

## THE RISE OF JUDICIAL SELF-GOVERNANCE IN THE NEW MILLENNIUM

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*A vast majority of court systems in the world are managed by the executive government, but a small and growing number of jurisdictions, including Victoria, South Australia and the Australian federal courts, have transitioned to judicial management of the court system. This article analyses the emergence of new institutions of judicial self-governance in Australia and overseas, with a particular emphasis on the establishment and regulation of judicial councils and judicial management boards inside judge-managed courts. The article also provides an introductory overview of the emerging scholarly discipline of judicial self-governance by identifying a range of unexplored institutional design questions and research directions for consideration and adaptation by Australian scholars who may be interested in examining the regulation of judge-managed institutions from a legal, political, institutional, managerial or constitutional perspective.*

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Cite as:

Tim Bunjevac, 'The Rise of Judicial Self-Governance in the New Millennium'  
(2021) 44(3) *Melbourne University Law Review* (advance)

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I INTRODUCTION

*Imagine that you have been appointed professor of constitutional law or political science at a leading university in a particular country. You are asked to analyse a major court system reform that was introduced five years ago, which placed the judiciary in charge of the operational management of the court system. From the legislative provisions, you establish that the Reform Act was formally passed in Parliament in 2014, but are unable to gather any information about any consultations with the general public, legal profession, research institutes, non-government organisations or the academy in the lead-up to the reform. A brief media release states that the reform was approved following a closed consultation process involving only a handful of senior court officials and the government.*

*Through your research you establish that no law lecturer, professor, management expert, barrister, solicitor, prosecutor or judge commented on the Bill when it was introduced in Parliament, even though the proposed changes were intended to have a significant impact on the administration of justice in this country. Similarly, none of the major media outlets had shown any interest, and you are unable to locate any pre-reform media interviews with the chief protagonists, despite the fact that the changes directly affected the way in which hundreds of millions of dollars in public money were to be expended every year.*

*As you continue your research, you realise that even today little is known about the inner workings of the reformed judicial institutions or the way in which the changes have impacted upon the constitutional separation of powers. No empirical research or official evaluation of the reform has been undertaken by anyone, although there are rumours that unnamed court officials recently prevented a researcher from conducting an empirical evaluation of the reform on questionable grounds.*

*You turn your attention to ordinary officers who perform day-to-day tasks in the court system and find that most of them are working under relentless pressure, and that their levels of psychological distress are significantly higher than that among the general population. Disturbingly, you also learn that several judicial and court officers recently committed suicide, reportedly due to their ‘unrelenting workload’ and ‘abuse of power’ by a presiding judge.*

Is this another ‘vignette from a banana republic or a central European backwater recently emerged from authoritarian rule?’<sup>1</sup>

In fact, this fictional story is partly based on actual events surrounding the landmark court system reform in Victoria, which introduced judicial self-governance in the courts and established an independent judicial council called Court Services Victoria (‘CSV’) in 2014.<sup>2</sup> Victoria thus joined South Australia<sup>3</sup> and the Australian federal courts<sup>4</sup> as members of a select group of jurisdictions from around the world, where judges are fully in charge of court administration and seemingly in control of their own institutional destiny. In practical terms, this means that judges are now responsible not only for their traditional administrative arrangements that focus on case management and legal procedure;<sup>5</sup> they also have assumed the responsibility to act as executive managers and policymakers for the financial, technical, administrative and human resources operations of the entire court system.<sup>6</sup> Above all, judges are now responsible for generating new solutions that will improve the administration of justice and respond to a myriad of well-documented challenges that they inherited from the government-run system of court administration.<sup>7</sup>

But are judges and judge-managed institutions in a position to meet these expectations? No empirical studies have been conducted into the wider systemic effects of judicial self-governance in any Australian jurisdiction where it

<sup>1</sup> John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia’s Courts: A Managerial Perspective* (Australian Institute of Judicial Administration, 2004) vii (‘*Governance of Australia’s Courts*’). The authors of this landmark court governance study also used a fictional vignette ‘from a banana republic or a central European backwater’ in their introduction.

<sup>2</sup> *Court Services Victoria Act 2014* (Vic) (‘*CSV Act*’).

<sup>3</sup> *Courts Administration Act 1993* (SA) (‘*Courts Administration Act*’).

<sup>4</sup> *Federal Court of Australia Act 1976* (Cth) pt IIA (‘*FCA Act*’).

<sup>5</sup> The traditional judicial management procedures include judicial administrative assignments, planning and ‘organisation of sittings and lists, the allocation of courtrooms’, as well as the ‘direction of administrative staff carrying out those functions’: Courts’ Strategic Directions Working Group, *Courts Strategic Directions Project* (Statement, 2 September 2004) 71.

<sup>6</sup> See generally Tin Bunjevac, ‘Transforming Court Governance in Victoria’ (PhD Thesis, Victoria University, February 2017).

<sup>7</sup> The *Courts Strategic Directions Project* (n 5) 52–62 identifies a long list of challenges, including political and budgetary pressures, unprecedented delays and backlogs, the growing litigiousness of society, greater complexity of law, higher expectations by litigants and so on. According to Robert Clark, in 2010, the Victorian courts had ‘Australia’s longest waiting lists for Supreme Court appeals, for County Court trials, in the Magistrates Court and in the Children’s Court’: ‘Coalition to Slash Court Delays’, *Robert Clark* (Web Page, 23 November 2010) <<http://www.robertclark.com.au/feature/ideas-and-solutions/coalition-to-slash-court-delays/>>, archived at <<https://perma.cc/6RFG-VCXX>>. See also Justice TH Smith, ‘Court Governance and the Executive Model’ (Conference Paper, Judicial Conference of Australia Colloquium, 2006).

was introduced, despite a number of early-warning signals that warranted at least a scholarly enquiry.<sup>8</sup> This article argues that the apparent lack of academic, political or general interest in this area is a concerning trend that may ultimately have unforeseen consequences for judicial independence and the administration of justice in this country. As recent experiences from a diverse group of international jurisdictions demonstrate, the institutional self-governance of the judiciary is not necessarily a 'one-way path and an unquestionable good';<sup>9</sup> it can be 'reduced and even abused',<sup>10</sup> especially if judges fail to develop the necessary administrative capacity to manage the court system in a more challenging institutional and political environment.<sup>11</sup>

<sup>8</sup> See, eg, Alford, Gustavson and Williams, *Governance of Australia's Courts* (n 1) 10. While the authors of the study did conduct interviews with judges, the study was essentially normative rather than evaluative in character. See also Judge Michael Forde, 'What Model of Court Governance Would Optimize the Expeditious Delivery of Justice, Judicial Independence and the Accountability of Queensland's Court System?' (Conference Paper, Governance and Justice Conference, Griffith University, 9–11 July 2001) 21–6. Judge Forde compared a limited number of court statistics from South Australia, but they were collected from documentary sources alone. His Honour's paper shows that judge-managed courts in South Australia were far more expensive to run and less effective than government-run courts in New South Wales ('NSW') and Queensland. For the federal courts, see Stephen Skehill, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio: Report to the Australian Government* (Report, January 2012). The report identified numerous problems in the administration of judge-managed federal courts, but this was primarily a policy-based strategic review of all federal agencies under the Attorney-General's portfolio. The reputation of federal judicial officers as court managers had been called into question following a series of large budgetary shortfalls: Michael Pelly, 'Federal Magistrates Court Audit Uncovers \$5m Black Hole', *The Australian* (online, 6 March 2009) <<http://www.theaustralian.com.au/business/legal-affairs/courts-5m-budget-blowout/story-e6frg97x-1111119045969>>.

<sup>9</sup> David Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' (2018) 19(7) *German Law Journal* 1567, 1586. See also Wim Voermans and Pim Albers, *Councils for the Judiciary in EU Countries* (Report, European Commission for the Efficiency of Justice, March 2003); Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15(7) *German Law Journal* 1257.

<sup>10</sup> Kosař (n 9) 1586.

<sup>11</sup> For a range of European perspectives, see Bobek and Kosař (n 9). For the federal courts, see Anne Wallace, 'Merging Federal Courts' Administration Won't Improve Services for Those Who Need It', *The Conversation* (Web Page, 4 November 2015) <<http://theconversation.com/merging-federal-courts-administration-wont-improve-services-for-those-who-need-it-49944>>, archived at <<https://perma.cc/3JKG-3R23>>. Wallace points out that the federal government reduced the Family Court of Australia's and the Federal Circuit Court's operational independence by placing all of their corporate services under the control of the Federal Court of Australia due to accumulated budget deficits. For the New Zealand perspective, see Forrie Miller, 'Reform of Courts Administration in New Zealand' [2019] (August) *New Zealand Law Journal* 232, 233. Miller points out that the New Zealand government merged the Department for Courts into the Ministry of Justice in 2003 without

Accordingly, the principal aim of this article is to invite the Australian academic community to contribute to this process and take a closer look at the emerging institutions and scholarly discipline of judicial self-governance.<sup>12</sup> Many important issues are at stake. First, what do we know about the concept of judicial independence in the age of judicial self-governance? While the traditional constitutional law lens has been preoccupied with the judiciary's perennial quest for independence from the executive government, the evolving power of judges in court management and the establishment of judicial administrative formations have received 'far less attention',<sup>13</sup> at least when compared to contemporary international scholarship in this area.<sup>14</sup> Two of the most ambitious empirical studies of judicial self-governance that were conducted in the United Kingdom ('UK') (2011–15)<sup>15</sup> and Europe (2016–20)<sup>16</sup> have practically gone unnoticed in Australian constitutional law circles, even though they pointed out 'huge'<sup>17</sup> policy and constitutional law implications of judicial self-governance.

consulting the judiciary. For North American experiences, see generally Perry S Millar and Carl Baar, *Judicial Administration in Canada* (McGill-Queen's University Press, 1981). For the United Kingdom ('UK') perspective, see Graham Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) 262.

<sup>12</sup> See, eg, Gar Yein Ng, 'A Discipline of Judicial Governance?' (2011) 7(1) *Utrecht Law Review* 102; Kosař (n 9).

<sup>13</sup> Kosař (n 9) 1574. See generally Mauro Cappelletti, "'Who Watches the Watchmen?': A Comparative Study on Judicial Responsibility" (1983) 31(1) *American Journal of Comparative Law* 1. See also Tin Bunjevac, 'The Corporate Transformation of the Courts: Towards a Judicial Board of Executive Directors' (2016) 25(4) *Journal of Judicial Administration* 197 ('The Corporate Transformation of the Courts'), which analyses the establishment of judicial boards of management from a normative level.

<sup>14</sup> The early pioneering research into judicial governance originated in the United States ('US'). However, much of the US scholarship is dated and reflects a different conception of the third arm of government to that found in Australia and Europe: see, eg, David J Saari, *American Court Management: Theories and Practices* (Quorum Books, 1982); Joe S Cecil, *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project* (Report, 1985); Russell R Wheeler, *Origins of the Elements of Federal Court Governance* (Federal Judicial Center, 1992).

<sup>15</sup> Gee et al (n 11); The Constitution Unit, 'The Politics of Judicial Independence', UCL (Web Page, 2015) <<https://www.ucl.ac.uk/constitution-unit/politics-judicial-independence>>, archived at <<https://perma.cc/2W9P-LH7H>>. A brief analysis of the study can be found in Tin Bunjevac, 'From Individual Judge to Judicial Bureaucracy: The Emergence of Judicial Councils and the Changing Nature of Judicial Accountability in Court Administration' (2017) 40(2) *University of New South Wales Law Journal* 806, 820–1 ('From Individual Judge to Judicial Bureaucracy').

<sup>16</sup> Kosař (n 9). Kosař is the principal investigator of a five-year, European Research Council-funded study on judicial self-governance: 'JUDI-ARCH Project', *Judicial Studies Institute* (Web Page) <<http://judicialstudiesinstitute.com/content/en/judi-arch/>>, archived at <<https://perma.cc/LE3L-8AH6>> ('JUDI-ARCH Project').

<sup>17</sup> Kosař (n 9) 1574.

Second, not much is known about the *inner workings* of the newly-established judicial institutions, such as judicial councils, judicial commissions or judicial management boards inside courts.<sup>18</sup> This is a prospective area for scholarly enquiry, as most of these institutions have been chronically under-researched, while others have been classified as *sui generis*.<sup>19</sup> It is perhaps due to their unique position within the judicial arm of government that these institutions have largely escaped the attention of empirical researchers from more established scholarly disciplines in Australia, such as political science, law, corporate governance, public administration and the organisational sciences. As a result, little *empirical* information is available about the internal operation of the judge-managed institutions or their broader systemic role within the court systems.

Undertaking scholarly research in this area will necessitate clear identification of the institutional ‘organs’ of judicial self-governance and detailed mapping of the courts’ internal divisions, stakeholders, rules and ‘constitutions’. These issues are explored, from a normative perspective, in Part I of this article, which seeks to examine the newly-established ‘judicial management boards’ in the Supreme and County Courts of Victoria following their transfer to judicial self-governance. However, as Kosař points out, only by conducting empirical research inside courts will we be able to fully understand the multitude of factors that can contribute to the ‘rise and fall of judicial self-governance’<sup>20</sup> and place us in a position to devise best-practice organisational solutions for the

<sup>18</sup> There is substantial international scholarship on judicial councils, but most studies analyse these institutions primarily from a policymaking, economic or constitutional perspective: see, eg, Voermans and Albers (n 9); Nuno Garoupa and Tom Ginsburg, ‘The Economics of Judicial Councils’ (Annual Paper, Latin America and Caribbean Law and Economics Association, University of California, Berkeley, 25 February 2007); Violaine Autheman and Sandra Elena, ‘Global Best Practices: Judicial Councils’ (IFES Rule of Law White Paper Series No 2, International Foundation for Electoral Systems, April 2004). A handful of empirical studies have been conducted in recent years: see, eg, Kosař (n 9), Gee et al (n 11); Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge University Press, 2012); Guy Lurie, Amnon Reichman and Yair Sagy, ‘Agencification and the Administration of Courts in Israel’ (2020) 14(4) *Regulation and Governance* 718.

<sup>19</sup> Committee for the Evaluation of the Modernisation of the Dutch Judiciary, States General of the Netherlands, *Judiciary Is Quality* (Report, December 2006) 29. The Committee defines the Dutch Council as a *sui generis*, non-departmental public body (‘NDPB’) based on two unique characteristics that distinguish it from all other NDPBs. First, it is the only NDPB situated within the judicial arm of government; and second, it performs a developmental function in the court system, having taken over that function from the Ministry of Justice. A third unique feature of European judicial councils is that they typically have extensive non-judicial participation on the governing board, which distinguishes them from the American models: see Tin Bunjevac, ‘Court Governance in Context: Beyond Independence’ (2011) 4(1) *International Journal for Court Administration* 35, 40–3 (‘Court Governance in Context’).

<sup>20</sup> Kosař (n 9) 1577.

future.<sup>21</sup> Over time, our research may even lead us to the development of an organic theory of judicial self-governance, perhaps initially through the adaptation of concepts borrowed from corporate governance and public administration theory.

