the appointee be a legal practitioner of either five or seven years' standing,[37] and although the appointment of an Australian judge formally lies within the discretion of the executive branch of government, there is in the common law tradition a long history of executive restraint in making judicial appointments that can be traced to the promise extracted from King John by the barons at Runnymede in 1215 as recorded in *Magna Carta* to 'appoint as justices … only men that know the law of the realm and are minded to keep it well'.[38]

Typically, appointment as a judge comes at a stage in a legal career when ambition to succeed has given way to hope of contributing to the maintenance of the system within which success has already been recognised. 'Most judges',

[35] Cf Oliver Wendell Holmes, 'Codes, and the Arrangement of the Law' in Sheldon M Novick (ed), *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (University of Chicago Press, 1995) vol 1, 212–13; Frank H Easterbrook, 'Ways of Criticizing the Court' (1982) 95(4) *Harvard Law Review* 802, 817.

[36] See generally Michael J Saks and Barbara A Spellman, *The Psychological Foundations of Evidence Law* (New York University Press, 2016).

[37] See, eg, *High Court Act* (n 34) s 7(b); *Federal Court Act* (n 34) s 6(2)(a)(ii); *Supreme Court Act 1970* (NSW) ss 26(1), (2)(b); *Victorian Constitution Act* (n 34) s 75B(1)(b).

[38] *Magna Carta 1215*, s 45. For this translation, see 'English Translation of Magna Carta', *British Library* (Web Page, 28 July 2014) <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation>, archived at <https://perma.cc/RGF4-G2HZ>.

as Richard Posner has observed, 'derive considerable intrinsic satisfaction from their work and want to be able to regard themselves and be regarded by others as good judges'.[39] Most judges, in my own observation, want to perform and be seen to perform the functions of their judicial office in a manner faithful to their judicial oath. That is their primary motivation. The observation that the 'intrinsic' satisfaction that judges get from judging well and being seen by others to judge well is their main motivation in performing their adjudicatory functions has a measure of theoretical and empirical support.[40]

Prior professional experience has ideally equipped the intrinsically motivated judge with the skill set needed to come close to meeting his or her sworn goal of doing right according to law from the time of appointment. Experience, as Oscar Wilde wrote, is what we call the mistakes we have made in the past.[41]

Women and men who, in the language of *Magna Carta*, come to the task of doing right according to law knowing the law and with a mind to keep the law well are less likely to make random errors in the performance of that task than those who don't and aren't. That comes down to a function of expertise:

> Due to study, training, and practice — often in addition to talent and motivation — experts are better than nonexperts in some domain of performance. Expert chess and golf and bridge players routinely beat nonexperts; expert surgeons perform difficult surgeries more successfully than nonexperts; expert violinists create truer sounds and make fewer mistakes than nonexperts.[42]

Adjudication according to law is a highly specialised form of reasoning. Once that is recognised, it is unsurprising to find that expert lawyers overall are much better at it than non-experts. Sir Edward Coke had to explain as much in 1607 to the newly installed and slightly offended King James I of England, who had in mind that he had the faculty of reason and could do just as good a job as his royal judges. 'God had endowed His Majesty with excellent science, and great endowments of nature', said Coke,

> but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of

[39] Judge Richard A Posner, *How Judges Think* (Harvard University Press, 2008) 62 (citations omitted).

[40] See Brian M Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Informa Law, 2021) 99–103, 109–10; Murray, Murray and Tulich (n 1) 113–14.

[41] Oscar Wilde, *The Picture of Dorian Gray*, ed Joseph Bristow (Oxford University Press, rev ed, 2006) 52.

[42] Barbara A Spellman, 'Judges, Expertise, and Analogy' in David Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision-Making* (Oxford University Press, 2010) 149, 152.

> law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it …[43]

The second of the systemic features that serve to mitigate error is the security of judicial tenure and remuneration traceable to that first bestowed on judges in England at the beginning of the 18th century.[44] Security of tenure is typically guaranteed by appointment to a fixed retiring age subject to the potential for prior removal from office only at the instigation of the legislative branch of government and only for incapacity or proven misbehaviour. Security of remuneration is typically guaranteed by a salary (and pension) which is fixed by legislation and which is incapable of being reduced during incumbency in office. Security of tenure and remuneration moderate the risk of external influence by removing potential sources of fear and of favour on the part of a judge. Security of tenure and remuneration, importantly, also free the judge to concentrate single-mindedly on the function of adjudication.

Together with the security of judicial tenure and remuneration, the third of the systemic features of a common law system that serves to mitigate error is a structural dimension of judicial independence. Some call it 'substantive independence': the guarantee that 'in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience'.[45] The label I prefer is 'decisional independence':

> [T]he ability of the judge in a particular case to ascertain, interpret, and apply the governing legal principles to the facts of the case before her as she deems appropriate, free from external or extraneous influences and pressures that might reasonably be thought to affect a decision.[46]

Freedom from external influence and pressure in the adjudication of an individual case obviously includes freedom from influences external to the court of which a judge is a member; it also includes freedom from influences and pressures within the court that might interfere with the process by which the individual judge reasons to what he or she considers in good conscience to be the correct or preferable judgment in the individual case.

[43] *Prohibitions del Roy* (1607) 12 Co Rep 63; 77 ER 1342, 1343.

[44] See *Act of Settlement 1700*, 12 & 13 Wm 3, c 2, s 3.

[45] International Project of Judicial Independence, International Association of Judicial Independence and World Peace, *Mount Scopus International Standards of Judicial Independence* (2018) art 2.2.2. See also Shimon Shetreet, 'Judicial Independence and Accountability: Core Values in Liberal Democracies' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 3, 15–16.

[46] Martin H Redish, 'Federal Judicial Independence: Constitutional and Political Perspectives' (1995) 46(2) *Mercer Law Review* 697, 707.