Third, as the recent series of tragic events in the Victorian court system demonstrate,<sup>22</sup> it is insufficient to direct our scientific enquiry at the normative, administrative and institutional levels alone; we must also analyse the personal experiences of individual judges and others within the judicial management structures to ascertain whether their actual role corresponds to that assigned to them on paper (if one is specified at all).<sup>23</sup> Issues of psychological stress, well-being, independence and impartiality are most relevant in this context,<sup>24</sup> but so are issues about judges' competence to act as effective managers while addressing complex operational, procedural and case management tasks in their everyday work routines. Judicial leaders, academic researchers and court system stakeholders ought to be interested to know whether court officials have up-to-date knowledge about the latest international developments in areas such as

<sup>21</sup> Ibid 1598.

<sup>22</sup> There have been reports of at least four suicides of magistrates and other court staff in Victoria since the transition to judicial self-governance: see, eg, Emma Younger, 'Victorian Courts' "Unrelenting" Caseload Contributed to Magistrate Stephen Myall's Death, Widow Says', *ABC News* (Web Page, 12 April 2018) <<https://www.abc.net.au/news/2018-04-12/stephen-myall-magistrate-unrelenting-workload/9643950>>, archived at <<https://perma.cc/433R-C8D3>>; Peter Wilmoth, 'Loneliness, Panic Attacks, Insomnia: Life for Some on the Judicial Bench', *The Sydney Morning Herald* (online, 4 August 2018) <<https://www.smh.com.au/national/loneliness-panic-attacks-insomnia-life-for-some-on-the-judicial-bench-20180731-p4zukq.html>>, archived at <<https://perma.cc/2KP5-9MVJ>>; Richard Baker and Nick McKenzie, 'WorkSafe to Investigate the Coroners Court of Victoria', *The Age* (online, 24 February 2019) <<https://www.theage.com.au/national/victoria/worksafe-to-investigate-the-coroners-court-of-victoria-20190222-p50zof.html>>, archived at <<https://perma.cc/FZP2-G3L7>>.

<sup>23</sup> Important pioneering work in this area has been undertaken by Kathy Mack, Anne Wallace and Sharyn Roach Anleu, but discipline-specific research is required in jurisdictions that have adopted judicial self-governance: see, eg, Kathy Mack and Sharyn Roach Anleu, 'The Administrative Authority of Chief Judicial Officers in Australia' (2004) 8(1) *Newcastle Law Review* 1; Anne Wallace, Sharyn Roach Anleu and Kathy Mack, 'Evaluating Judicial Performance for Caseload Allocation' (2015) 41(2) *Monash University Law Review* 445.

<sup>24</sup> Carly Schrever, Carol Hulbert and Tania Sourdin, 'The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing' (2019) 28(3) *Journal of Judicial Administration* 141, 142. The authors could only identify '15 published studies worldwide purporting to systematically examine judicial stress': at 142 n 3.

caseflow management<sup>25</sup> and workload measurement,<sup>26</sup> which are the key to improving the effectiveness of court operations.<sup>27</sup>

This takes us to the next important issue at stake: how can any identified problems and capability gaps be addressed, and by whom? Most courts in Australia do not possess the necessary resources, know-how or methodological prowess to undertake complex empirical studies that measure how different types of cases are impacting the use of judicial and administrative resources.<sup>28</sup> Should this task ideally be undertaken by the court staff, managing judges, the judicial council, management consultancy firms, academics or someone else? Unfortunately, there are few — if any — court-system researchers in this country with the required technical expertise to manage such projects on their own.<sup>29</sup> This is partly due to the fact that the latest, state-of-the art workload measurement systems employ sophisticated ‘casemix’ and artificial intelligence

<sup>25</sup> Much influential work in this area has been conducted in the US: see, eg, David C Steelman, John A Goerdts and James E McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (National Center for State Courts, 2004).

<sup>26</sup> See, eg, Richard Van Duizend, David C Steelman and Lee Suskin, *Model Time Standards for State Trial Courts* (Model Standards, National Center for State Courts, 2011).

<sup>27</sup> See Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (Australasian Institute of Judicial Administration, 2012) 166. The authors of this landmark study pointed out that most judges and court administrators in Australia appeared to be ‘relatively unfamiliar’ with modern international advances in these areas.

<sup>28</sup> There are several illustrations of how courts in other jurisdictions have developed methodologies for the use of judicial and administrative resources. The Australasian Institute of Judicial Administration Award for ‘Excellence in Judicial Administration’ was given to the District Court of New Zealand for developing a ‘Judicial Resource Model’; a model that calculates the case weights in order to determine judicial resource requirements: Australasian Institute of Judicial Administration, ‘Award for Excellence in Judicial Administration’ (December 2019) *AIJA News* 2. See also Burkhard Hess, ‘Practical Ways of Combating Delays in the Justice System, Excessive Workloads of Judges and Case Backlogs: German Report’ (Follow-Up Seminar Paper, European Commission for the Efficiency of Justice, 27–8 September 2005). The author points out that a German study required the involvement of almost 2,000 judges and prosecutors to calculate the average processing times for several different types of court cases. See also Victor E Flango and Brian J Ostrom, *Assessing the Need for Judges and Court Support Staff* (National Center for State Courts, 1996).

<sup>29</sup> A study conducted by the Family Court of Australia, with the assistance of KPMG, describes an early (and since discontinued) attempt by the Court to measure administrative workload: Justice Stephen O’Ryan and Tony Lansdell, ‘Benchmarking and Productivity for the Judiciary’ (Conference Paper, Australasian Institute of Judicial Administration Conference, 7 July 2000). Similarly, the Federal Court of Australia engaged an American expert to advise on the setting up of the individual docket system: Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court’s Individual Docket System* (Law and Justice Foundation of New South Wales, 2002) 3.

(AI) technology that was originally developed for other industries.<sup>30</sup> To address this ‘capability gap’, Part II of this article identifies the need for comparative empirical research into the jurisdictions that have successfully introduced such systems in courts, using a *multidisciplinary* approach to investigate the difficult questions involved in establishing such systems that have been identified in the literature: technological, procedural, managerial, legal and ethical issues.

Finally, for constitutional law scholars and political science researchers who are perhaps more theoretically-inclined, the emergence of institutions of judicial self-governance prompts a range of unexplored constitutional theory questions that have only recently been identified by international scholars. The central research question in this area will be to examine how the transition to judicial self-governance has changed the constitutional separation of powers. Part III of this article places this issue in the Victorian context by pointing out that the Victorian legislation does not regulate the powers of the Minister towards the judicial council and courts, and there are also no provisions that envisage any formal institutional interaction between the self-managed judiciary and Parliament.<sup>31</sup> By contrast, the availability of explicit statutory *guarantees* of ongoing institutional engagement between the three branches of government was seen as being pivotal to protecting judicial independence in the UK following the landmark constitutional reform that took place in that country in 2005.<sup>32</sup> Australian research that examined the impact of the Victorian reform on the ability of the judiciary to secure adequate funding, protect institutional independence and maintain adequate visibility in a crowded political arena would make a valuable contribution to this field.

Another constitutional ‘crisis point’ is also conceivable — that the self-managed judiciary has become too independent, indolent, unresponsive or unwilling to engage with the government, Parliament or other stakeholders. Accordingly, there is also a need for future research to examine how the ‘politics of judicial independence’ have played out in the new institutional environment:

<sup>30</sup> The so-called ‘casemix’ systems have been designed for hospital funding: Alford, Gustavson and Williams, *Governance of Australia’s Courts* (n 1) 47–8. For a useful overview of international weighted caseload systems see, Mack, Wallace and Anleu (n 27) 166–70. See also Richard Mohr and Francesco Contini, ‘Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries’ (2007) 1(2) *European Journal of Legal Studies* 254 (‘Judicial Evaluation in Context’); Richard Mohr et al, ‘Performance Measurement for Australian Courts’ (1996) 6(3) *Journal of Judicial Administration* 156.

<sup>31</sup> Tin Bunjevac, ‘Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis of the *Court Services Victoria Act 2014* (Vic)’ (2015) 41(2) *Monash University Law Review* 299, 321–4 (‘Court Services Victoria’).

<sup>32</sup> Gee et al (n 11) 112.

what formal or informal arrangements are in place to ensure that the new institutions of judicial self-governance remain ‘responsive’ to the needs of government and other justice system stakeholders whose work is intricately connected with the work of the courts? A further aspect that could be investigated in this area is whether there are any ‘hidden guardians’ of judicial independence within the other two branches of government, such as the parliamentary select committees, Presiding Officers, Auditor-General’s and Victorian Government Solicitor’s offices, departmental officials and others.

As the introductory overview of this article demonstrates, the establishment of new institutions of judicial self-governance necessitates a new scholarly agenda that goes beyond the traditional categories of ‘judicial councils’ or desktop analyses of the ‘models’ of court governance. Much more empirical work is needed to allow us to fully understand the growing international phenomenon of judicial self-governance with all of its dimensions, values, motivations and complexities. Indeed, as the concluding Part of this article points out, European scholars have already started ‘unpacking’ the discipline of judicial self-governance into smaller units, such as judicial councils, informal self-governance, ‘digital’ self-governance, ‘information’ self-governance, ‘regulatory’ self-governance, and ‘ethical’ self-governance of the judiciary.<sup>33</sup> This article offers an initial contribution to this process in Australia by identifying a range of unexplored institutional design questions and research directions for consideration and adaptation by Australian scholars who may be interested in examining the regulation of judge-managed institutions from a legal, political, institutional, managerial or constitutional perspective.

## II JUDICIAL SELF-GOVERNANCE IN VICTORIAN COURTS

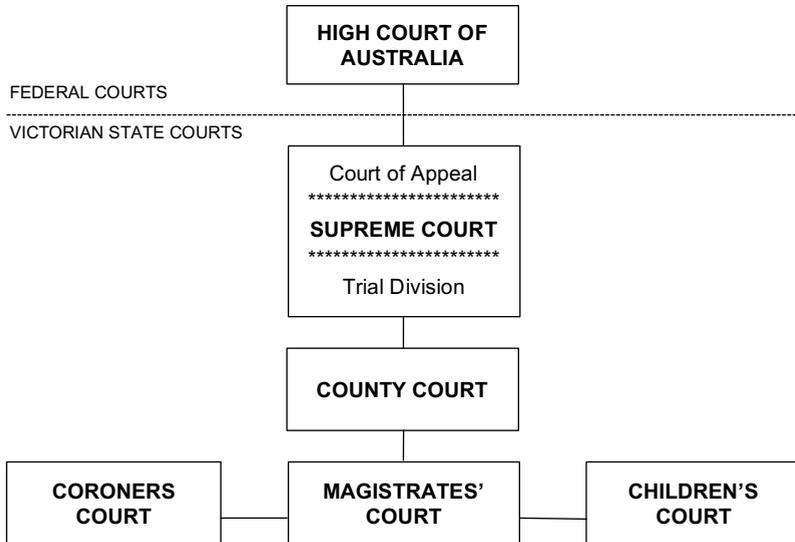
As foreshadowed, this Part of the article identifies the need for research into the internal governance arrangements of Victorian courts to determine what changes have been made since their transition to judicial self-governance. Victoria is the second largest Australian state with 6.7 million inhabitants<sup>34</sup> and a traditional three-tiered system of courts of general jurisdiction that was, until 2014, managed by the Department of Justice.<sup>35</sup>

<sup>33</sup> Kosar (n 9) 1596.

<sup>34</sup> Australian Bureau of Statistics, *National, State and Territory Population, June 2020* (Catalogue No 3101.0, 17 December 2020).

<sup>35</sup> ‘About CSV’, *Court Services Victoria* (Web Page, 18 December 2020) <<https://www.courts.vic.gov.au/about-csv/>>, archived at <<https://perma.cc/HRD2-X8J3>>.

Figure 1: Victorian Court System



The Victorian court system reform represents the most recent attempt *in the world* to transfer the responsibility for court administration from the executive government to the judiciary through the establishment of a judicial council, CSV,<sup>36</sup> which operates the court system's shared administrative services, and judicial management boards inside courts, which are involved in court administration.<sup>37</sup> This is a challenging task, because CSV and the courts must establish entirely new systems of administrative accountability that will not only address known deficiencies of the government-controlled model but also re-

<sup>36</sup> This type of judicial council is known in the literature as the 'court services model', because it is primarily responsible for the provision of corporate and administrative services to the courts. This model has been introduced in many northern European countries (Sweden, Norway, Denmark, Ireland, the Netherlands) and South Australia. On the history of the court services model, see generally Bunjevca, 'Court Governance in Context' (n 19). The Court Services Victoria ('CSV') model is to be contrasted with the judicial councils modelled upon the Italian *Consiglio Superiore della Magistratura*, which are primarily concerned with matters impacting judicial tenure, such as judicial appointments, complaints and the conduct of disciplinary proceedings against judges: see generally Bobek and Kosař (n 9).

<sup>37</sup> 'Functions and Structure', *Court Services Victoria* (Web Page, 18 December 2020) <<https://www.courts.vic.gov.au/about-csv/functions-and-structure>>, archived at <<https://perma.cc/W4TT-F7UF>>; Tim Bunjevca, 'The Transformation of Court Governance in Victoria' (Pt II) (2019) 28(3) *Journal of Judicial Administration* 169, 194–6 ('The Transformation of Court Governance in Victoria: Part II').

define judges' role in court administration and protect their independence in dispensing justice.<sup>38</sup>

Operational deficiencies of the government-controlled model of court administration have been well-documented both in Australia and overseas. Alford, Gustavson and Williams famously quipped that the internal management separation between the judiciary and court administration in government-run courts reminded them of a 'primitive organisation form' that was long gone from management theory textbooks.<sup>39</sup> According to the authors, an inherent flaw of this model was that those individuals who carried the ultimate responsibility for improving court performance (ie judges) did not have sufficient managerial authority over the court staff and other organisational resources needed to achieve that goal.<sup>40</sup> Instead, the court administration and finances were controlled by government officials who were not court professionals, were physically separated from the courts, and had no control over judges' work.<sup>41</sup> In management theory, this situation is characterised as a *misalignment* between 'authority' and 'responsibility', because it often results in duplication of internal processes and inefficient decision-making, if not severe malfunctioning of an organisation.<sup>42</sup> Alford, Gustavson and Williams concluded that the government control of court finances, staff and operations was 'problematic both for judicial independence on the one hand and for the efficiency and effectiveness of the courts on the other',<sup>43</sup> as courts were effectively forced to operate within broader governmental structures and priorities.<sup>44</sup>

<sup>38</sup> Voermans and Albers (n 9) 103.

<sup>39</sup> John Alford, Royston Gustavson and Philip L Williams, 'Court Governance: Can Justice Be Measured?' (Conference Paper, 21<sup>st</sup> AIJA Conference, 19–21 September 2003) 10 ('Can Justice Be Measured?'). The authors also pointed out that the government-run court systems reminded them of an 'ancient form of life'.

<sup>40</sup> Alford, Gustavson and Williams, *Governance of Australia's Courts* (n 1) 85–6.

<sup>41</sup> See generally Smith (n 7).

<sup>42</sup> Alford, Gustavson and Williams, *Governance of Australia's Courts* (n 1) 20, 42–3, 85–6.

<sup>43</sup> *Ibid* 85.

<sup>44</sup> *Ibid* vii, 23, 86. The authors noted that the government would, '[a]t unpredictable intervals, transfer funds from the courts' agreed annual budget to unrelated areas within the Department of Justice, which made it difficult for the courts to function independently from government and improve efficiency: at vii. For a European study that reached the same conclusion, see Voermans and Albers (n 9) 100–1. A similar conclusion was also reached by Canadian experts: Karim Benyekhlef et al, *Alternative Models of Court Administration* (Final Report, September 2006) 15.

*A Problems Associated with Judge-Managed Courts*

While in theory a judge-managed court system may be more likely to protect judicial independence and improve court performance,<sup>45</sup> practical experiences from a diverse range of jurisdictions demonstrate that the transfer to judicial self-governance does not necessarily translate into a better court system or more effective court organisation.<sup>46</sup> For example, Judge Forde's comparative study found that the judge-managed District Court of South Australia was more expensive to run and far less productive than the District Courts of Queensland and New South Wales, which were managed by the executive government.<sup>47</sup> The Australian federal courts have been criticised for running a series of extraordinary deficits over many years,<sup>48</sup> which recently prompted the federal government to reduce the operational independence of the Federal Circuit Court of Australia and the Family Court of Australia and place their corporate services under the control of the Federal Court of Australia.<sup>49</sup>

In Europe, too, judge-managed court systems have been the subject of criticism for their perceived lack of transparency, accountability and independence. For example, Selejan-Guțan examined the internal dynamics in Romanian courts and concluded that they had adopted an overly obedient administrative culture, which she attributed to the judiciary's compliant ethos inherited from the country's communist era.<sup>50</sup> In contrast, the judicial

<sup>45</sup> Alford, Gustavson and Williams, *Governance of Australia's Courts* (n 1) 89. The European Commission for the Efficiency of Justice Report recommended to the Czech Republic to introduce a system of integrated management, because that system was more likely to improve court efficiency: Voermans and Albers (n 9) 112.

<sup>46</sup> For a detailed review of the relevant literature on this issue, see Tim Bunjevac, 'The Transformation of Court Governance in Victoria' (Pt I) (2018) 28(2) *Journal of Judicial Administration* 69 ('The Transformation of Court Governance in Victoria: Part I'); Bunjevac, 'The Transformation of Court Governance in Victoria: Part II' (n 37).

<sup>47</sup> Forde (n 8) 26. Unfortunately, Forde's analysis was based on a desktop analysis of available statistical information and did not offer any empirical insights about any underlying organisational causes that may have been responsible for those results. See also Laurie Glanfield, 'Governing the Courts: Issues of Governance Beyond Structure' (Conference Paper, AIJA Conference, 14–16 July 2000) 4.

<sup>48</sup> Skehill (n 8) 25–6 [4.6]–[4.9]; Pelly (n 8).

<sup>49</sup> Wallace (n 11).

<sup>50</sup> Bianca Selejan-Guțan, 'Romania: Perils of a "Perfect Euro-Model" of Judicial Council' (2018) 19(7) *German Law Journal* 1707, 1724.

institutions in Italy<sup>51</sup> and Slovakia<sup>52</sup> have been traditionally dominated by a small group of senior judges, which in some cases has given rise to claims of ‘intra-judicial oppression.’<sup>53</sup> The experiences of Spain,<sup>54</sup> Turkey<sup>55</sup> and Slovenia<sup>56</sup> show that the executive government can continue to be dominant even under judicial self-governance. According to Kosař, this was achieved through politically-appointed members on the judicial boards or reliance upon complex informal networks.<sup>57</sup>

The examples above show that the transition to judicial self-governance is a complex process, which requires careful examination of internal judicial culture, administrative relationships between senior judges and other judges, as well as a range of formal and informal arrangements that exist between the judiciary and the executive government. These issues are undoubtedly relevant to Victoria as well, because the transfer to a judge-managed court system in any jurisdiction requires the establishment of new administrative frameworks that must be capable of supporting an effective system of court administration while protecting judges’ independence in dispensing justice.<sup>58</sup> As Millar and Baar pointed out in their seminal work, *Judicial Administration in Canada*, judge-controlled court systems ‘must evolve from the present non-systems.’<sup>59</sup> Drawing upon their extensive experiences from North American court system reforms, Millar and Baar went on to identify two common situations in which judge-controlled court systems failed to address the problems inherent in the government-controlled model. According to the authors, the principal reason was the judiciary’s failure to develop an effective system of internal administrative accountability,<sup>60</sup> while the second was the failure of

<sup>51</sup> Simone Benvenuti and Davide Paris, ‘Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model’ (2018) 19(7) *German Law Journal* 1641.

<sup>52</sup> Bobek and Kosař (n 9) 1288. Notably, former Chief Justice of the High Court of Australia, Sir Garfield Barwick, was also criticised for using his powers to assign cases in such a way so as to achieve the results he personally favoured: Neil Andrews, ‘Vinegar Free?: Sir Garfield Barwick’s Recipe for Judicial Salad’ (1996) 3(2) *Canberra Law Review* 175, 188–9.

<sup>53</sup> Bobek and Kosař (n 9) 1288 (referring to the dominance of senior judges on the Slovak Judicial Council). For Italy, see Benvenuti and Paris (n 51). See also Andrews (n 52) 188–9.

<sup>54</sup> Aida Torres Pérez, ‘Judicial Self-Government and Judicial Independence: The Political Capture of the General Council of the Judiciary in Spain’ (2018) 19(7) *German Law Journal* 1769.

<sup>55</sup> Başak Çalı and Betül Durmuş, ‘Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey’ (2018) 19(7) *German Law Journal* 1671.

<sup>56</sup> Matej Avbelj, ‘Contextual Analysis of Judicial Governance in Slovenia’ (2018) 19(7) *German Law Journal* 1901.

<sup>57</sup> Kosař (n 9) 1579–81.

<sup>58</sup> Bunjevac, ‘From Individual Judge to Judicial Bureaucracy’ (n 15) 814.

<sup>59</sup> Millar and Baar (n 11) 67.

<sup>60</sup> *Ibid.*

the judicial council to remain relevant and responsive to the needs of the courts in practice.<sup>61</sup>

### B *Developing Systems of Judicial Administrative Accountability*

The first obstacle identified by Millar and Baar has been traditionally attributed to the absence of clearly-defined competencies, internal documents or rules detailing judges' administrative responsibilities in courts.<sup>62</sup> According to Ng, introducing reforms in this area has been a slow process, because judges are known to resist formal management structures and hierarchical style of management.<sup>63</sup> One of the reasons for this is that the judicial working culture is characterised by individual autonomy, which is often justified with reference to the principle of judicial *decisional* independence.<sup>64</sup> However, as Langbroek points out, while judges' independence may be regarded as a strong attribute when it comes to dispensing justice in courts, it may also represent an obstacle to the effective management of courts, because it is difficult to implement and sustain reforms in any large and complex organisation without a robust system of administrative accountability and managerial discipline.<sup>65</sup>

The absence of clearly-defined judicial administrative responsibilities was specifically highlighted in the Victorian courts in the lead up to the 2014 reform. This author pointed out that there were no legislative provisions or formal court rules clarifying the functions and powers of the administrative judges presiding over the courts' internal administrative divisions, lists and portfolios, especially in the Supreme and County Courts.<sup>66</sup> It was also unclear what formal or informal arrangements were in place to coordinate the judicial administrative structures with the court administration that was controlled by the Victorian Department of Justice. Church and Sallmann illustrated this problem by pointing out that even the courts' own Chief Executive Officers ('CEOs')

<sup>61</sup> Ibid 67–71.

<sup>62</sup> Ibid.

<sup>63</sup> Ng, 'A Discipline of Judicial Governance?' (n 12) 107–8.

<sup>64</sup> Justice RE McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) 1(1) *Journal of Judicial Administration* 3, 6.

<sup>65</sup> Philip M Langbroek, 'Quality Management and Autonomy for Court-Organisations' (EGPA Paper, EGPA Studygroup on Management and Delivery of Justice, 2001) 10.

<sup>66</sup> Bunjevac, 'The Transformation of Court Governance in Victoria: Part II' (n 46) 194. The *Magistrates' Court Act 1989* (Vic) ss 6(1) and 13 confer more specific powers on the Chief Magistrate to assign duties to magistrates and ensure their attendances in court. Chief magistrates typically have much better defined powers, because magistrates' courts had evolved from the magistracy administrative model that was more hierarchical and bureaucratic from the outset: see Mack and Anleu (n 23).

were routinely excluded from meetings of judges, because they were regarded as executive officials, ‘rather than as “court people”’.<sup>67</sup>

According to former Chief Justice Marilyn Warren, the situation was not much better on the judicial side either, because the Chief Judge of the County Court and the Chief Justice of the Supreme Court did not have any formal legal authority or management tools to administer their courts, and instead needed to seek approval from all other judges sitting on the councils of judges before implementing any administrative reforms.<sup>68</sup> This type of collegiate decision-making is regarded as ineffective in the court governance literature, because it is primarily aimed at reaching a consensus among judges on all aspects of their work in the courts.<sup>69</sup>

### C *Judicial Management Boards in the County and Supreme Courts*

Following the 2014 reform, the County and Supreme Courts of Victoria established *non-statutory* court management boards,<sup>70</sup> which appear to be involved in court management *alongside* the pre-existing administrative structures. The County Court’s management board includes the head judges from the Court’s litigation divisions (the Criminal, Commercial and Common Law divisions),<sup>71</sup> which suggests that the Board has a strong *operational* focus and is therefore intended to operate as a board of *executive* directors. The Board also comprises the Chief Judge, head judge of circuits, and the Court’s CEO, who is a non-judicial director of operations.<sup>72</sup> Finally, and somewhat unusually, the management board is chaired by an ‘*advisor*’ to the Chief Judge<sup>73</sup> and continues to be

<sup>67</sup> See Thomas W Church and Peter A Sallmann, *Governing Australia’s Courts* (Australian Institute of Judicial Administration, 1991) 25.

<sup>68</sup> Chief Justice Marilyn Warren, ‘State of the Victorian Judicature Address’ [2007] 141 *Victorian Bar News* 22, 36.

<sup>69</sup> Thomas W Church Jr, ‘Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals’ in Arthur D Hellman (ed), *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Cornell University Press, 1990) 226, 229. Church Jr refers to a US judicial commission finding that any governing organ with more than 15 members “‘inevitably’ gives rise to “[s]erious problems of administration and of internal operation”’. See also Voermans and Albers (n 9) 100–1.

<sup>70</sup> County Court of Victoria, *2014–15 Annual Report* (Report, 2015) 8 (‘*2014–15 Annual Report*’); Bunjevac, ‘The Transformation of Court Governance in Victoria: Part II’ (n 46) 194.

<sup>71</sup> County Court of Victoria, *2014–15 Annual Report* (n 70) 8.

<sup>72</sup> *Ibid.* Apart from these six board members, the Board also includes the Court’s representatives on the CSV committees.

<sup>73</sup> County Court of Victoria, *Annual Report 2018–19* (Report, 2019) 51 (emphasis added) (‘*Annual Report 2018–19*’).

subject to ‘regular reporting’ to the Court’s Council of Judges,<sup>74</sup> which comprises 69 judges.<sup>75</sup>

In contrast, the management board of the Supreme Court has much wider membership, which, in addition to the Chief Justice, includes judges from unspecified judicial ‘administrative portfolios’ and ‘up to two independent members’, whose function is ‘to provide external unbiased advice on the administration of the Court.’<sup>76</sup> According to the Supreme Court’s *Annual Report*, meetings of the board may also be observed by the Executive Director of Corporate Services and members of the Court’s Leadership Group.<sup>77</sup> The broad composition and the inclusion of independent advisers and observers on the Supreme Court’s management board suggests that this is probably another policymaking or advisory organ, rather than an executive board, which is unusual in view of the existence of the Council of Judges comprising 40 judges. The advisory nature of the Board can also be inferred from the fact the Board was established by the Council of Judges ‘to assist with the Chief Justice’s role in determining the strategy, plans, procedures and policies for the court administration.’<sup>78</sup> The statement implies that the Chief Justice has a separate policymaking function in court administration that is exercised *concurrently* with the Council of Judges and the board of management. Presumably, this is because the Courts’ legislation was amended in 2016 to give the Chief Justice of the Supreme Court and the Chief Judge of the County Court a generic power to ensure the ‘the effective, orderly and expeditious discharge of the business of the Court.’<sup>79</sup> Nevertheless, the nature and extent of this responsibility remains unclear, especially since an earlier version of the Bill that sought to give the chief judicial officers the additional powers to ‘assign duties’ and to require judges to ‘carry out’ the assigned duties had lapsed and these powers have not been inserted into the Courts’ legislation.

Apart from the above, there is no information publicly available about the actual functions and procedures of the court management boards, or their administrative powers vis-à-vis the chief judges, the councils of judges, court

<sup>74</sup> County Court of Victoria, *2014–15 Annual Report* (n 70) 8.

<sup>75</sup> County Court of Victoria, *Annual Report 2018–19* (n 73) 6.

<sup>76</sup> Supreme Court of Victoria, *Annual Report 2017–19* (Report, October 2019) 63 (*‘Annual Report 2017–19’*).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.* (emphasis added). Traditionally, the Chief Justice was the only judge who could communicate with the CEO *on behalf of* the Council of Judges: Justice RE McGarvie, ‘Judicial Responsibility for the Operation of the Court System’ (1989) 63 (February) *Australian Law Journal* 79, 92.

<sup>79</sup> *Supreme Court Act 1986* (Vic) s 28AAA(1) (*‘Supreme Court Act’*); *County Court Act 1958* (Vic) s 8E(1) (*‘County Court Act’*).

divisions, court lists, court administration or the holders of judicial administrative portfolios (such as IT and finance).<sup>80</sup> Second, it is unclear how judges are selected to, and removed from, the management board, and whether the Board itself has any actual management powers over non-managing judges, such as to issue administrative directions or to temporarily restrict judges to non-sitting duties.<sup>81</sup> Third, it is unclear whether, and to what extent, the collegiate councils of judges are involved in the management affairs of each court, a practice that is not regarded favourably in modern court governance literature.<sup>82</sup> Finally, there are ‘unusual provision[s]’ in the *Court Services Victoria Act 2014* (Vic) (*‘CSV Act’*) that appear to give the CEO of CSV the powers to ‘direct’ the court CEOs and ‘appoint’ and ‘manage’ the court staff, thus suggesting the presence of yet another decision-making layer in court administration.<sup>83</sup>

#### D Future Research into Judicial Management Boards

To further investigate how the management boards operate in practice, comparative empirical research should be conducted into the internal governance arrangements of the County and Supreme Courts to contrast those arrangements with other jurisdictions that have successfully introduced executive boards of judges. One of the aims of the research would be to identify what formal strategies, practices, rules and documents have been created to assist the judicial executives in the performance of their duties. In practical terms, this aspect of the research would focus on identifying the policies or rules that regulate the relationships between the management boards, councils of judges, chief judges, court divisions, internal administrative portfolios, non-managing judges and court staff (if any). The research methodology should be modelled on comparable empirical studies conducted overseas, which typically involved questionnaires and structured interviews with court officials to discern whether and how administrative arrangements have improved judges’ effectiveness as court managers.<sup>84</sup>

<sup>80</sup> Bunjevac, ‘The Transformation of Court Governance in Victoria: Part II’ (n 37) 195.

<sup>81</sup> See, eg, *FCA Act* (n 4) s 15. Section 15(1) gives the Chief Justice the responsibility ‘for ensuring the effective, orderly and expeditious discharge of the business of the Court’. However, this includes the powers to ‘make arrangements as to ... who is ... to constitute the Court’, ‘assign particular caseloads, classes of cases or functions to particular Judges’ and even to ‘temporarily restrict a Judge to non-sitting duties’: at s 15(1AA)(a).