The fourth feature serving to mitigate error is the personal discipline that a judge minded to keep the law well brings to the task of adjudication. Sir Matthew Hale, who would go on to hold the office of Lord Chief Justice of England, resolved on a set of rules to guide his own judicial conduct around the time he was appointed Lord Chief Baron of the Exchequer in 1660. He called them '[t]hings necessary to be continually had in remembrance'.[47] Two centuries later, one of Hale's successors in the office of Lord Chief Justice, Lord Campbell, would say that Hale's rules 'ought to be inscribed in letters of gold on the walls of Westminster Hall, as a lesson to those intrusted with the administration of justice'.[48] Another of Hale's successors in the office of Lord Chief Justice, Lord Bingham, in his popular yet profound little book *The Rule of Law*, wrote in 2010 that Hale's rules 'would still today be regarded as sound rules for the conduct of judicial office'.[49]

My own view is that judges would do well to learn Hale's rules by heart. I have argued in the past, and make no apology for repeating, that four of them together 'capture the personal intellectual and moral discipline of decision-making on which the integrity of the system depends'.[50] Those four rules are:

1 'That in the execution of justice, I carefully lay aside my own passions, and not give way to them, however provoked';

2 'That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions';

3 'That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard'; and

4 'That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard'.[51]

The four rules are all ways of mitigating what Kahneman and Tversky identified as 'confirmation bias', or more specifically 'anchoring bias'. Confirmation bias is the natural human tendency to rely heavily on information that supports an already-formed belief and to discount information that does not. Anchoring

[47] John Lord Campbell, *The Lives of the Chief Justices of England: From the Norman Conquest till the Death of Lord Mansfield* (Blanchard & Lea, 1851) vol 1, 433.

[48] Ibid.

[49] Lord Bingham, *The Rule of Law* (Allen Lane, 2010) 21. The rules were read at the memorial service for Lord Bingham at Westminster Abbey on 25 May 2011: Note, 'Sir Matthew Hale's Resolution' (2011) 27(3) *Arbitration International* 281, 281.

[50] Justice Stephen Gageler, 'Alternative Facts in the Courts' (2019) 93(7) *Australian Law Journal* 585, 593.

[51] Ibid. See also Campbell (n 47) 433.

bias, at least in an adjudicatory context, can be seen as a form of confirmation bias[52] that arises from the unfolding of new information through time: it is the natural human tendency to rely heavily on an initial piece of information or an initial impression at the expense of discounting the importance of subsequently acquired information and downplaying the need for further reflection. Anchoring bias is the adjudicator's curse. Genuinely to keep a mind that is open to persuasion from the beginning of a process of adjudication to the end of that process is not easy because in a real sense it is not natural. It takes considerable effort to achieve an open mind and considerable discipline to maintain one. The discipline can be acquired with experience but its maintenance can never be taken for granted, even amongst the experienced. That point was made eloquently by Coke's contemporary and rival Sir Francis Bacon on his appointment as Lord Chancellor in 1617 when he expressed the opinion 'that whosoever is not wiser upon advice than upon the sudden … was no wiser at fifty than … at thirty'.[53] Tellingly for the critical weakness of a common law system to which I will come, Bacon said that in the context of acknowledging delay to have been an endemic problem in the Court of Chancery and promising to do better than his predecessor Lord Ellesmere.[54]

The fifth feature of a common law system operating to mitigate against an adjudicatory outcome affected by error is the requirement for a judge to give reasons. As Kahneman has explained, the slower a person thinks, the less likely the person is to rely on heuristics. Producing reasons for judgment demands very slow thinking. Sir Frank Kitto, in a paper written for the education of Australian judges titled 'Why Write Judgments?', referred to the requirement to give reasons as 'an effective stimulant to judicial high performance'.[55] Quoting EM Forster — 'How do I know what I think till I see what I say?' — Kitto identified the greatest advantage of producing written reasons for judgment as lying in the discipline that the process of writing imposes on a judge doing his or her honest best to decide the case correctly.[56] That is because, as he put it, experience teaches that

> only in the throes of putting ideas down on paper, altering what has been written, altering it a dozen times if need be, putting it away until the mind has recovered

[52] See Barry (n 40) 15–16.

[53] Francis Bacon, *The Works of Lord Bacon: With an Introductory Essay, and a Portrait* (William Ball, 1838) vol 1, 711.

[54] Ibid.

[55] Sir Frank Kitto, 'Why Write Judgments?' (1992) 66(12) *Australian Law Journal* 787, 790.

[56] Ibid 796.

> its freshness, even tearing it up and starting again, can most of us hope to get, in a difficult case, the fruits of the requisite intensity of penetrating thought …[57]

Not only does the duty of the judge to give reasons slow down the thinking process, but it addresses the problem of substitution which has been identified as the core problem of heuristics and therefore of biases. Essentially, substitution is the process of finding an answer to a complex and difficult question by substituting the answer to a simple and easy question. Being forced to give reasons for decision forces the decision-maker to identify and to answer the real question, however complex and difficult that question might seem.

Last is the appellate process, which avowedly exists for the correction of error.[58] The appellate structure itself has an internal logic. I have noted in the past that it can be explained in terms of a simple mathematical formula known as Condorcet's Jury Theorem, after an 18th-century French social statistician who sought to explain the mathematical structure of group decision-making.[59]

Condorcet's Jury Theorem comes down to this:

> [F]or a group tasked with adjudicating a controversy that has two possible outcomes, where the judgmental competence of each of the individual group members … exceeds 0.5 (that is to say, where each group member judging individually would be more likely to be right than wrong) …[60]

where each member (preferably but not necessarily with the benefit of information gained from attending to the views of other members through a process of collective deliberation) votes independently and sincerely according to what each truly thinks to be the best result, 'and where the decision-making rule is that of a majority vote, the probability that the judgment of the group will be correct increases as the size of the group increases'.[61] If you assume, for example, that judges have a uniform level of competence such that any judge, judging individually, has an 80% probability of arriving at a correct judgment, then application of the theorem produces the result that a group of judges, voting by majority rule, have a probability of making a correct decision of: for a group of

[57] Ibid.

[58] *Norbis v Norbis* (1986) 161 CLR 513, 518–19 (Mason and Deane JJ); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 555–6 [30]–[31] (Gageler J).

[59] Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36(2) *Sydney Law Review* 189, 193–6. See also Cristóbal Caviedes, 'Is Majority Rule Justified in Constitutional Adjudication?' (2021) 41(2) *Oxford Journal of Legal Studies* 376, 380–8.

[60] Gageler, 'Why Write Judgments?' (n 59) 193.