<sup>82</sup> Voermans and Albers (n 9) 100–1. See Church Jr (n 69) 229.

<sup>83</sup> *CSV Act* (n 2) ss 25(1)(b), 33(2)(b). See also Bunjevac, ‘Court Services Victoria’ (n 31) 309–10.

<sup>84</sup> For useful questionnaires, see Voermans and Albers (n 9) 121–5; Mack, Wallace and Anleu (n 27) 206; WJM Voermans, *Geïntegreerde Rechtbanken: Het Vervolg* (Report, 1994) 95–8;

While a comprehensive assessment can only be made following an in-depth empirical study, the publicly disclosed features of the Victorian management boards do raise interesting questions. As noted above, modern court governance literature does not view favourably the situation where there are multiple decision-making layers and organs involved in the court administration.<sup>85</sup> In Victoria, it appears that the councils of judges, the management boards, the CEO of CSV, the court CEOs, divisional head judges, as well as the chief judges are all involved in court administration and policymaking at the same time.<sup>86</sup> This problem is further compounded by the fact that the actual powers and functions of these court organs and functionaries are either unpublished or insufficiently defined in any statute, court rule or regulation, which lacks transparency and promotes administrative ambiguity. This state of affairs should be contrasted with the successful board models from the United States ('US') and Europe, which may also be considered in future research.

#### *E Comparison with the US and the Netherlands*

The most successful judicial institutions in the US demonstrate a strong desire by the judiciary to formalise the administrative structures and relationships within courts in the form of highly transparent rules and regulations.<sup>87</sup> As Wheeler explains in the context of the US federal judiciary, the judicial administrative bodies and chief judges were typically given not only the power to ensure the expeditious and efficient disposition of cases, but also to make

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances' (PhD Thesis, Utrecht University, 2007) ch 3; For specific judicial evaluation methodology issues, see Mohr and Contini, 'Judicial Evaluation in Context' (n 30); Francesco Contini and Richard Mohr, *Judicial Evaluation: Traditions, Innovation and Proposals for Measuring the Quality of Court Performance* (VDM Verlag Dr Müller, 2008). Mohr and Contini explain that judicial evaluation research is a distinct method of evaluation research, which has a preference for qualitative assessment of the data and adherence to a set of identified values that inform the presentation of the conclusions: Richard Mohr and Francesco Contini, 'Conflicts and Commonalities in Judicial Evaluation' (2014) 4(5) *Oñati Socio-Legal Series* 843.

<sup>85</sup> According to a study, one of the identified key principles of effective court governance is '[c]lear, well-understood and well-respected roles and responsibilities among the governing entity, presiding judges, court administrators, boards of judges, and court committees': Christine M Durham and Daniel J Becker, 'A Case for Court Governance Principles' (Paper, Perspectives on State Court Leadership, Executive Session for State Court Leaders in the 21<sup>st</sup> Century, Harvard Kennedy School et al) 6.

<sup>86</sup> *CSV Act* (n 2) ss 10–12, 25, 33; County Court of Victoria, *2014–15 Annual Report* (n 70) 8; Supreme Court of Victoria, *Annual Report 2017–19* (n 76) 63.

<sup>87</sup> See generally Robert W Tobin, *Creating the Judicial Branch: The Unfinished Reform* (Authors Choice Press, 2004) 158. Interestingly, Tobin notes that this principle is enshrined in many state constitutions, which typically mandate the chief judge to establish administrative boards and appoint a chief administrative officer to 'serve at [their] pleasure'.

administrative orders that all judges must comply with.<sup>88</sup> The same principles apply in the state jurisdictions as well. For example, a resource developed by the National Centre for State Courts lists exemplar court rules from more than 30 state jurisdictions regulating matters such as the terms of office of judges and other court functionaries, appointment and selection criteria, removal of administrative judges, functions and powers of administrative judges, judicial assignments, docket management, coordination of judicial schedules, meetings of judges, court organisation, and many other aspects of court administration.<sup>89</sup>

In Europe, the most successful example of the judicial management board is found in the Netherlands.<sup>90</sup> This court organ has been faithfully modelled upon a corporate board of *executive* directors, and consists of the court president ('chief judge'), divisional head judges and a non-judicial CEO who is also the director of operations.<sup>91</sup> In the court governance literature, this system is known as 'integrated management', because it effectively integrates *all* of the judicial and non-judicial operations under a *single* executive court authority. According to an empirical evaluation of the Dutch integrated management boards by Franssen, Mein and Verberk, the inclusion of the divisional head judges and the director of operations on the board effectively addresses the principal deficiency of the government-controlled model of court administration, which relied on multiple administrative chains of command within the courts.<sup>92</sup>

Like its American counterparts, the judicial management board in the Netherlands scores well against the modern criteria for judicial self-governance, which require the courts to formalise the administrative structures and

<sup>88</sup> See Wheeler (n 14) 19.

<sup>89</sup> National Center for State Courts, 'Key Elements of an Effective Rule of Court on the Role of the Presiding Judge in the Trial Courts' (Working Document, June 2006). See also Judicial Council of California, 'Judicial Council Governance Policies' (Policy Document, June 2008).

<sup>90</sup> Bunjevac, 'The Corporate Transformation of the Courts' (n 13) 209.

<sup>91</sup> *Ibid.* See also *Judiciary (Organisation) Act 1827* (Netherlands) s 15 ('*Judiciary (Organisation) Act*').

<sup>92</sup> Joost Franssen, Arnt Mein and Suzan Verberk, 'Gerechtsbesturen, Integraal Management en MD-Beleid' [The Functioning of Court Administration, Integral Management and Management Development Policy] (Final Report, 15 November 2006) 8. According to the Franssen, Mein and Verberk: 'The definitions of tasks, powers and responsibilities are clear. The court administrative boards are currently better able to manage their own organisations as a result of the transparency of the spending budgets. At divisional level in particular, integral management has been effectively implemented. In that sense the introduction of the integral management concept has provided a solution to the aforementioned lack of clarity regarding the (division of) tasks, powers and responsibilities [in the executive model]'.

relationships in the form of highly transparent rules and regulations.<sup>93</sup> Specifically, each court management board is required *by law* to detail its own internal management rules in the form of court regulations, which must, in any event, include rules about the board's decision-making, division of responsibilities, organisational structure, complaints procedure, delegation of duties, replacement of members in the event of illness, and the jurisdictional allocation of cases between the court divisions.<sup>94</sup> Therefore, the court regulations in the Netherlands can, in reality, be conceived of as a court equivalent of the corporate constitution.

There are other innovative features of the integrated management model that should be considered for future research. For example, all of the divisional head judges, as well as the presiding judge, are appointed by royal decree for a six-year term.<sup>95</sup> The idea behind this requirement is that the judicial representatives on the board should be chosen based on merit, which has been identified in the literature as an essential principle of judicial self-governance.<sup>96</sup> Another important feature of this model is that it fully separates the court management from the collegiate councils of judges, which no longer have a formal say in court operations, although they do continue to perform an advisory role to the governing board.<sup>97</sup> Lastly, the legislation itself purposefully prescribes a qualified definition of judicial independence in court administration, by making it clear that all judges must comply with administrative directions of the executive board, except where this would undermine party impartiality in court proceedings.<sup>98</sup>

#### F *Internal Judicial Independence under Judicial Self-Governance*

The qualified definition of judicial administrative independence in the Dutch legislation is an important innovation that runs contrary to the traditionalist views expressed by constitutional theory scholars, such as Shetreet, who

<sup>93</sup> See National Center for State Courts, 'Principles for Judicial Administration' (Guiding Principles, July 2012) 3. 'Principle 1: Effective court governance requires a well-defined governance structure for policy formulation and administration for the entire court system.'

<sup>94</sup> See *Judiciary (Organisation) Act* (n 91) s 19.

<sup>95</sup> *Ibid* s 15(4). The members of the management board may be reappointed. Once a term of at least six consecutive years has passed, the judge-managers are entitled to an allowance in addition to their salary for the work performed in their managerial capacity: at s 16(1).

<sup>96</sup> See National Center for State Courts, 'Principles for Judicial Administration' (n 93) 4. See also Durham and Becker (n 85) 5.

<sup>97</sup> *Judiciary (Organisation) Act* (n 91) s 28; Tin Bunjevca, 'Court Governance: The Challenge of Change' (2011) 20(4) *Journal of Judicial Administration* 201, 219–20.

<sup>98</sup> *Judiciary (Organisation) Act* (n 91) ss 23, 24.

famously warned that the creation of hierarchical patterns within the judiciary ‘might have a chilling effect on judicial independence.’<sup>99</sup> This issue has traditionally arisen in the context of judicial assignments, such as where a presiding judge improperly transfers another judge to a remote courthouse in order to influence their decision-making, or uses the power to assign cases to ensure results they personally approve.<sup>100</sup> However, most of these concerns can now be adequately addressed through the establishment of transparent judicial transfers regulations, such as those found in Queensland,<sup>101</sup> and non-discretionary systems for case assignment that are commonly found in continental Europe. For example, in Germany, the constitutional principle of the ‘lawful judge’ necessitates the creation of a case allocation system that takes away the court management’s discretion in assigning cases to specific judges.<sup>102</sup> According to Marfoding and Eyland, this constitutional requirement is designed to safeguard judicial independence and eliminate any potential for the arbitrary exercise of managerial authority in courts.<sup>103</sup>

Overall, however, the qualified definition of judicial independence in the Netherlands appears to be consistent with the contemporary theory on judicial administrative accountability, which sees multiple benefits associated with the

<sup>99</sup> Shimon Shetreet, ‘Judicial Independence: New Conceptual Dimensions and Contemporary Challenges’ in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff, 1985) 590, 639.

<sup>100</sup> See above n 52.

<sup>101</sup> The *Magistrates Act 1991* (Qld) provides an example of a transparent procedure for judicial complaints against transfers to remote locations. Parts 6 and 7 of the Act regulate the process and provide for the right to apply for an external review of the transfer decision before a Supreme Court judge.

<sup>102</sup> Annette Marfoding and Ann Eyland, ‘Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany’ (University of New South Wales Faculty of Law Research Paper No 28, 2010) 142–3, citing *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 101(1) and *Gerichtsverfassungsgesetz* [Courts Constitution Act] (Germany) 9 May 1975, BGBl I, 2019, 1002 § 16.

<sup>103</sup> Marfoding and Eyland (n 102) 142. In this context, it should be noted that the European Court of Human Rights has ruled the presiding judges’ discretionary power to assign cases to be in violation of art 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) (‘ECHR’), on the basis that it breached litigants’ right to have their dispute heard before an ‘independent court’: see Joost Sillen, ‘The Concept of “Internal Judicial Independence” in the Case Law of the European Court of Human Rights’ (2019) 15(1) *European Constitutional Law Review* 104. Arguably, this argument is likely to be made in Victoria as well in the coming years, because s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is broadly equivalent to art 6 of the ECHR (n 103).

establishment of judicial administrative hierarchies and no *inherent* conflict between judicial administrative ‘corporatisation’ and decisional independence.<sup>104</sup> As Malleson points out, it is *party impartiality* that must be protected, while judges’ administrative independence has no justification that is separate from its relationship with party impartiality.<sup>105</sup> Langbroek argues that greater corporatisation of the judiciary is unavoidable, because it is impossible to implement administrative reforms in any large organisation without a robust system of administrative accountability and discipline.<sup>106</sup> This view is also shared by Voermans and Albers, who completed a series of empirical studies of the Dutch courts when they were transitioning to judicial self-governance.<sup>107</sup> They concluded that the establishment of formal administrative hierarchies within the judiciary was *essential* in order to improve court performance and transform the courts from ‘organizations of professionals’ to ‘professional organization[s]’.<sup>108</sup> More recently, these findings were mirrored in a landmark empirical study of the UK court system, which concluded that the establishment of a formal judicial bureaucracy under the leadership of the Lord Chief Justice had significantly enhanced the judiciary’s capacity to protect judicial independence.<sup>109</sup> Specifically, the study found that greater judicial ‘corporatism’ enabled the judiciary to effectively engage with the other two branches of government and maintain its visibility in the broader political process.<sup>110</sup>

Future research into the judicial management boards in Victoria would make a further contribution to knowledge about these issues by investigating the experiences of judges within the newly-established judicial administrative structures.

<sup>104</sup> Gee et al (n 11) 101, 112, 127–8. Contini and Mohr point out that the relationship between judicial independence and administrative accountability is not a ‘zero sum game’, and the two can co-exist: Francesco Contini and Richard Mohr, ‘Reconciling Independence and Accountability in Judicial Systems’ (2007) 3(2) *Utrecht Law Review* 26, 28–9.

<sup>105</sup> Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999) 63.

<sup>106</sup> Langbroek, ‘Quality Management and Autonomy for Court-Organisations’ (n 65) 10.

<sup>107</sup> See, eg, Voermans and Albers (n 9) 97–105.

<sup>108</sup> Ibid 101 n 47 (emphasis omitted). See also Voermans (n 84) 90–1.

<sup>109</sup> Gee et al (n 11) ch 6.

<sup>110</sup> See *ibid*; Bunjevac, ‘From Individual Judge to Judicial Bureaucracy’ (n 15) 821. This author proposes a “‘new elaboration’ of judicial administrative accountability’, according to which ‘the introduction of formal [judicial] administrative hierarchies ... can be justified [on the basis that it can] improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence.’ As the present study does not allow for a detailed elaboration of these issues, in view of its more empirical focus, for a detailed review of the literature and theory, see at 814–21.

### III JUDICIAL SELF-GOVERNANCE AND WORKLOAD ORGANISATION

The absence of clearly-defined judicial administrative powers and responsibilities in courts is often compounded by the absence of sophisticated systems for workload measurement and work allocation. Prior to the Victorian reform, a series of longitudinal empirical studies by Mack, Wallace and Anleu found that *no court in Australia* had a differentiated caseload measurement system, which means that each court case was treated equally for workload planning and budgeting purposes, regardless of its length, type or complexity.<sup>111</sup> Furthermore, none of the courts had a formal process for assessing individual judicial performance, either in terms of their knowledge or in terms of the particular skills that needed to be strategically deployed.<sup>112</sup> Notably, most courts still used unwieldy paper diary systems and relied on implicit institutional knowledge in undertaking judicial workload allocation, which was regarded as inadequate and ineffective for the purposes of measuring and allocating workloads in the courts.<sup>113</sup> All of this led the authors to conclude that the existing systems were 'largely inadequate', while the Australian judiciary and court administrators appeared to be 'relatively unfamiliar' with contemporary international developments in this area.<sup>114</sup>

Against this background, this Part of the article first identifies the need for future research to investigate what workload organisation systems have been deployed by Victorian courts following their transfer to judicial self-governance. Second, there is also a need for empirical research to explore what innovations are available in this area in international practice that may be adapted for use by Australian courts. A third aspect that could be investigated in this context is the role of judicial councils in this area and, more broadly, their role in promoting the future development of the court system.

#### *A Recent International Developments in Workload Measurement*

In contrast to Australia, there is burgeoning overseas literature on weighted caseload measurement systems for the courts, particularly in the US and Europe. A key study by Flango and Ostrom sets out 12 detailed guidelines for establishing a weighted caseload measurement system, including a step-by-step methodology for calculating the judicial and administrative time required to

<sup>111</sup> Mack, Wallace and Anleu (n 27) 164.

<sup>112</sup> *Ibid* 162–3.

<sup>113</sup> *Ibid* 6, 166, 168.

<sup>114</sup> *Ibid* 166.

hear different types of cases.<sup>115</sup> In general, the methodology relies on a combination of quantitative and qualitative estimations, which allow courts to better approximate the workload for judges and court staff, while also taking into account court-specific factors that may differentially affect the estimations.<sup>116</sup> According to Flango and Ostrom, the main advantage of this system is that it gives a more accurate prediction of the courts' resourcing needs, which can be used to better plan and utilise existing resources or make more persuasive bids for additional resources.<sup>117</sup>

The accuracy of any weighted caseload system depends upon the method of measurement, quality of the data, and regular follow-up studies. The simplest method of measurement is the so-called Delphi technique, which is used in many US jurisdictions and relies on the analysis of historical court files and judicial estimations of the time required to process each case type or case activity.<sup>118</sup> The downside to this approach is that the consensus-derived case weights may not represent realistic estimates of the time needed to process cases and consequently may need to be verified by other means.<sup>119</sup>

In an attempt to improve the reliability of time estimations, some US and European jurisdictions have undertaken comprehensive time studies that required substantial resources and commitment from judges and court staff over extended periods of time. Hess illustrates this issue by pointing out that the Pebsby workload measurement system in Germany was based on an empirical study involving about 1,900 judges and prosecutors, as well as more than 40 courts, which identified typical annual workloads based on the average processing times for several different types of cases.<sup>120</sup> Similarly, in the Netherlands, the Lamicie workload measurement system involves periodic time-studies undertaken by a commission of judges that calculate the average processing times for a mixture of 45 different types of court cases and case events (also known as a 'casemix' system).<sup>121</sup> According to Langbroek, the system is used in annual negotiations between the judiciary and government to determine court

<sup>115</sup> Flango and Ostrom (n 28).

<sup>116</sup> Ibid 4.

<sup>117</sup> Ibid 19–20. See also Philip Langbroek and Matthew Kleiman, *Backlog Reduction Programmes and Weighted Caseload Methods for South East Europe: Two Comparative Inquiries* (Final Report, 2016) 38–9. According to the Langbroek and Kleiman, the Californian legislature appointed 50 new judges 'in response to a case weighting study' in 2006: at 38.

<sup>118</sup> Flango and Ostrom (n 28) 81.

<sup>119</sup> Ibid.

<sup>120</sup> Hess (n 28).

<sup>121</sup> Pim Albers, 'Reducing Delays: Recent Developments in the Netherlands' (Follow-Up Seminar Paper, European Commission for the Efficiency of Justice, 27–8 September 2005).

budgets, based on a fixed cost price assigned to each case type.<sup>122</sup> One of the known advantages of this system is that it improves court efficiency and budget transparency, because courts' needs are calculated by reference to actual cases outputs (cases resolved), rather than inputs (number of staff and judges employed).<sup>123</sup>

In the last few years, international experts have developed even more accurate caseload measurement techniques that, in addition to case weights, utilise sophisticated Data Envelopment Analysis ('DEA') algorithms and Stochastic Frontier Analysis ('SFA') modelling. These 'smart' case weighting tools make extensive use of AI and are designed to take into account all possible combinations of case weights for each court *relative to all other courts* within the same jurisdiction.<sup>124</sup> According to Wittrup, these tools allow court executives to calculate the optimal workload estimates for each court, undertake internal transfers of staff and judges, and create a more balanced workload among all courts.<sup>125</sup>

### B Criticisms of Weighted Caseload Systems

While there are, undoubtedly, many advantages of introducing weighted caseload measurement systems in courts, the examples from overseas must be treated with a degree of caution for a number of reasons. The first issue to bear in mind, according to Mack, Wallace and Anleu, is that, although the weighted caseload systems can be useful in measuring case complexity, they still cannot measure the quality of outcomes or the experiences of individual litigants.<sup>126</sup> The underlying concern here is that the courts might get carried away in

<sup>122</sup> Philip M Langbroek, 'Organization Development of the Dutch Judiciary: Between Accountability and Judicial Independence' (2010) 2(2) *International Journal for Court Administration* 21, 27 ('Organization Development of the Dutch Judiciary'). According to Langbroek, the Council for the Judiciary receives the budget from the Ministry of Justice based on a simplified calculation of 11 broad case types across all courts, while the budget allocation between the Council and the courts is actually based on 49 individual categories of cases.

<sup>123</sup> *Ibid.*

<sup>124</sup> Jesper Wittrup, 'The Importance of (Smart) Case Weighting' (Conference Paper, International Justice Forum, 18 September 2019) 11–13.

<sup>125</sup> *Ibid.* 5. Interestingly, this system has been successfully implemented in a number of developing countries, which benefitted from rule of law programmes funded by international aid donors: see, eg, Jesper Wittrup et al, 'Assessment of the Need for Judges in Georgia' (Report, 13 August 2018). For examples of international court studies using Data Envelopment Analysis ('DEA') algorithms and Stochastic Frontier Analysis ('SFA') modelling, see Linn Hammergren, Georgia Harley and Svetozara Petkova, *Case-Weighting Analyses as a Tool to Promote Judicial Efficiency: Lessons, Substitutes, and Guidance* (Report, December 2017) 30–4, 57–61.

<sup>126</sup> Mack, Wallace and Anleu (n 27) 170.

emphasising productivity over content quality, which could potentially also have a negative impact on judicial independence in dispensing justice.<sup>127</sup> Visser, Schouteten and Dijkers point out that many judges in the Netherlands have voiced concern about the formal link between the courts' annual budget allocations and the Lamicie workload measurement system, because in some courts it had created a culture where 'the management seemed to be interested predominantly in quantity and timeliness'.<sup>128</sup>

In an attempt to address these concerns, the Dutch Council for the Judiciary and courts have developed a counterbalancing quality management system called RechtspraakQ, which imposes a series of overarching organisational standards on the courts that are designed to maintain their focus on delivering quality legal outcomes.<sup>129</sup> The measures adopted for this purpose include a suite of internal 'quality regulations', court-wide positioning and peer-review studies, guaranteed time for judicial education, mandatory periodic second-reading of judgments, client evaluation surveys, staff satisfaction surveys, judicial complaints procedures, external audits, as well as a judicial performance appraisal system.<sup>130</sup> These measures are important and must be considered in future research, by focusing on the extent to which they have been effective in counterbalancing the negative tendencies of the casemix system in practice and their impact on the work of judges.

Another aspect that should be considered is whether a casemix measurement system would be compatible with the existing case allocation systems that operate in Australian state courts. Mack, Wallace and Anleu argue that weighted caseload systems are more appropriate for jurisdictions that are using the so-called individual docket system, which allocates each case to an individual judge from the first mention to the final hearing.<sup>131</sup> In contrast, Australian state courts use the so-called master calendaring system, which is much more unpredictable in terms of case allocation, because each interlocutory hearing is

<sup>127</sup> Nina L Holvast and Nienke Doornbos, 'Exit, Voice, and Loyalty within the Judiciary: Judges' Responses to New Managerialism in the Netherlands' (2015) 11(2) *Utrecht Law Review* 49; Francesco Contini and Davide Carnevali, 'The Quality of Justice in Europe: Conflicts, Dialogue and Politics' (Paper, Research Institute on Judicial Systems, Italian National Research Council, June 2010) 8.

<sup>128</sup> Contini and Carnevali (n 127) 8. See also Max Visser, Roel Schouteten and Josje Dijkers, 'Controlling the Courts: New Public Management and the Dutch Judiciary' (2019) 40(1) *Justice System Journal* 39, 48; Elaine Mak, 'Judicial Self Government in the Netherlands: Demarcating Autonomy' (2018) 19(7) *German Law Journal* 1801, 1837.

<sup>129</sup> Netherlands Council for the Judiciary, 'Quality of the Judicial System in the Netherlands' (Brochure, March 2008) 5.

<sup>130</sup> *Ibid* 5–10.

<sup>131</sup> Mack, Wallace and Anleu (n 27) 169. For a detailed overview of the individual docket system in the Federal Court of Australia, see Sage, Wright and Morris (n 29).

allocated to a different judge all the way up to the final hearing, and this potentially makes it more difficult to measure the case activities in a standardised way.<sup>132</sup> Nevertheless, it is difficult to see why Victorian courts would not be able to estimate the average number and duration of typical case events and interlocutory matters associated with each case type (which is a standard practice at the first mention in most court hearings), while leaving room for statistical ‘outliers’ to cover the situations where individual outcomes do not accord with those estimations.<sup>133</sup> This would arguably encourage judges to more effectively enforce the agreed timetables and reduce the number of unnecessary pre-hearing adjournments, which has been identified in the literature as one of the principal reasons for excessive court delays in the master calendaring system in Australia.<sup>134</sup>

A related question is whether a casemix system would even be suitable for a common law jurisdiction, such as Victoria, because it has a more adversarial

<sup>132</sup> Mack, Wallace and Anleu (n 27) 169. Mack, Wallace and Anleu suggest the weighted caseload system would not work in the magistrates’ courts due to the more unpredictable nature of their daily work routines. See also Gordon Griller and Patricia K Costello, *Master (Central) to Individual Case Calendaring Plan: 18<sup>th</sup> Judicial District of Kansas, Sedgwick County (Wichita)* (Final Report, April 2018) 11. The master calendaring system appears to be more appropriate for the lower courts, because they involve ‘narrow fact situations’, ‘numerous case types’ and ‘straightforward legal issues’ provided, however, that there is strict application of policies on adjournments and other pre-trial events. But see Hammergren, Harley and Petkova (n 125) 32. The author of a report on a Brazilian court project suggested that SFA modelling may be more appropriate for lower level courts with large data pools and a more homogenous case mix across all courts. According to Hammergren, Harley and Petkova, SFA modelling can be used to demonstrate ‘the enormous differences in performance as measured by several indicators between similar courts across states and within each one’: at 33.

<sup>133</sup> Alford, Gustavson and Williams, *Governance of Australia’s Courts* (n 1) 47. Alford, Gustavson and Williams point out that the casemix system would normally include flexible ‘outliers’ for ‘unexpectedly lengthy or short cases’.

<sup>134</sup> Marfording and Eyland (n 102) 249–53. This landmark empirical study of civil litigation analysed 240 comparable civil cases under the individual docket system in Germany and the master calendaring system in NSW: at xxi. It found that the lack of effective judicial case management at the pre-hearing stage within the master calendaring system was a key reason for excessive delay in NSW: at 141. The study found that the Regional Court of Stuttgart completed identical types of cases in 7.68 months, compared with 23.44 months in the District Court of NSW and 35.12 months in the Trial Division of the Supreme Court of NSW: at 113. The study also identified numerous disadvantages of the master calendaring system and recommended the adoption of the individual docket system in NSW: at 151. To date, the NSW government and the judiciary have not responded to the findings of the study, which has been described as ‘the most comprehensive and interesting comparative study of civil litigation in a generation’: Richard Ackland, ‘We Should Look to Germany for Justice’, *The Age* (online, 1 October 2010) <<http://www.theage.com.au/it-pro/we-should-look-to-germany-for-justice-20100930-15zcz.html>>, archived at <<https://perma.cc/9HEA-FC6B>>. For a recent National Center for State Courts study that includes guidelines for transitioning from a master calendaring system to an individual docket system, see Griller and Costello (n 132).

system of litigation than Germany or the Netherlands.<sup>135</sup> Alford, Gustavson and Williams briefly considered this issue in their study of court governance and formed the view that the creation of a casemix system in Australian courts would not represent an insurmountable obstacle from a technical point of view.<sup>136</sup> On the contrary, they argue that the adversarial system of litigation would likely counteract the negative tendencies of the casemix system, because judges in the common law jurisdictions have much less capacity to control the pace of litigation than do judges in less adversarial civil systems, such as the Netherlands and Germany.<sup>137</sup>

Apart from the outlined procedural issues, there are also significant technical questions relating to data collection and the use of AI that need to be better understood and investigated in future research. As pointed out earlier, the accuracy of any weighted caseload system ultimately depends on the availability of high-quality data and the correctness of the assumption that future case outcomes will be statistically similar to the ones recorded in the past.<sup>138</sup> Otherwise, as Wittrup points out: 'If [the] case statistics are erroneous, both [the] traditional and smart case weighting will fail to provide accurate estimates for the optimal allocation of [judges and] staff.'<sup>139</sup>

Unfortunately, there are few, if any, court system researchers in Australia with the required technical expertise in weighted caseload modelling, which means that any future studies in this area will likely necessitate an international or at least interdisciplinary approach to empirical research and project management. In addition, the question arises as to who would be best placed to lead or sponsor such projects, given that the judiciary would be highly unlikely to support any involvement by the executive government in this area. In the Netherlands, the development of the Lamicie system was largely driven by the Dutch Council,<sup>140</sup> which suggests that CSV may wish to be involved in the proposed project together with researchers from other industries who have practical expertise in developing casemix systems. A leading Australian institute in this area is the National Casemix and Classification Centre at the University of Wollongong, which has substantial expertise in developing casemix systems for

<sup>135</sup> Marfording and Eyland (n 102) 10–15. On this issue, the authors of the study explain that civil litigation in Germany has always been fundamentally adversarial in nature, despite the common misconception held by Australian lawyers that European courts use an inquisitorial system.

<sup>136</sup> Alford, Gustavson and Williams, *Governance of Australia's Courts* (n 1) 48.

<sup>137</sup> Ibid. See also Marfording and Eyland (n 102) 10–15.

<sup>138</sup> See above Part III(A).

<sup>139</sup> Wittrup (n 124) 20.

<sup>140</sup> Bunjevac, 'From Individual Judge to Judicial Bureaucracy' (n 15) 839.

Australian public hospitals (which are largely funded according to the number and types of treatments delivered, rather than the number of doctors employed).<sup>141</sup> The Centre has expressed interest in the proposed research, as it would provide a unique opportunity to investigate an entire spectrum of technical issues that are associated with the potential application of casemix technology in a different institutional environment.

*C Judicial Councils and Courts: A Source of Support, Protection or Hindrance?*

A further aspect that should be investigated as part of future research into the new institutions of judicial self-governance is the role of the judicial council in promoting the future development of the court system. This research would allow researchers to gain a deeper understanding as to the full range of supporting services that this new institution can provide to the courts in order to stimulate future innovation. This is an important enquiry, because, as Millar and Baar noted in their seminal study of North American court system reforms, one of the two traditional failings of judicial self-governance was to ensure that the judicial council remained relevant and responsive to the needs of the courts in practice.<sup>142</sup>

Recent experiences from the US, Europe and Canada suggest that the judicial council should not involve itself directly in the operational management of individual courts as this can lead to courts' over-reliance on the council and impede the development of judicial administrative capacity in the courts themselves. According to Church and Sallmann, the early American court reformers recognised the importance of preserving individual courts' operational autonomy by leaving basic decisions about case processing, staff selection and management in most cases with the courts themselves.<sup>143</sup> This practice allowed individual jurisdictions and federal circuits to develop innovative administrative rules and governance arrangements that were remarkably functional and innovative at the same time.<sup>144</sup>

<sup>141</sup> 'National Casemix and Classification Centre', *University of Wollongong Australia* (Web Page, 2021) <<https://www.uow.edu.au/ahsri/chsd/nccc/>>, archived at <<https://perma.cc/4P9V-APD5>>.