[61] Ibid.

three, 90%; for a group of five, 94%; for a group of seven, 97%; and for a group of nine, 98%.[62]

The mechanism at work, expressed in simplified mathematical terms, is that random errors made by individuals get diluted in a group and tend to cancel each other out. The same mechanism was expressed in more human terms by Benjamin Cardozo when he wrote of the nature of the judicial process:

> The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater that its component elements.[63]

Condorcet's Jury Theorem explains the inherent logic of the typical appellate structure in which a judgment of a single judge gets to be appealed to an intermediate court of appeal composed of three or five judges, with a capacity for a further appeal to an ultimate appellate court of five or seven or nine judges. Even if there is no increase in the average competence of judges the further you get up the appellate hierarchy (and many lower court judges would argue that there is not), the outcome is more likely to be right for no reason other than because the numbers are greater. Provided judgmental competence is not compromised, increased diversity in judicial appointments supports the logic of collective correction.[64]

Condorcet's Jury Theorem also explains, incidentally, why there is not much point having an ultimate appellate court of more than nine judges and why increasing the size of an ultimate appellate court from seven to nine judges is of marginal benefit. As the group gets larger, the incremental benefit of further increasing the size of the group diminishes. Beyond nine, it rapidly decreases almost to vanishing point.

The mere existence of the appellate process as a mechanism for the correction of judicial error within a common law system in turn tends to reduce the incidence of judicial error warranting appellate correction. The judge whose intrinsic motivation is to do, and to be seen to do, right according to law is not likely to be a judge who is happy to be told publicly by other judges that he or

[62] Ibid 193–4.

[63] Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 177.

[64] The large and important topic of judicial diversity lies beyond the scope of my present analysis. See generally Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018).

she has been wrong. Judges are for that reason motivated to avoid being corrected on appeal. The prospect of reversal on appeal if an error is made is an added incentive to strive to produce a judgment that is, and can be seen by other judges to be, correct.

Just as Molière's character Monsieur Jourdain found to his surprise that he had been speaking in prose for 40 years without knowing it,[65] we can see that the institutional structure within which adjudication has evolved to occur in a common law system has been mitigating noise and bias for a considerably longer period with minimal conscious design. The system has, in the words of Vernon Smith, a measure of ecological rationality.

V Inherent Weaknesses within a Common Law System

That brings me to the second part of the exercise I have set for myself. A system that has an ecological rationality can still be a system that has inherent weaknesses. When identified and analysed, some or all of the weaknesses might well be remedied to the benefit of the system as a whole by constructivist intervention.

A *Judicial Incompetence*

The first of the features to which I have referred as giving a common law system strength in pursuing its objective of doing right according to law — the practice of appointing judges from the senior ranks of a competent and independent legal profession — has the obvious weakness that, as no more than a practice, it need not always be followed. Left entirely to the executive, judicial appointment is vulnerable to forces of patronage and ideology to an extent that can compromise the appointment of persons who have the capacity optimally to perform the judicial function, as successive Chief Justices of the High Court have had occasion to comment.[66] Other than in an extreme case of professional or public criticism of an appointment to judicial office of someone known to be grossly unqualified, there is little political downside to an executive government appointing persons whose lack of experience or lack of aptitude makes it difficult for them to perform the judicial function well.

[65] Monsieur de Molière, *Le Bourgeois Gentilhomme: Comédie-Ballet* (John Watts, 1732) 58–9.

[66] Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51(7) *Australian Law Journal* 480, 494; Sir Gerard Brennan, 'The Selection of Judges for Commonwealth Courts' in Department of the Senate, *The Senate and Accountability* (Papers on Parliament No 48, January 2008) 1, 6–8.

Not every appointment to the judiciary could ever be expected to be of the quality of Sir Matthew Hale, just as no appointment to the judiciary could now ever be expected to be as bad as Hale's immediate predecessor, Sir John Kelyng, whom Lord Campbell referred to as 'one of the most worthless of Chief Justices',[67] whose conduct on the bench appears 'to have been marked by lack of discretion, violent outbursts of temper, and an insulting manner generally' and who stood charged before the House of Commons with 'mishandling juries, aiding arbitrary government, and having "undervalued, vilified and condemned *Magna Carta*"'[68] which he is said to have referred to as '*Magna Farta*'.[69] Between a Hale and a Kelyng there is a considerable range of abilities. There have been many persons appointed as judges who have not been as bad as Kelyng but who still should never have been appointed as judges. In the modern-day language of superheroes, not every judge who is appointed can be expected to be Ronald Dworkin's 'Justice Hercules'.[70] Perhaps not every judge who is appointed can even be expected to have the worldly knowledge and jurisprudential sophistication of JW Harris's more realistic alternative, 'Justice Humdrum'.[71] Every judge who is appointed should nevertheless be expected to have a minimum level of competence commensurate with their level within the judicial hierarchy, together with a capacity for and disposition towards independence of thought and action.[72] Regrettably, a common law system in its traditional form contains nothing to guarantee that will be the case.

In respect of judicial appointment, there is room for constructivist intervention in pursuit of the objective of doing right according to law. In 2003, the Commonwealth Heads of Government Meeting agreed to the so-called 'Latimer House' principles on the accountability of and relationship between the three branches of government. One of those stated principles was that '[j]udicial appointments should be made on the basis of clearly defined criteria and

67 Campbell (n 47) 407.

68 Leonard Naylor and Geoffrey Jaggar, 'Kelyng, John (1607–71), of Hatton Garden, London and Southill, Beds', *The History of Parliament: British Political, Social and Local History* (Online Encyclopedia) <http://www.historyofparliamentonline.org/volume/1660-1690/member/kelyng-john-1607-71>, archived at <https://perma.cc/3D8G-VRRK>.

69 *Oxford Dictionary of National Biography* (online at 6 January 2022) 'Magna Carta through Eight Centuries'.

70 See Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1083.

71 JW Harris, 'Unger's Critique of Formalism in Legal Reasoning: Hero, Hercules, and Humdrum' (1989) 52(1) *Modern Law Review* 42, 55–7.