<sup>142</sup> Millar and Baar (n 11) 67–71.

<sup>143</sup> Church and Sallmann (n 67) 72–3.

<sup>144</sup> For example, the relevant US legislation allowed courts of appeal with more than 15 judges to experiment with internal administrative units: *Omnibus Judgeship Act of 1978*, Pub L No 95–486, § 6, 92 Stat 1629, 1633. The administrative innovations of the Ninth Circuit Court of Appeals, in particular, have been well-documented and studied around the world: see, eg, Church Jr (n 69).

In Europe, an empirical study commissioned by the European Commission for the Efficiency of Justice examined the internal management arrangements in the Irish court system following the establishment of a judicial council in that country: Irish Courts Service ('ICS').<sup>145</sup> Voermans and Albers noted that ICS had assumed a central responsibility for managing the court administration across all courts, while judges continued to operate in accordance with their traditional judicial administrative arrangements that they inherited from the executive system of court governance.<sup>146</sup> They concluded that this arrangement promoted ongoing management separation between the judiciary and court administration, while ICS retained many operational powers that could 'easily affect the judicial work' in individual courts.<sup>147</sup> Another perceived deficiency of this model, according to Voermans and Albers, was that ICS focused predominantly on the administrative and technical aspects of court administration, without paying sufficient attention to the broader systemic trends and strategies for improving the quality of justice in the future.<sup>148</sup>

In Canada, a study commissioned by the Canadian Judicial Council in 2006 similarly noted that the Canadian federal judiciary's reliance on the Courts Administration Service ('CAS') to centrally manage the court administration inhibited the judiciary's capacity to comprehend the broader business environment in which the courts operated.<sup>149</sup> Benyekhlef et al explain that judges in individual courts were missing the appropriate analytical framework to make effective operational decisions on their own due to ongoing reliance on CAS bureaucracy that centrally managed the court administration.<sup>150</sup> According to the authors, the only way to address this problem in practice was to ensure that both the judiciary and CAS concurrently received information on all aspects of court operations, otherwise the judiciary would 'have no mechanism' to identify when judicial intervention in court administration was required.<sup>151</sup> They concluded that the judiciary's reliance on CAS to manage the court administration rendered this model a variant of the *executive* system of court administration, despite the fact that CAS was independent of the executive

<sup>145</sup> Voermans and Albers (n 9) ch 4.

<sup>146</sup> Ibid 36.

<sup>147</sup> Ibid 37. Voermans and Albers point out that any changes initiated at the central level by the Irish Court Service, such as the way in which matters are processed or recorded, would impact on the way that the court registrars work and require constant changes across all individual courts.

<sup>148</sup> Ibid.

<sup>149</sup> Benyekhlef et al (n 44) 15.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid 103.

government and that the judiciary had the power to issue binding directions to it.<sup>152</sup>

In contrast to the ICS and CAS, which focus primarily on the technical and operational side of court administration, the literature on the judicial councils in the Netherlands and Sweden shows that this institution can be vested with much broader organisational competencies to support the future development of the court system.<sup>153</sup> In the Netherlands, the need to innovate and improve the quality of justice was identified as a fundamental challenge for the self-managed judiciary. This was partly due to the withdrawal of the executive government from that area of responsibility, and partly also because there was a recognition that the judiciary's traditional administrative culture and commitment to justice were no longer sufficient to meet modern society's expectations of the courts.<sup>154</sup> According to Voermans and Albers, modern court users and other stakeholders had additional demands from the courts, including the need to ensure

efficient streamlining of the working processes within the courts, judicial precision during procedures, permanent training of judges and auxiliary staff, uniformity in applying substantive and procedural law, correct treatment [of parties], avoidance of long waiting periods, guarantees concerning the speed of settlement, etc.<sup>155</sup>

Ten Berge explains how a judicial council can contribute to the expansion of the judiciary's administrative capacity and meet the *future* demands of the courts in each of these areas.<sup>156</sup> First, the judicial council can offer technical expertise to courts by devising new approaches to case management, and procedural and organisational accessibility. Second, it can provide various forms of professional support, such as advanced legal research, in order to improve

<sup>152</sup> Ibid 102–3.

<sup>153</sup> See generally Bunjevac, 'Court Governance in Context' (n 19). See also *Judiciary (Organisation) Act* (n 91) s 94: 'The Council is tasked with providing support for activities of the courts aimed at achieving uniform application of the law and promoting legal quality'.

<sup>154</sup> Voermans and Albers (n 9) 101–2. See also Courts' Strategic Directions Working Group (n 5) 52–62, which pointed out a series of emerging internal and external challenges that were impacting the Victorian courts: ongoing political and budgetary pressures, unprecedented delays, growing litigiousness of society, greater complexity of the law, higher service expectations from court users, and demands that the courts deliver more justice in less time and for less money.

<sup>155</sup> Voermans and Albers (n 9) 102.

<sup>156</sup> JBJM ten Berge, 'Contouren van een Kwaliteitsbeleid voor de Rechtspraak' in PM Langbroek P, K Lahuis and JBJM ten Berge (eds), *Kwaliteit van Rechtspraak op de Weegschaal* (WEJ Tjeenk Willink, Zutphen and GJ Wiarda Instituut, 1998), cited in Ng, 'Quality of Judicial Organisation and Checks and Balances' (n 84) 32.

the quality of legal outcomes in individual cases or categories of cases. Third, the council can provide organisational support to the courts by assisting them to devise best-practice organisational rules, policies and competencies for judges and court staff. Fourth, it can promote greater use of information and communication technology platforms to improve business and legal process analytics (such as the establishment of a weighted caseload system). Fifth, the judicial council can work with courts and educational providers to develop more formal and systematic approaches to training, education and professional development of judges and court administrators. Sixth, from a customer service point of view, the council can assist the courts by creating uniform policies on customer service and other organisational strategies that place a greater focus on the needs of court users. Finally, at a broader systemic and political level, the council can develop the legislative and policy proposals on issues impacting the courts and maintain effective institutional relationships with the government, Parliament and other justice system stakeholders.<sup>157</sup>

At first, ten Berge's prescriptions for a model judicial council paint the picture of a versatile judicial think tank that operates primarily as a research and development engine of the judiciary. However, as Langbroek, and Voermans and Albers separately point out, the judicial councils in the Netherlands and Sweden were primarily designed to *shield* the courts from the executive government by removing all direct institutional, administrative and financial connections between them.<sup>158</sup> In the Netherlands, this was achieved by bolstering the statutory competencies of the Dutch Council and turning it into a powerful monitoring agency for the courts.<sup>159</sup> In this regard, the Council's principal task is to distribute the budget to each court from a global budget it receives from the government, and to ensure that the courts account for their organisational functioning to the Council itself, rather than the government.<sup>160</sup> To achieve these aims, the Council in the Netherlands was vested with a vast range of supervisory functions over the courts under the *Judiciary (Organisation) Act 1827* (Netherlands), including the power to require the management board of each court to submit a detailed annual plan and budget for approval by the

<sup>157</sup> See Ng, 'Quality of Judicial Organisation and Checks and Balances' (n 84) 32.

<sup>158</sup> Langbroek, 'Organization Development of the Dutch Judiciary' (n 122) 25; Voermans and Albers (n 9) 22, 102.

<sup>159</sup> Voermans and Albers (n 9) 103. See, eg, *Judiciary (Organisation) Act* (n 91) s 29.

<sup>160</sup> Langbroek, 'Organization Development of the Dutch Judiciary' (n 122) 25, 27; Voermans and Albers (n 9) 103. See also *Judiciary (Organisation) Act* (n 91) s 29(1). This provision makes it clear that the Dutch Council allocates a budget to each court and may attach rules to the allocation of the budget. For Sweden, see Domstolsverket, *Verksamhetsplan 2020–2022* [Operational Plan 2020–2022] (Report, 25 February 2020); Voermans and Albers (n 9) 24–6.

Council.<sup>161</sup> In addition, the Council is entitled to issue general directions to the courts and set aside administrative decisions of the courts' management boards where it forms the view that those decisions are 'manifestly incompatible with the law or the interests of the proper operation of the court'.<sup>162</sup> Finally, in extreme cases, the Council can even recommend to the Minister the suspension or dismissal of court management board members for reasons of their 'unsuitability'.<sup>163</sup>

#### D *CSV and the Courts: Areas for Research*

All of the described features of the judicial councils identified above should inform future research into the newly established judicial council of Victoria (and South Australia), because they raise a number of unexplored questions regarding the judicial council's present and future role in the development of the court system:

1. To what extent is CSV's function in the court system comparable to that of the ICS or the Dutch Council for the Judiciary?
2. Does CSV have adequate organisational competencies and technical capabilities to shield the courts from the executive government, or to act as a research and development engine of the Victorian court system in the future?
3. Does CSV exercise any (formal or informal) policymaking, budgetary, supervisory or management-related powers over the courts, or does it merely provide them with shared technical services, such as security, archiving, IT and human resources support?
4. Finally, if CSV is not vested with any operational, policymaking, budgetary, supervisory or management-related powers over the courts, what is the main mission of this institution, and can the courts continue to operate without CSV, based on the Australian federal courts model?

While more definitive answers to these questions can only be provided following in-depth empirical research, there are a number of salient features of the CSV framework which suggest that this institution may have a limited role to play in the future development of judicial self-governance in Victoria. First,

<sup>161</sup> *Judiciary (Organisation) Act* (n 91) ss 31–2.

<sup>162</sup> *Ibid* s 37.

<sup>163</sup> *Ibid* ss 38(1)–(2). The recommendation is made to the Minister of Justice, while the dismissal is effected by royal decree. The law also provides a safeguard mechanism whereby any interested party is entitled to apply to the Supreme Court of the Netherlands to appeal against the recommendation and the Court can set it aside, where it finds there were no grounds for the recommendation: at s 39.

there are legislative provisions in the *CSV Act* which suggest that CSV's function will be confined to providing the '[shared] administrative services and facilities' to the courts, 'rather than conferring a broad mandate on CSV to improve the quality of justice in the court system'.<sup>164</sup> Second, as was pointed out earlier, the establishment of the court management boards in the County and Supreme Courts suggests that the courts are transitioning to a system of integrated management, which necessarily implies a reduced role for CSV in court administration.<sup>165</sup> Third, Speagle argues that CSV was always 'intended to have a "thin" centre',<sup>166</sup> because the courts had a preference for a decentralised model that would 'ensure that they retained control over their existing resources and what activities were actually undertaken by [CSV]'.<sup>167</sup> Specifically, Speagle points to *CSV Act* s 41(3)(b), which provides for the 'separate estimates of receipts and expenditure for each jurisdiction' to be submitted to the Attorney-General during the annual budgeting cycle. In other words, it appears that each court has retained a separate line of budget from the executive government, which indicates that CSV will be unlikely to act as an overarching monitoring agency of the courts, let alone shield them from executive interference.

On the contrary, Speagle argues that the individual funding link between the courts and the executive government may have been negotiated out of a concern by the lower courts that 'they would not fare so well against the "higher" jurisdictions [under a stronger CSV]'.<sup>168</sup> The courts' concerns about a stronger CSV may have been amplified by *CSV Act* s 33, which formally gives the CEO of CSV managerial authority over individual court CEOs, which is to be exercised concurrently with the chief judge of each court. Arguably, then, if that power were to be exercised in actual practice, that situation would be strongly reminiscent of the pre-reform arrangement, when individual court CEOs were placed in a position of conflicting formal and informal loyalties and demands between the chief judges and the Executive Director of Courts at the Victorian Department of Justice.<sup>169</sup>

<sup>164</sup> *CSV Act* (n 2) s 4. On this issue, see Bunjevac, 'The Transformation of Court Governance in Victoria: Part II' (n 37) 201.

<sup>165</sup> Bunjevac, 'Court Services Victoria' (n 31) 310–12.

<sup>166</sup> Donald Speagle, 'The Court Services Victoria Act 2014 (Vic): Disappointed Expectations?' (2020) 31(4) *Public Law Review* 398, 414.

<sup>167</sup> *Ibid* 413.

<sup>168</sup> Speagle (n 166) 418.

<sup>169</sup> Alford, Gustavson and Williams, *Governance of Australia's Courts* (n 1) 203; Bunjevac, 'Court Services Victoria' (n 31) 309. Prior to the reform, the court CEOs formally reported 'to the

Notably, former Attorney-General Robert Clark recently suggested that a far more substantive role had been envisaged for CSV during his time in office. He points out that, originally, ‘the allocation of resources to each court was to continue to be determined as part of the government’s annual budget processes, after consideration of budget submissions made by CSV and by individual courts, and with CSV providing administrative staffing and facilities to each court in accordance with that court’s budget.’<sup>170</sup> This suggests that the apparent sidelining of CSV may not have been the original intent behind *CSV Act* s 41, but was probably the result of subsequent informal negotiations taking place behind the scenes. The ongoing uncertainty about CSV’s role in this process demonstrates the importance of conducting future empirical research into the formal, as well as informal, powerbroking arrangements in this area, particularly because recent experiences from Europe have shown that in smaller jurisdictions ‘personal relations and informal networks play a more important role than the institutional design.’<sup>171</sup>

Another area that requires future research is to identify what supporting mechanisms or tools remain at CSV’s disposal to improve the functioning of the court system in the future, or to shield the courts from the executive government’s influence via the annual budgetary cycle. This is an important issue, because individual courts are far ‘more vulnerable to executive interference’ where ‘there is no judicial council interposed between [them] and the executive.’<sup>172</sup> This point is best illustrated by the recent *forced centralisation* of the Australian federal courts’ corporate services, which, according to Wallace, was principally ‘driven by the executive, rather than the courts, and motivated primarily by reducing costs.’<sup>173</sup>

Future empirical research in this area would greatly contribute to our understanding of judicial councils’ wider function in judicial self-governance and the extent to which CSV in particular will likely remain relevant and responsive to the needs of the courts in the future.

Chief Judges in relation to basic administrative tasks’, but were de facto answerable to the Executive Director of Courts at the Department of Justice ‘in relation to “broader business management reporting activities” and “resource planning and allocation”’.

<sup>170</sup> Tim Bunjevac, *Judicial Self-Governance in the New Millennium: An Institutional and Policy Framework* (Springer International, 2020) vii.

<sup>171</sup> Kosař (n 9) 1581, 1589, 1593. See also Avbelj (n 56); Björn Dressel, Raul Sanchez-Urribarri and Alexander Stroh, ‘The Informal Dimension of Judicial Politics: A Relational Perspective’ (2017) 13 *Annual Review of Law and Social Science* 413; Special Issue, ‘Informal Networks and Judicial Institutions: Comparative Perspectives’ (2018) 39(5) *International Political Science Review* 573.

<sup>172</sup> Bunjevac, ‘From Individual Judge to Judicial Bureaucracy’ (n 15) 828–9.

<sup>173</sup> Wallace (n 11).

#### IV JUDICIAL SELF-GOVERNANCE AND THE SEPARATION OF POWERS AND RESPONSIBILITIES FOR THE COURT SYSTEM

The proposed future research into the systemic effects of judicial self-governance in Victoria and Australia would be incomplete without in-depth investigation into the wider institutional, constitutional and political ramifications of the court system reform. From a theoretical perspective, it can be argued that the establishment of judicial councils and other institutions of judicial self-governance heralds the emergence of a strong and self-sufficient judiciary, with reduced dependency on the elected branches of government. As Langbroek explains, the transfer of responsibility for court administration to the judiciary was intended to reduce the 'traditional tensions' between the judiciary and the executive government through a corresponding increase in judicial self-responsibility and administrative independence.<sup>174</sup> At the same time, however, the court system reform can bring up unexpected *new sources of tension* to the surface, because the government continues to manage a suite of services that are deeply intertwined with the work of the courts, such as corrections, prosecutions and legal aid, thus requiring ongoing engagement and coordination with the judiciary. Even the judiciary's hard-fought institutional autonomy may turn out to be fickle and limited, because the courts' global budget will always be determined by the legislature,<sup>175</sup> while the executive government, for its part, may be more interested in addressing other political priorities. According to Laster, this situation poses a 'real danger' that the judiciary might find itself struggling for resources,<sup>176</sup> and this raises a number of fundamental questions that have not yet been explored in any study of judicial self-governance in this country.

##### *A The Scope of the Minister's Powers and Responsibilities for the Court System*

As foreshadowed, the first issue to be considered concerns the Minister's role in formulating the wider court system policy in coordination with CSV and the courts. This is an important issue, because, previously, the Attorney-General had direct, day-to-day insight into the operation of the courts and exercised

<sup>174</sup> Philip Langbroek, 'Two Cases of Changing the Judiciary and the Judicial Administration: The Netherlands and Guatemala' (Conference Paper, Conference on Empowerment, Security and Opportunity through Law and Justice, World Bank, 8–11 July 2001) 2–3.

<sup>175</sup> See Benyekhlef et al (n 44) 104. The authors discuss the inherent limitations of judicial self-governance and proceed to propose an ideal model where an independent commission is tasked with the formulation of the judiciary's budget: at 108.

<sup>176</sup> Kathy Laster, 'Separation of Powers through Separation of Administration?' (2011) 36(2) *Alternative Law Journal* 135, 135.

almost complete control over key aspects of court administration and court system policy.<sup>177</sup> In contrast, under judicial self-governance, the Minister's capacity to influence the court administration is 'objectively diminished',<sup>178</sup> because their role is confined to approving the courts' annual budget<sup>179</sup> and holding sporadic consultations with CSV pursuant to a non-binding Memorandum of Understanding ('*Victorian MoU*').<sup>180</sup>

The situation in Victoria should be contrasted with jurisdictions such as Ireland and the Netherlands, where the legislation provides a number of specific mechanisms to ensure that the court system remains a shared responsibility between the government and the judiciary. In Ireland, the *Courts Service Act 1998* (Ireland) ('*Courts Service Act*') provides that the CEO is responsible for the management of the ICS,<sup>181</sup> but the ICS itself is required to submit for the Minister's approval, 'with or without amendment, a strategic plan for [each] ensuing three year period'.<sup>182</sup> In addition, the ICS is required to 'have regard to any policy or objective of the Government or a Minister of the Government insofar as it may affect or relate to the functions of the Service'.<sup>183</sup> A similar set of provisions is found in the Netherlands,<sup>184</sup> but the legislation there also gives the Minister the power to issue 'general directions' to the Dutch Council should that be necessary to ensure the 'proper operation of the courts'.<sup>185</sup> In exceptional circumstances, the Minister is also entitled to set aside decisions of the Council where it has made decisions that are 'incompatible with the law or the interests of the proper operation of the courts'.<sup>186</sup>

<sup>177</sup> Bunjevac, 'From Individual Judge to Judicial Bureaucracy' (n 15) 834.

<sup>178</sup> *Ibid* 830.

<sup>179</sup> *CSV Act* (n 2) ss 41(4), (7).

<sup>180</sup> *Memorandum of Understanding between the Attorney-General (Vic) and the Courts Council of Court Services Victoria*, signed 7 May 2015, 7–10 [5.1]–[10.7] ('*Victorian MoU*'). Notably, the *Victorian MoU* (n 180) that was available for viewing on CSV's website in April 2020 expired on 30 September 2017: at 7 [5.1]. This document sets out a range of information-sharing arrangements between the government and CSV that focus on the financial management and the financial reporting arrangements under the *Financial Management Act 1994* (Vic): *Victorian MoU* (n 180) 5 [3.4], 6 [3.17], 9 [10.2], 10 [10.3]. Remarkably, the *Victorian MoU* (n 180) explicitly states that it 'does not create legal relations or constitute a legally binding agreement between the Parties. Nevertheless, the Parties intend to act in accordance with the terms and the spirit of the MOU': at 7 [4.2].

<sup>181</sup> *Courts Service Act 1998* (Ireland) ss 17, 19–20 ('*Court Service Act*').

<sup>182</sup> *Ibid* s 7(1).

<sup>183</sup> *Ibid* s 13(2)(b).

<sup>184</sup> *Judiciary (Organisation) Act* (n 91) ss 102(2), 104(2).

<sup>185</sup> *Ibid* s 93(1). The direction must not be issued if the Council takes the view that it would breach judicial independence: at s 93(4).

<sup>186</sup> *Ibid* s 106(1).

The examples from Ireland and the Netherlands reflect a recognition that the Minister of Justice will always be politically accountable for the proper operation of the court system and that the scope of that responsibility should, as far as practicable, be defined in statute.<sup>187</sup> In contrast, the exact scope and boundaries of the Minister's responsibility for the operation of the courts in Victoria remain undefined, which suggests that it remains informal and open to future interpretation and negotiation. The *CSV Act* itself confers a central responsibility for the operation of CSV on its CEO,<sup>188</sup> but there appear to be no corresponding legislative expectations on CSV to coordinate operational plans with the government or to take into account any government policy that may impact upon the operation of the courts.<sup>189</sup> The *Victorian MoU* takes this approach one step further by expressly declaring that the 'Attorney-General is not responsible for the administration of CSV or the Jurisdictions'.<sup>190</sup>

In this author's view, the suggestion that the Attorney-General will be a passive observer when it comes to the administration of CSV or the jurisdictions, is not only unrealistic, but potentially also seriously underestimates the underlying imbalances of power between the judiciary and the executive government in the wider political arena. In their analysis of the ICS, Voermans and Albers characterised the vesting of sole statutory responsibility in the CEO as a 'smokescreen' in view of the Attorney-General's ongoing political accountability 'for the supply of the means necessary for the administration of justice'.<sup>191</sup> They argue that when politically sensitive issues involving the courts do arise, the Minister will always have the upper hand in addressing those issues, because they will be under greater political and community pressure to respond and find a workable solution, regardless of who is formally in charge of court

<sup>187</sup> *Management and Financing of the Courts* (First Report, April 1996) 44. According to the Report, '[i]n a democracy of the type established in Ireland it is appropriate that there be political accountability: not, of course, in respect of the content of judicial decisions, but rather for the operation of the Court system. The financial and administrative infrastructure of the Courts are matters which enter the political equation for accountability.' For a corresponding view from the UK, see Gee et al (n 11) 38, who point out that the formal division of responsibilities between the judiciary and the government in the area of court administration was primarily deemed necessary by the judiciary, as it was no longer confident that the Lord Chancellor would protect its interests in Cabinet.

<sup>188</sup> *CSV Act* (n 2) ss 25-7. These provisions make it clear that the CEO functions as the accountable officer and public service body Head.

<sup>189</sup> Apart from s 41 of the *CSV Act* (n 2), CSV is subject to the Standing Directions issued under the *Financial Management Act 1994* (Vic), which applies in a modified form to CSV for being a 'public body' under s 3 (definition of 'public body'). See also *Victorian MoU* (n 180) 10 [10.3].

<sup>190</sup> *Victorian MoU* (n 180) 5 [3.5].

<sup>191</sup> Voermans and Albers (n 9) 38.

administration.<sup>192</sup> In that situation, according to Voermans and Albers, the judiciary's position will likely prove to be much weaker, because '[t]he line of a Minister's political responsibility to Parliament has different dynamics than that of the much slower and less direct line of responsibility that the Courts Service has with Parliament.'<sup>193</sup>

Voermans and Albers' predictions proved to be correct in 2011 when a new government was elected in Ireland on a populist platform to change the *Constitution* to permit a reduction in judges' salaries following a wave of funding cuts elsewhere in the public sector.<sup>194</sup> According to O'Brien, a group of Irish judges published a memorandum outlining their concerns about the wording of the referendum proposal on the website of the ICS.<sup>195</sup> This provoked a 'furious reaction' by the Minister for Justice Alan Shatter, 'who regarded the publication of the Memorandum ... as an unacceptable use of the resources of [the ICS] for political purposes.'<sup>196</sup> He demanded that the memorandum be immediately withdrawn, and the CEO dutifully complied with the direction, despite the fact that, under the *Courts Service Act*, the CEO is responsible to the Board of the ICS, which has a *judicial* majority.<sup>197</sup> According to O'Brien, the incident revealed that the ICS was 'anything but a representative body for the judiciary',<sup>198</sup> and that the judiciary 'had been made the victims of a power play by a Government anxious to show its "political virility" to the public'.<sup>199</sup>

<sup>192</sup> Ibid. Indeed, the community itself may regard the Minister to be accountable, regardless of who is formally in charge of the court administration: see, eg, John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Report, June 2003) 42. Uhrig gives the example of the Civil Aviation Safety Authority which had been managed by a board independent of the Minister. However, following a series of aviation safety incidents, the 'community expected the Minister to be accountable for the performance of the authority'. In response, the government removed the board and reinstated the government's direct involvement in the operation of the authority.

<sup>193</sup> Voermans and Albers (n 9) 33.

<sup>194</sup> See Susan Daly, 'Referendum on Judges' Pay Is Passed with Huge Majority', *thejournal.ie* (Web Page, 29 October 2011) <<https://www.thejournal.ie/referendum-on-judges-pay-is-passed-with-huge-majority-267496-Oct2011/>>, archived at <<https://perma.cc/F6XX-NT8T>>.

<sup>195</sup> Patrick O'Brien, 'Never Let a Crisis Go to Waste: Politics, Personality and Judicial Self-Government in Ireland' (2018) 19(7) *German Law Journal* 1871, 1895–6. Notably, the memorandum pointed out that judges were not in principle opposed to a reduction in salaries: at 1896.

<sup>196</sup> Ibid 1896.

<sup>197</sup> Ibid. The statutory position of the CEO is similar in Victoria, where the CEO of CSV is formally responsible to the board of CSV, which is controlled by the judiciary: *CSV Act* (n 2) ss 10(2), 12, 25.

<sup>198</sup> O'Brien (n 195) 1896.

<sup>199</sup> Ibid 1897. The referendum proposal passed by a majority of nearly 80%: at 1896.

From the Victorian perspective, the Irish experience highlights a potential new source of tension between the judiciary and the executive government that needs to be further investigated in order to be better understood. It shows that, in politically charged situations, the judicial council may have limited room to manoeuvre when it comes to defending the judiciary's position. It also shows that the actual, and as yet undefined, powers of the Attorney-General may in reality prove to be far more potent and unpredictable than the sparse budgetary provisions in the *CSV Act* or the *Victorian MoU* would suggest. Accordingly, one of the key issues to be investigated in future research concerns not only the Attorney-General's capacity to formulate the court system policy in coordination with the judiciary, but also the judiciary's administrative and political capacity to influence the government and Parliament in situations when their political priorities or interests fundamentally diverge.

#### B *The Judiciary's Capacity to Influence the Government and Parliament*

The landmark empirical study of the UK court system considered these issues in detail and found that the 'retreat of the politicians' was fast emerging as a *primary challenge* for the self-governed judiciary.<sup>200</sup> Gee et al explain that the nature of the political processes affecting the judiciary changed dramatically following the transfer of the leadership of the judiciary from the Lord Chancellor to the Lord Chief Justice in 2006.<sup>201</sup> One of the consequences of the reform was that the Lord Chancellor no longer commanded the same degree of political prestige or influence as before, with the result that he could no longer be relied upon as the judiciary's 'valuable advocate in Cabinet'.<sup>202</sup> The situation was not much better at the departmental level either, because the non-judiciary-related portfolio of the Ministry of Justice had grown exponentially to encompass areas such as corrections, probation and other aspects of the criminal justice system.<sup>203</sup> As a consequence, the judiciary had found themselves in a position where they had to 'compete for attention ... alongside ... more politically salient priorities'.<sup>204</sup>

According to Gee et al, the judiciary's very survival in this environment required greater internal administrative 'corporatisation' and the development of deeper institutional relationships with the executive government, Parliament

<sup>200</sup> Gee et al (n 11) 262.

<sup>201</sup> Ibid 130. See also *Constitutional Reform Act 2005* (UK) s 7(1) ('CRA').

<sup>202</sup> Gee et al (n 11) 33–4.

<sup>203</sup> Ibid 34.

<sup>204</sup> Ibid 35.

and other political actors.<sup>205</sup> Paradoxically, greater institutional independence of the judiciary required more, rather than less, political astuteness and formal engagement by the judiciary with the other two branches of government and the public.<sup>206</sup> When judges realised that they were no longer able to rely on informal undertakings from the Lord Chancellor that were rooted in centuries-old constitutional convention, they insisted on formalising the relationship with the executive through *explicit* constitutional guarantees and formal legal agreements, such as the *Constitutional Reform Act 2005* (UK) ('CRA'), the Concordat,<sup>207</sup> and two Courts Service Framework Documents.<sup>208</sup>

The extent to which the institutional relationship between the judicial bureaucracy and the elected branches of government has been formalised in England and Wales is truly remarkable for a country that traditionally relied on unwritten constitutional conventions to govern the relationships. To illustrate this issue, the CRA sets out the Lord Chancellor's overarching constitutional '[g]uarantee of continued judicial independence', which consists of specifically enumerated responsibilities towards the court system and the judiciary.<sup>209</sup> These include ensuring an efficient and effective system to support the court administration, properly resourcing the entire court system, as well as upholding the 'public interest' that the judiciary is supported in exercising its constitutional function to deliver justice.<sup>210</sup> The Concordat, which was the precursor agreement to the CRA, contains provisions about the establishment of the future judicial bureaucracy under the leadership of the Lord Chief Justice and regulates matters relating to the provision of resources, deployment, leadership posts, judicial complaints and judicial appointments.<sup>211</sup> Lastly, the Framework Documents outline the parties' responsibilities in court administration in minute detail, because the English judiciary demanded a document that would clearly set out 'who was responsible for what and who was accountable for

<sup>205</sup> Ibid 252–3.

<sup>206</sup> Ibid 263.

<sup>207</sup> Ibid 38. See also Select Committee on the Constitutional Reform Bill [HL], Parliament of the United Kingdom, *Constitutional Reform Bill [HL]: Volume 1* (HL Paper No 125–I, 2 July 2004) app 6. The Concordat is formally titled 'The Lord Chancellor's Judiciary-Related Functions: Proposals'.

<sup>208</sup> Gee et al (n 11) 42–3. See also Lord Chancellor, *Her Majesty's Courts Service: Framework Document* (Cm 7350, April 2008); Lord Chancellor, *HM Courts & Tribunals Service: Framework Document* (Cm 8882, July 2014).

<sup>209</sup> CRA (n 201) s 3.

<sup>210</sup> Ibid s 3(6).