72 See Stephen Gageler, 'Judicial Appointment' (2008) 30(1) *Sydney Law Review* 157, 157–9.

by a publicly declared process' which should ensure, amongst other things, 'appointment on merit'.[73] Considerable progress has since been made towards reform of the process of judicial appointment in many other common law jurisdictions.[74] We have a long way to go in Australia before adherence to the principle could be said to be the national norm. 'Australia', as Andrew Lynch has observed, 'remains faithful to the practice of appointing judicial officers by essentially unconstrained executive discretion'.[75]

B *Judicial Sloth*

The second and third of the features I referred to as giving a common law system strength in pursuing its objective of doing right according to law — the security of judicial tenure and remuneration, and the guarantee of decisional independence — carry with them a weakness of a slightly different nature. The security of tenure and remuneration, which gives a judge freedom to concentrate single-mindedly on the task of adjudication, serves to shield the judge from the economic discipline that would automatically apply were the judge (like a commercial arbitrator) a competitor in a market for legal services. The guarantee of decisional independence, which gives the judge freedom to concentrate single-mindedly on producing the correct or preferable judgment in any case, serves also to shield the judge from supervision of the timeliness and quality of the judgment that could be expected were performance of the adjudicatory function to be subjected to managerial oversight.

If drawn from the senior ranks of a competent and independent legal profession, the capacity of a judge for hard work can ordinarily be assumed. Even then, however, the motivation of the judge to work hard cannot be taken for granted. The lazy judge, regrettably, has been a phenomenon at least as common as the incompetent judge, although the two have never been mutually exclusive.

In relation to judicial discipline, there is again room for constructivist intervention in pursuit of the objective of doing right according to law. In some jurisdictions in Australia, there exist formal mechanisms for investigating and

[73] Commonwealth Secretariat et al, *Commonwealth (Latimer House) Principles on the Three Branches of Government* (February 2009) 11.

[74] See generally Jan van Zyl Smit, '"Opening up" Commonwealth Judicial Appointments to Diversity? The Growing Role of Commissions in Judicial Selection' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 60.

[75] Andrew Lynch, 'Diversity without a Judicial Appointments Commission: The Australian Experience' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 101, 101.

reporting on complaints of judicial misconduct,[76] which on occasion have included complaints about inordinate delay in the production of judgments.[77] Complaint-handling mechanisms of that nature are well-enough suited to addressing inordinate delay attributable to laziness or incompetence on the part of an aberrant judge. Ensuring timeliness in the production of judgments by competent and hard-working judges is another matter.

C *Judicial Delay*

Bearing directly on judicial productivity, the fourth and the fifth of the features I referred to as giving a common law system strength in pursuing its objective of doing right according to law — the personal discipline expected of a judge in reserving judgment until at or after the end of a case and the discipline required of a judge in slowing down his or her thinking in order to write reasons for judgment — give rise to a problem of a different nature. The problem here is not with the system failing to deliver. The problem here is that the system operating to maximise the probability of achieving the sworn judicial goal of doing right according to law is inherently in tension with a temporal dimension of justice for which the system itself has not evolved naturally to provide. To do right according to law is necessarily to take time to do right according to law. That creates, in the language of economics, an opportunity cost to doing right according to law. The cost of producing an outcome that is right is the cost of not producing an outcome that is quick.

There will always be judgments in routine matters that are done best when they are done quickly. The general rule of thumb, however, is that the quicker a judgment is produced, the more likely it is to contain error. The likelier a judgment is to contain error, the likelier it is to be reversed on appeal. Hence the need to take time. The problem is that taking more time to attempt to produce a judgment that is likelier to be right comes at a cost of delay that will at some point become unacceptable.

Famously, in his commentary on *Magna Carta*, Coke recognised celerity as an essential quality of justice 'because delay is a kind of denial'.[78] Unfortunately,

[76] See *Judicial Commissions Act 1994* (ACT) pt 4; *Judicial Officers Act 1986* (NSW) pt 6; *Judicial Conduct Commissioner Act 2015* (SA) pts 3–4; *Judicial Commission of Victoria Act 2016* (Vic) pts 2–3.

[77] See, eg, *Bruce v Cole* (1998) 45 NSWLR 163, 191–5 (Spigelman CJ, Mason P agreeing at 202, Sheller JA agreeing at 208, Powell JA agreeing at 208).

[78] Sir Edward Coke, *The Second Part of the Institutes of the Laws of England: Containing the Exposition of Many Ancient and Other Statutes* (E and R Brooke, 1797) 55.

celerity in the production of a judgment is not a quality a common law system of justice is well adapted to achieve.

Within the Australian system, a writ of mandamus might in theory be directed by the High Court[79] to a tardy judge of a federal court or an order in the nature of mandamus might in theory be directed by a state Supreme Court to a tardy judge of another state court if delay in the production of a judgment were so extreme as to be characterised as a constructive failure to exercise jurisdiction.[80] Perhaps because of the potential for the cost of the remedy to outweigh the cost of the delay sought to be remedied, neither remedy appears ever to have been sought in practice in Australia.[81] As understood in Australia, mandamus of its nature is incapable of being directed by a court to itself or to one of its own judges.[82]

Nor is delay in the production of judgments a problem that the appellate process is equipped to resolve. Appellate courts have come of late to emphasise that long delay in the production of judgments weakens confidence in the judicial process and would subvert the rule of law if left unchecked.[83] However, appellate courts have also recognised that circumstances in which delay of itself can form a basis for appellate review must be rare if those circumstances can exist at all.[84] The structural difficulty is that an appeal can occur only after a judgment has been delivered. In the case of a judgment long delayed, the appeal can occur only after the long delay has already occurred. No order the appellate court could then make could remedy the prior delay. To reverse the judgment under appeal would do nothing to shorten the time already elapsed. To grant a

[79] *Constitution* s 75(v).

[80] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[81] Mandamus has, on occasion, issued as a remedy for judicial delay in the United States: Charles Gardner Geyh, 'Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases under the Civil Justice Reform Act' (1993) 41(3) *Cleveland State Law Review* 511, 523–4.

[82] *Re Jarman; Ex parte Cook* (1997) 188 CLR 595, 602–4 (Brennan CJ), 636–7 (Gummow J); *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437, 452–3 (Isaacs J). See also *Federated Engine Drivers' and Firemen's Association of Australasia v The Colonial Sugar Refining Co Ltd* (1916) 22 CLR 103, 117 (Isaacs, Gavan Duffy and Rich JJ).

[83] See, eg, *R v Maxwell* (1998) 217 ALR 452, 462–3 (Spigelman CJ, Sperling and Hidden JJ), quoting *Goose v Wilson Sandford & Co* (Court of Appeal of England and Wales, Peter Gibson, Brooke and Mummery LJJ, 13 February 1998) [112] (Peter Gibson, Brooke and Mummery LJJ).

[84] See, eg, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 473–4 [5] (Gleeson CJ), citing *Monie v Commonwealth* (2005) 63 NSWLR 729; *NatWest Markets plc v Bilta (UK) Ltd (in liq)* [2021] EWCA Civ 680, [45] (Asplin, Andrews and Birss LJJ).

new trial would only exacerbate the problem by continuing the delay into the future.

The approach of appellate courts has rather been to treat long delay in the production of a judgment as a reason to bring special vigilance to the appellate scrutiny of the judgment for factual and legal error. They have recognised that the comparative advantage that a trial judge is accepted ordinarily to have over an appellate court in assessing oral testimony decreases the longer a judgment is delayed, as judicial memory fades and reconstruction of the impression created by the testimony becomes harder.[85] They have also recognised that long delay can give rise to a legitimate suspicion 'that the task may have become too much for the trial Judge and that he or she had been unable, in the end, to grapple adequately with the issues'.[86]

The consequence of that heightened level of appellate scrutiny of a judgment for factual and legal error in a case of long delay in the production of a judgment is a heightened expectation as to the quality of the reasons that must be given for the delayed judgment when the judgment is ultimately produced. Not only will it be incumbent on the judge to explain how he or she found the facts and applied the law, but the judge will face the added burdens of needing

> to explain how, despite the delay, he [or she] was able to recollect the oral testimony and demeanour of witnesses in order to demonstrate that delay did not affect [the] decision

and to demonstrate by the structure and detail of his or her analysis of the facts and the law that he or she has not taken short cuts to avoid hard issues.[87] That heightened expectation as to the content of the reasons for a long-delayed judgment adds to the burden of producing the judgment. The prospect of appellate scrutiny of the judgment for factual and legal error can, in that way, operate to compound the delay.

To note that the inbuilt mechanism for the correction of error cannot directly address the problem of excessive delay, and may even exacerbate it, is not necessarily to accept that Charles Dickens's *Bleak House* is a depiction of the natural state of a common law system.[88] But it is to explain at least in part why many of the numerous constructivist reforms to common law systems that have

[85] See, eg, *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17, 32–3 [66]–[73] (Carr, Emmett and Gyles JJ).

[86] Ibid 33 [74], quoting with minor changes *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273, 283 [31] (Steytler, Templeman and Simmonds JJ).

[87] *Von Schoeler v Allen Taylor & Co Ltd [No 2]* (2020) 273 FCR 189, 211 [113] (Flick, Robertson and Rangiah JJ).

[88] Charles Dickens, *Bleak House* (Oxford University Press, 2008).

occurred since the time of Dickens have been attempts to reduce delay, why most of those reforms have met with only limited success, and why metrics of the kinds that were used to trigger the current conversation about judicial productivity in Australia remain a source of anxiety. The criticism that comes with a purely quantitative assessment of judicial productivity based on the time taken by judges to deliver their judgments highlights a problem for which the common law system has no internally generated solution.

VI Formulating a Constructivist Solution for Judicial Delay

A *The Lack of a Comprehensive Australian Solution*

The Australian Law Reform Commission remarked in the opening chapter to the report of its review into the federal justice system in 2000 that the twin problems of cost and delay in the curial administration of justice had by then been inquired into and analysed by law reform bodies throughout the common law world on and off for 150 years without any lasting solution having been found.[89] The Commission endorsed Adrian Zuckerman's then-recent observation that '[a]lthough excessive delay and high cost have serious effects on the system of justice, they have been persistent in most civil justice systems for a very long time' and that whilst '[e]very country boasts a long history of attempts to reduce delay and cost … few have been even moderately successful in reaching a sensible balance'.[90]

Judicial delay in the production of judgments is just one component of the delay that has long been experienced in the curial administration of justice. Despite the ongoing conversation about it, judicial delay is not typically revealed in statistics about timeliness of disposition of litigation in Australia. Statistics published annually by Australian courts typically adopt the 'backlog' performance indicator used by the Productivity Commission in its annual *Report on Government Services*.[91] That performance indicator lumps post-hearing delay

[89] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, January 2000) 76 [1.73].

[90] Ibid, quoting with minor changes Adrian AS Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in Adrian AS Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999) 3, 51.

[91] See, eg, Supreme Court of New South Wales, *Annual Review 2019* (Report, 14 December 2020) 28–32, 44–53 <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Annual%20Reviews%20+%20Stats/Annual_Review_2019.pdf>, archived at <https://perma.cc/7ZAR-5WMW>.

in with pre-hearing delay by measuring and reporting only on the overall period between the commencement of proceedings and the finalisation of proceedings. Finalisation for that purpose can be by judgment, but can also be by settlement, discontinuance or deemed abandonment.[92] The backlog reported is therefore of the number of proceedings that for any reason have not been finalised at the end of the annual reporting period.

Despite the ongoing conversation about judicial delay in the production of judgments, I am also unaware of that form of post-hearing delay having been isolated for inquiry and analysis in the context of considering law reform in Australia, other than in a review of the efficiency of the operation of the Family Court of Australia and the Federal Circuit Court of Australia conducted by PricewaterhouseCoopers for the Commonwealth Attorney-General's Department in 2018. PricewaterhouseCoopers identified a reduction in the average period between reservation and production of judgments as one of several 'opportunities' having 'the potential to significantly improve the efficiency of the family law system', but made no recommendation as to how that reduction might be achieved.[93]

Most courts in Australia have published policies on reserved judgments which make provision for a party or legal representative who is concerned that a reserved judgment has been outstanding for an unreasonably long time to raise the matter, directly or through a professional association, with the applicable head of jurisdiction, who will then look into the matter and take it up with the judge concerned if the head of jurisdiction thinks that is appropriate.[94] Just how that conversation is supposed to go is not spelt out in the policies.

Policies of that nature appropriately provide an orderly channel for those directly affected to raise concerns about judicial delay that stop short of amounting to complaints of judicial misconduct. They hardly provide a solution to the systemic problem of judicial delay. Parties and their legal representatives can be expected to be in the best position to assess the point at which the

[92] See Productivity Commission, *Report on Government Services* (Report, 22 January 2021) pt C, [7.4].

[93] PricewaterhouseCoopers, *Review of Efficiency of the Operation of the Federal Courts* (Final Report, April 2018) 7.

[94] See, eg, WG Soden, 'Access to Reserved Judgments', *Federal Court of Australia* (Web Page) <https://www.fedcourt.gov.au/feedback-and-complaints/reserved-judgments>, archived at <https://perma.cc/9M34-VFYM>; Supreme Court of New South Wales, *Delays in Reserved Judgments* (Policy, 23 September 2020) <https://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/Delays%20in%20reserved%20judgments,%2023%20Sept%202020.pdf>, archived at <https://perma.cc/D2NM-T82R>; 'Protocol for Reserved Judgments', *Supreme Court of Victoria* (Web Page, October 2016) <https://www.supremecourt.vic.gov.au/court-decisions/judgments-and-sentences/protocol-for-reserved-judgments>, archived at <https://perma.cc/VB6G-QNA2>.

cost of delay in the resolution of their dispute has become unacceptable. They can be expected to bear responsibility for those aspects of pre-hearing delay over which they have control. They should not be expected to bear responsibility for an aspect of post-hearing delay over which they have none. The responsibility for judicial delay in the production of a judgment must lie with the court.

Most courts in Australia have for some years attempted to manage delay internally through some form of periodic internal reporting. On one version, a periodic report on outstanding judgments of each judge of the court is received by the applicable head of jurisdiction alone. On another version, a periodic report on outstanding judgments of each judge of the court (or a division of the court) is circulated to all judges of the court (or division), and is perhaps even expected to be discussed in regular conferences which all judges are expected to attend. Both versions rely on peer pressure to coax or cajole judgment-production, treading softly around the edges of the decisional independence of the judge. The acceptability and effectiveness of each appears to vary from court to court and from time to time.

B *Two United States Solutions*

An extreme externally imposed solution to the problem of judicial delay is that found in the *California Constitution*. The solution is to suspend the payment of the salary of a judge for every day that a judgment remains outstanding beyond a period of 90 days from the day that a cause is submitted for decision.[95] Unsurprisingly, the solution has been observed in practice to create an incentive for judges to decide cases before properly thinking them through.[96]

A more moderate externally imposed solution to the problem of judicial delay was imposed by the United States Congress on federal District Courts through the enactment of the *Civil Justice Reform Act of 1990* ('*Civil Justice Reform Act*'),[97] an initiative of Senator Joseph R Biden Jr when Chairman of the Senate Judiciary Committee.[98] The enactment was against the background of the Brookings Institution, an independent 'think tank', having at Biden's invitation convened a task force to develop a set of recommendations to alleviate

[95] *California Constitution* art VI § 19.

[96] See generally Daniel J Bussel, 'Opinions First — Argument Afterwards' (2014) 61(5) *UCLA Law Review* 1194.

[97] 28 USC §§ 471–82 (2018).

[98] Joseph R Biden Jr, 'Equal, Accessible, Affordable Justice under Law: The Civil Justice Reform Act of 1990' (1992) 1(1) *Cornell Journal of Law and Public Policy* 1, 3–5.

general problems of expense and delay within the federal court system.[99] The 10th 'procedural recommendation' made by the task force was to provide 'for the regular publication of … undecided motions and caseload progress'.[100] The task force unanimously expressed the belief that

> substantially expanding the availability of public information about caseloads by judge [would] encourage judges with significant backlogs … to resolve those matters and to move their cases along more quickly.[101]

The manner of implementation of the recommendation was hammered out in the ensuing legislative process.[102]

The solution ultimately enacted in the *Civil Justice Reform Act* I will call the 'moderate United States Solution'. The solution is to require preparation and publication by the Administrative Office of the United States Courts of a 'semiannual' (or biannual) report,[103] known colloquially as the 'Six-Month List' or in some quarters as the 'Report of Shame'. The Six-Month List is required to record at six-monthly intervals, for each United States district judge and magistrate judge, all motions pending more than six months and all bench trials that have remained undecided more than six months, in addition to all civil cases pending more than three years.[104] The reporting system adopted to meet that statutory requirement gives a snapshot of the number of judgments that each judge, identified by name, has had outstanding for more than six months as at each 31 March and each 30 September.[105] The system permits judges, if they wish, to explain why a judgment remains outstanding for more than six months using one or more standardised 'status codes'. Status codes commonly reported are 'opinion/decision in draft', 'complexity of case', 'heavy criminal and civil caseload', 'awaiting materials' and 'voluminous briefs/transcripts to be read'.[106]

[99] Ibid 4–5.

[100] Brookings Institution, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989) 27.

[101] Ibid.

[102] Geyh (n 81) 528–32.

[103] 28 USC § 476 (2018).

[104] Ibid.

[105] See Administrative Office of the United States Courts, 'Civil Justice Reform Act Report', *United States Courts* (Web Page) <https://www.uscourts.gov/statistics-reports/analysis-reports/civil-justice-reform-act-report>, archived at <https://perma.cc/QJA5-7UVT>.

[106] See, eg, Administrative Office of the United States Courts, *Civil Justice Reform Act of 1990: National Summary Report* (Report, 30 September 2018) 2–3 <https://www.uscourts.gov/sites/default/files/cjra_na_0930.2018_1.pdf>, archived at <https://perma.cc/VQQ9-762H>.

A glance at the pattern of reports published on the website of the Administrative Office of the United States Courts between 1998 and 2020 suggests that the effect of publication of individualised statistics has been to incentivise federal judges in the United States to treat the production of a judgment by the time of each reporting deadline as something to be achieved to avoid the embarrassment of being named and shamed.[107] For most judges, the number of judgments on motions and bench trials outstanding for more than six months as at each 31 March and each 30 September is consistently recorded as zero. The names of those few judges who are reported as having one or more outstanding judgments stand out uncomfortably from the pack.

The incentive of judges to treat each 31 March and each 30 September as a deadline to produce judgments is confirmed by a recently published study of the operation of the Six-Month List based on quantitative analysis of data drawn from records of civil cases decided by federal courts between 1980 and 2017. Entitled 'The Six-Month List and the Unintended Consequences of Judicial Accountability', the study highlights what the authors describe as 'unintended but entirely foreseeable consequences of imposing a calendar deadline'.[108] Two of the highlighted consequences are aspects of a phenomenon the authors call the 'Student Syndrome'.[109] The first is a tendency for judges to rush to produce many judgments in the weeks before 31 March and before 30 September, when the next deadline for reporting is looming.[110] The second is a corresponding tendency for judges to slacken off in the production of judgments in and after April and October when the immediate deadline has passed and the next deadline seems far away.[111] The authors of the study conclude that the Six-Month List has the overall effect of shortening the average time taken to produce reserved judgments at the expense, through the operation of that second aspect of the 'Student Syndrome', of lengthening the time taken to produce those judgments that are reserved towards the beginning of each reporting period.[112]

The rush to deliver judgments immediately before a reporting deadline, in combination with the insensitivity of the reporting to the difficulty of the judg-

[107] See generally 'Civil Justice Reform Act Report' (n 105).

[108] Miguel FP de Figueiredo, Alexandra D Lahav and Peter Siegelman, 'The Six-Month List and the Unintended Consequences of Judicial Accountability' (2020) 105(2) *Cornell Law Review* 363, 448.

[109] Ibid 382.

[110] Ibid 392, 444.

[111] Ibid 400, 445.

[112] Ibid 416, 441, 445.

ments outstanding, leads the authors of the study to suggest that another unintended but foreseeable consequence of the Six-Month List is that 'in an effort to comply with the List, judges may be making more errors' on the basis that '[a]lmost by definition, rushed work is more likely to be error-prone'.[113] The propensity of the Six-Month List to increase judicial speed at the cost of increasing judicial error had earlier been predicted by reference to the work of Kahneman in an essay entitled 'The Perils of Productivity'.[114] The prediction of increased error in judgments delivered immediately before a reporting deadline does not yet appear to have been tested by reference to reversal rates on appeal.

C *A New Zealand Solution*

An externally imposed solution to the problem of judicial delay which utilises a more nuanced form of public reporting is found in the *Senior Courts Act 2016* (NZ) and the *District Court Act 2016* (NZ). The solution is to require the head of jurisdiction of each of the Supreme Court, the Court of Appeal, the High Court and the District Court, in addition to publishing information about the process by which parties to proceedings before the Court may obtain information about the status of any reserved judgment in those proceedings, to 'periodically publish information about the number of judgments … that he or she considers are outstanding beyond a reasonable time for delivery' and to 'publish any other information about reserved judgments that he or she considers is useful'.[115]

To implement the requirement to periodically publish information about the number of judgments they consider to be outstanding beyond a reasonable time for delivery, the Chief Justice of the Supreme Court, the President of the Court of Appeal and the Chief Judge of the High Court have each adopted a six-month reporting period and the latter two have each adopted the rule of thumb that any judgment not delivered within six months of the last day of hearing or receipt of the last submission will be treated as outstanding beyond a reasonable time in the absence of extenuating circumstances.[116] The Chief

[113] Ibid 364, 439.

[114] Mark Spottswood, 'The Perils of Productivity' (2014) 48(3) *New England Law Review* 503, 520–1, citing Kahneman (n 24).

[115] *Senior Courts Act 2016* (NZ) s 170. See also *District Court Act 2016* (NZ) s 218.

[116] 'Supreme Court: Judgment Delivery Expectations', *Courts of New Zealand* (Web Page) <https://www.courtsofnz.govt.nz/the-courts/supreme-court/judgment-delivery-expectations>, archived at <https://perma.cc/545P-JVCM>; 'Court of Appeal: Judgment Delivery Expectations', *Courts of New Zealand* (Web Page) <https://www.courtsofnz.govt.nz/the-courts/court-of-appeal/court-of-appeal-judgment-delivery-expectations-inquiry-process-

Judge of the District Court has adopted a 12-month reporting period and a 90-day delivery standard.[117]

A glance at the integrated *Courts of New Zealand* website suggests that the prospect of reporting has a hastening effect on the production of judgments throughout the reporting period. During the six months to 1 March 2021, the Court of Appeal delivered 344 judgments.[118] The number of judgments reported by the President to have been outstanding beyond a reasonable time at the end of the period was zero, as was the number of judgments reported by the President to have been outstanding beyond a reasonable time at any time during the period.[119] During the six-month reporting period to 31 March 2021, the High Court delivered 1,686 judgments.[120] The number of judgments reported by the Chief Judge to have been outstanding beyond a reasonable time during the period was six and at the end of the period was just four.[121] The annual report of the District Court indicates that it delivered 999 reserved judgments in the year ended 30 June 2020, of which the Chief Judge considered none to have been outstanding beyond a reasonable time.[122]

Enactment of what I will call the 'New Zealand Solution' in 2016 was preceded by a report of the New Zealand Law Commission in 2012, which was prepared over a two-year period with the benefit of extensive consultation following circulation of issue papers.[123] The Law Commission noted in its report that

and-recent-judgment-timeliness>, archived at <https://perma.cc/CZ9J-ARMW>; 'High Court: Judgment Delivery Expectations', *Courts of New Zealand* (Web Page) <https://www.courtsofnz.govt.nz/the-courts/high-court/high-court-judgment-delivery-expectations-inquiry-process-and-recent-judgment-timeliness>, archived at <https://perma.cc/3L6T-6C35>.

117 District Court of New Zealand, *Annual Report 2021* (Report, 2021) 26 <https://www.districtcourts.govt.nz/assets/Uploads/Publications/2021/2020-21-Annual-Report-of-the-District-Court.pdf>, archived at <https://perma.cc/A27S-M9YC>.

118 'Court of Appeal: Judgment Delivery Expectations' (n 116).

119 Ibid.

120 'Delayed Judgment Reports Covering 6 Month Periods from 1 October 2017–31 March 2021', *Courts of New Zealand* (Web Page) <https://www.courtsofnz.govt.nz/the-courts/high-court/delayed-judgment-reports-covering-6-months-periods-from-1-october-2017>, archived at <https://perma.cc/C9NC-ZG3K>.

121 Ibid.

122 District Court of New Zealand, *Annual Report 2020* (Report, 2020) 23–4 <https://www.districtcourts.govt.nz/assets/Uploads/2020-Images/Annual-Report/Annual-Report-2020-v2.pdf>, archived at <https://perma.cc/BGB2-WAFB>.

123 New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act* (Report No 126, November 2012) 6–7.

> there was one matter, not discussed in the issues papers, which was consistently raised with Commission staff [in consultation discussions]: the time taken for reserved judgments, and a perceived lack of judicial accountability for ensuring the efficient delivery of these.[124]

Taking the view that 'the public has a genuine interest in knowing what judgments are outstanding in each court, and the judges responsible for delivering these',[125] the Law Commission recommended what might be described as a particularly onerous version of the moderate United States Solution. The recommendation was that

> [a] list of reserved judgments for every judge in each of the District Courts, High Court, Court of Appeal and Supreme Court should be published on the Courts of New Zealand website on the first day of every month.[126]

The prospect of the Law Commission's recommendation being taken up met resistance from within the New Zealand judiciary.[127]

The New Zealand Solution as enacted appears to have been generated within the Ministry of Justice. The Ministry identified risks of requiring publication of information at the level of the individual judge to include the risk of unfair identification of 'slow' delivery in cases of complexity, as well as the risk that '[j]udges could feel compelled to deliver to any targets specified, possibly at the expense of a quality decision', recognising that a 'rushed decision is more likely to be susceptible to appeal'.[128] The Ministry justified the solution ultimately enacted as striking an appropriate balance between 'enhancing judicial accountability' and 'respecting judicial independence', emphasising that in leaving the design of how to publish information on the timeliness of the delivery of reserved judgments to heads of jurisdiction, it 'does not require reporting on individual judges (nor rule this out)'.[129]

What the New Zealand Solution has in common with the moderate United States Solution is that each relies on the prospect of adverse publicity to create what I might call a 'constructivist incentive' for a judge to produce a judgment

[124] Ibid 89 [8.29].

[125] Ibid 89 [8.30].

[126] Ibid 90 recommendation 41.

[127] Supreme Court, Court of Appeal and High Court, Submission to Justice and Electoral Select Committee, Parliament of New Zealand, *Judicature Modernisation Bill* (12 March 2014) 15–16 [60]–[63]; Judges of the District Courts, Submission to Justice and Electoral Select Committee, Parliament of New Zealand, *Judicature Modernisation Bill* (20 February 2014) 29 [153]–[157].

[128] Letter from Warren Fraser, on behalf of the Secretary for Justice, to Scott Simpson, Chairperson, Justice and Electoral Select Committee, Parliament of New Zealand, 21 May 2014, 3 [11].

[129] Ibid 3 [14].

within a timeframe that will avoid reporting. No less than the ecological incentive to produce a correct judgment (able to withstand appellate scrutiny), the constructivist incentive to produce a timely judgment (and thereby to avoid reporting) relies on the intrinsic motivation of the judge to be regarded by others as a good judge.

Yet the New Zealand Solution appears to me to have distinct advantages over the moderate United States Solution. By requiring periodic publication only of how many judgments a head of jurisdiction considers outstanding beyond a reasonable time, it accommodates the exceptionally long or exceptionally complex case where the time taken to produce the judgment appropriately exceeds the norm and avoids causing public embarrassment to a judge who, for good reason, is unable to adhere to that norm in the production of a judgment. By providing for publication of the number of judgments considered to be outstanding during each six-month period and not simply at the end of each six-month period, it minimises incentives both to rush judgments at the end of each six-month period and to treat judgments reserved at the beginning of each period with less expedition.

Advantages of the New Zealand Solution over the policies and practices that currently prevail in Australia are manifold. By obliging the head of jurisdiction to form an opinion in respect of every judgment about whether the judgment has been outstanding beyond a reasonable time and to publish that opinion, and by not ruling out the possibility of publicly identifying an individual judge in a case of extreme delay, it arms the head of jurisdiction with practical authority to incentivise speeding up the process of judgment writing without compromising decisional independence. It gives to parties and the public the assurance that such time as is being taken in the production of any judgment is being actively monitored by the head of jurisdiction.

VII Conclusion

The *Federal Court of Australia Act 1976* (Cth) has, since 2009, stated the overarching purpose of the provision it makes for civil procedure as being to facilitate the just resolution of disputes both 'according to law' and 'as quickly, inexpensively and efficiently as possible'.[130] The *Civil Procedure Act 2010* (Vic) similarly expresses its overarching purpose as being to facilitate 'the just, efficient, timely and cost-effective resolution of the real issues in dispute'.[131] In the blunt terms characteristic of legal speech in New South Wales, the *Civil Procedure Act*

[130] *Federal Court Act* (n 34) s 37M(1), as inserted by *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth) sch 1 item 6.

[131] *Civil Procedure Act 2010* (Vic) s 7(1).

2005 (NSW) identifies its overriding purpose as being to facilitate the 'just, quick and cheap' resolution of the real issues in dispute.[132] The placement of the comma between 'just' and 'quick' is, of course, critical to an appreciation of the meaning conveyed.

Those and other recent legislative expressions of the objective of timeliness in a common law system of adjudication are formal recognitions of what has for a very long time been an unfulfilled societal expectation and systemic aspiration.

My focus has been on one persistent contributor to delay in the just resolution of disputes according to law in a common law system: judicial delay in the production of judgments. In the course of addressing that narrow but persistent problem, I have undertaken a wide survey of the ecological rationality of a common law system to suggest that the problem calls for an externally imposed — constructivist — solution.

For so long as judges in a common law system are to remain human, it needs to be recognised that a common law system will remain one in which being just will be in tension with being quick. The problem is not simply that being quick does not come naturally. The problem is that being quick goes against the grain of a judge who strives to be correct.

No judge can be expected simultaneously to maximise speed and correctness. The ecological rationality of the system is weighted in favour of correctness. To encourage speed on the part of a judge, some form of constructivist intervention is necessary. The challenge is to find a form of constructivist intervention that strikes an appropriate balance between speed and correctness without compromising decisional independence. The New Zealand Solution appears to me to come close.

[132] *Civil Procedure Act 2005* (NSW) s 56(1).