<sup>211</sup> Select Committee on the Constitutional Reform Bill [HL] (n 207) app 6. These provisions have been included (in a modified form) in the CRA (n 201) pt 4.

what.<sup>212</sup> The end result, according to Gee et al, was that the partnership, which had functioned on an informal basis for centuries, was, within a decade, formalised in four extremely detailed legal instruments.<sup>213</sup>

Notably, the authors of the UK study also examined the changing institutional relationship between the judiciary and Parliament, where judicial participation is now also formally guaranteed under the CRA.<sup>214</sup> According to the authors, the judiciary's participation on the Parliamentary Committees afforded the judiciary an important platform from which they could ventilate their concerns, hold Ministers to account and '[monitor] the workings of the new institutional architecture' of the court system.<sup>215</sup> Having interviewed more than 150 senior judges, public servants, Ministers and parliamentarians, they concluded that the newly formed institutional interactions between the judiciary and Parliament had in fact acquired a *central role* in promoting judicial visibility and protecting judicial independence.<sup>216</sup>

The insistence by the English and Welsh judiciary on having explicit statutory guarantees of judicial independence under the CRA stands in sharp contrast to the Victorian judiciary's ongoing reliance on scant informal protocols and implicit undertakings that are rooted in constitutional convention.<sup>217</sup> Arguably, the absence of formal legal guarantees may result in the future marginalisation and self-isolation of the judiciary, with unpredictable consequences for judicial independence. To investigate these issues in more detail, future empirical research should be undertaken in Victoria that will examine the strength of the newly-formed institutional connections between the self-governing judiciary, the government and Parliament. The research should investigate the scope of the Minister's responsibility for the court system and the judiciary's ability to secure sufficient institutional visibility in the wider political arena. The research methodology should be modelled closely upon the UK study and should ideally be undertaken not only by legal scholars, but also by political

<sup>212</sup> Gee et al (n 11) 43. The scope of this article does not allow for a detailed exposition of the Framework Agreements, which cover all operational aspects of the Courts and Tribunals Service, including budgeting, performance standards, audits, resource allocation, inspections and governance. For a detailed analysis of the UK model of court administration, see Bunjevac, 'The Transformation of Court Governance in Victoria: Part I' (n 46) 89–91.

<sup>213</sup> Gee et al (n 11) 43. The CRA (n 201) alone contains more than 300 pages of detailed provisions.

<sup>214</sup> CRA (n 201) s 5 provides that senior members of the judiciary 'may lay before Parliament written representations on ... matters of importance relating to the judiciary, or otherwise to the administration of justice'.

<sup>215</sup> Gee et al (n 11) 113.

<sup>216</sup> Ibid ix, 112.

<sup>217</sup> See Bunjevac, 'The Transformation of Court Governance in Victoria: Part II' (n 37) 195.

scientists with an interest in examining the changing dynamics of the constitutional separation of powers in Victoria.

## V CONCLUSION

As the foregoing analysis demonstrates, the emerging institutions of judicial self-governance deserve a comprehensive research agenda that goes beyond the traditional analyses of judicial councils, commissions and 'models' of court governance that have been circulating in the literature since at least the 1980s. Much of that literature, including earlier contributions by this author, has an inherent limitation in that it portrays a '*static* view of judicial self-governance',<sup>218</sup> as if implying that the choice of a conceptual 'model' at one point in time predetermines the court system's success or failure in the future.

The recent empirical studies by British and European researchers have significantly raised the bar in this area by expanding the research agenda from both a practical and scholarly point of view. They portray judicial self-governance as a far more *dynamic* and complex network of actors and institutional layers that necessitate a dedicated and multidimensional approach to researching courts. The present study seeks to contribute to this process by identifying areas for future research that are intended to shed more light on the underlying organisational dynamics within Victorian courts and their interactions with government and Parliament.

The research proposed in Part I would provide practical insights into the new judicial administrative arrangements that have been established in the County and Supreme Courts and their impact on judicial independence. Specifically, the research would shed more light on the underlying organisational dynamics at the *micro*-institutional level by investigating the administrative rules and relationships affecting the internal organisational 'stakeholders', such as the councils of judges, boards of management, chief judges, divisional head judges, 'ordinary' judges and the court administration. These are basic areas of research from the point of view of disciplines such as corporate governance, public administration or management, and yet there are practically no empirical studies that are dedicated to examining these issues in Australia, despite the fact that South Australia and the federal courts had transitioned to judicial self-governance some 30 years ago. It is also hoped that this research would stimulate the future development of an organic theory of judicial self-governance, perhaps initially through the adaptation of concepts borrowed from corporate governance and the public administration theory.

<sup>218</sup> Kosar (n 9) 1586 (emphasis in original).

The second area for future research identified in this article lies at the *meso*-institutional layer of judicial self-governance by investigating the administrative capacity of the judiciary to innovate and improve the quality of justice in the future. From a practical point of view, this question is of paramount importance because the executive government is no longer directly responsible for the courts, while individual judges, by and large, have limited time and expertise to experiment and innovate.<sup>219</sup> Experiences from other jurisdictions suggest that the potential source of innovation and institutional support may be the judicial council. This article identifies the need for empirical research to investigate whether CSV is equipped with the necessary expertise and organisational competencies to make a meaningful contribution to the future development of the Victorian judiciary. A more immediate aim of the research would be to address the identified need for courts to develop an objective workload measurement system, and that aspect of the research can be further expanded to investigate issues such as the internal governance architecture (and future organisational relevance) of CSV itself. Future research in this area would also benefit from the expertise of other disciplines, such as the National Casemix and Classification Centre, for questions relating to the use of casemix technology, or public administration for questions relating to the regulation of independent non-departmental public bodies.<sup>220</sup>

<sup>219</sup> This is of course a mere generalisation, easily disproved by the Australian federal courts' enviable record in innovation: see generally Chief Justice Michael EJ Black, 'The Federal Court of Australia: The First 30 Years' (2007) 31(3) *Melbourne University Law Review* 1017, 1041–50. See also Bunjevac, 'The Transformation of Court Governance in Victoria: Part II' (n 37). The self-governed Australian federal courts have made 'remarkable achievements in areas such as judicial innovation, benchmarking and productivity for the judiciary, case management reform, and even the promotion of [rule of law] projects for overseas judiciaries': at 175 (citations omitted).

<sup>220</sup> Public administration experts in Europe have classified the judicial council as a public sector body *sui generis*, because it is the only non-departmental public body situated inside the *judicial* arm of government, and this makes it an interesting object of study from a regulatory and theoretical perspective: see Committee for the Evaluation of the Modernisation of the Dutch Judiciary (n 19) 29. This author has explored this issue previously from a purely theoretical perspective, and has argued that there are established concepts in the public administration theory relating to the governing board design, and well-defined mechanisms regulating the relationship between the Minister, the board and CEO that may be relevant in the context of judicial councils: Bunjevac, 'Court Governance in Context' (n 19). For example, in the Scandinavian countries, such as Sweden, Norway and Denmark, the judicial membership on the board of the judicial council is not static or permanent, which addresses the so-called 'problem of representation', which is associated with chief judges' permanent membership on the board of the judicial councils, such as CSV: Bunjevac, 'From Individual Judge to Judicial Bureaucracy' (n 15) 824–6. For other manifestations of the 'problem of representation', see Bobek and Kosář (n 9) 1270; Millar and Baar (n 11) 69–73. For the Scandinavian model of public administration

The third identified area for future research lies at the *macro*-institutional level and explores the wider systemic, political and constitutional aspects of the Victorian judiciary's unchartered journey of self-governance. The research should be closely modelled upon the landmark UK study that was undertaken by that country's leading political scientists, which suggests that Victoria would also benefit from the involvement of political scientists. The lessons from overseas show that the transition to self-governance can still lead to political contestation of judicial independence and the emergence of new sources of tension between the government and judiciary that should be further investigated in order to be better understood. This article identifies two potential sources of tension for future research; namely, the powers of the Minister in shaping the court system policy, and the judiciary's ability to protect judicial independence and maintain sufficient institutional visibility in a more complex institutional environment. One of the key lessons from Europe is that judicial independence requires more, rather than less, institutional engagement by the judiciary with the other branches of government. This research would provide a further contribution to knowledge in this area by examining the quality of the institutional interaction between the three branches of government.

This article shows that much more empirical work is needed to allow us to fully understand the growing phenomenon of judicial self-governance with all of its internal and external dimensions, motivations and complexities. While the existing literature on judicial councils, court reform, the role of chief judges, court procedure, court technology and case management often touches upon issues of judicial self-governance, a more holistic approach to examining those issues in the specific normative context of judicial self-governance has been missing.<sup>221</sup> As Kosař points out 'we still lack a comprehensive conceptual understanding of judicial self-governance.'<sup>222</sup> This article makes a further contribution to examining these issues in Australia.

and judicial councils, see generally Paul T Levin, 'The Swedish Model of Public Administration: Separation of Powers' (2009) 4(1) *Journal of Administration and Governance* 38; 'The Swedish National Courts Administration' (2007) 51 *Scandinavian Studies in Law* 629; John Bell, 'Sweden's Contribution to Governance of the Judiciary' (2007) 50 *Scandinavian Studies in Law* 83; 'The Danish Courts: An Organisation in Development' (2007) 51 *Scandinavian Studies in Law* 581; Arvid Rosseland (ed), 'Presentation of the National Courts Administration and the Norwegian Court Reforms of 2002' (2007) 51 *Scandinavian Studies in Law* 608.

<sup>221</sup> Kosař (n 9) 1575–6.

<sup>222</sup> *Ibid* 1576.

Kosař's six-year, European Research Council-funded,<sup>223</sup> empirical study goes one step further, by proposing to compartmentalise ('unpack') the emerging scholarly discipline of judicial self-governance into smaller units of study, just as the discipline of corporate governance once did, by broadening its traditional focus on directors' duties to issues such as directors' compensation schemes, board design, informational disclosure, agency problems, corporate social responsibility and so on. In a similar vein, Kosař proposes to shift the existing scholarship's focus from the *persons* and *bodies* of judicial self-governance, to underlying *dimensions* of judicial self-governance, which are many and varied.<sup>224</sup> He proposes an initial 'conceptual map' (Table 1) that outlines eight separate dimensions of judicial self-governance that should be the subject of future study: personal, administrative, financial, educational, informational, ethical, digital and regulatory self-governance of the judiciary.

*Table 1: Dimensions of Judicial Self-Governance: A Concept Map*<sup>225</sup>

<b>Judicial self-governance</b>	Personal	Selection of judges; promotion; disciplining; impeachment; relocation/reassignment; salaries and non-monetary benefits of judges
	Administrative	Work schedules; composition of panels; initial case assignment; case reassignment; case load quotas; court performance evaluation; case flow; setting the number of judges per court; setting the number and process of hiring law clerks; setting the number and process of judicial personnel; transfer of jurisdiction; processing complaints
	Financial	Setting the budget of the judiciary; setting the budgets of individual courts; allocation of budget within courts; non-monetary support for courts (law clerks)
	Educational	Training of judicial candidates; training of judges; organising conferences; attending conferences; funding of further education; compulsory education

<sup>223</sup> The European Research Council funded the project with an ERC Starting Grant: 'JUDI-ARCH Project' (n 16).

<sup>224</sup> Kosař (n 9) 1594.

<sup>225</sup> Ibid 1597.

<b>Judicial self-governance</b>	Ethical	Judicial ethics and codes of conduct
	Information	Transparency mechanisms; recording trials; publishing judgments; financial disclosure; protection of personal data (General Data Protection Regulation implementation)
	Digital	Administration of the files and judgments (data storage, clouds, servers); access to internet; online search engines; e-justice
	Regulatory	Rules of procedure; court statute

While many of the identified dimensions are not unique to judge-managed courts, they nevertheless require dedicated scholarly attention because each involves issues that do not normally arise in courts that are controlled by the executive government. For example, the judicial involvement in the budget negotiation, planning and fiscal spending ('financial self-governance') is far more extensive and arguably much more important under judicial self-governance than it is in the executive system, because budget can be used as an 'effective tool for shaping the judiciary'.<sup>226</sup> Furthermore, the *consequences* of any financial mismanagement are starkly different for judge-managed courts, because even a modest budget deficit can be portrayed as a sign of gross financial incompetence, thus significantly eroding the public confidence in the judiciary.<sup>227</sup>

A different set of theoretical, normative and reputational concerns arises with respect to the 'informational' self-governance of the judiciary, and this may be another potential area to engage in interdisciplinary research. Organisational scholars, such as Alford, Gustavson and Williams, explain that informational governance is a complex undertaking that must be regulated with due care and diligence even within a single large organisation.<sup>228</sup> For self-managed courts, the provision of information about their internal operations to the government and outside parties involves much higher stakes, because the informational exchange serves to address fundamentally different accountability

<sup>226</sup> Ibid 1594.

<sup>227</sup> For example, the Federal Magistrates Court was criticised for using the MYOB accounting software, 'which was designed for a small business and not an organisation with a budget of more than \$55 million': Pelly (n 8).

<sup>228</sup> Alford, Gustavson and Williams, 'Can Justice Be Measured?' (n 39) 12–22.

purposes when compared to courts that are run by the executive government.<sup>229</sup> In the executive system, the Minister of Justice exercises *vertical* control over all aspects of court administration and therefore has a complete picture of the court system's finances, operational demands, delays and other administrative issues.<sup>230</sup> In contrast, under judicial self-governance, the accountability relationship is much more *horizontal* and requires a robust informational exchange by the courts in order to give the Minister and other stakeholders a true account of the judiciary's stewardship of the court system.<sup>231</sup> According to Alford, Gustavson and Williams, the organisational theory of 'relational contracts' may be useful in addressing some of the trust-related problems that may arise in this situation, because that theory seeks to engender greater levels of trust between parties through specific strategies that have been devised by organisational researchers since the 1970s.<sup>232</sup>

The 'regulatory' self-governance of the judiciary is another important area for future research that underscores the fundamental differences between judge-managed and government-managed court systems. In essence, this aspect refers to the ability of judges to formulate the basic rules and structures of their own internal organisation,<sup>233</sup> an issue that was explored in Part I of this article. However, from a wider disciplinary point of view, the principal aim of 'regulatory self-governance' is not simply to document how management boards or court divisions are being managed or regulated by Victorian judges in practice, but to contribute to the development of a comprehensive normative and theoretical framework that will examine those issues in the abstract. By way of comparison, the discipline of corporate governance has developed multiple 'board theories' to explain the underlying organisational dynamics for different types of companies, and those theories have had a *direct* bearing on how corporate boards of directors are structured and regulated in different organisational settings. The so-called agency theory postulates a governing board

<sup>229</sup> According to Contini and Mohr, an accountable judiciary must establish the appropriate processes and strategies that *explain* the internal culture, values and workings of the judicial organisation to its stakeholders: Contini and Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (n 104) 30. Furthermore, the courts must also provide appropriate organisational strategies and accountability mechanisms to demonstrate that the judicial organisation acts in accordance with the fundamental values that it is seeking to uphold, such as the rule of law, equality, independence and impartiality: see generally Malleon (n 105).

<sup>230</sup> See Langbroek, 'Quality Management and Autonomy for Court-Organisations' (n 65) 6.

<sup>231</sup> The recent investigation by the Judicial Commission of Victoria into a staff member's suicide in the Coroners Court demonstrates the difficulties that the judiciary faces in this area. The Commission has been accused of being 'unable or unwilling to inform the public about [the outcome of the investigation]': Baker and McKenzie (n 22).

<sup>232</sup> Alford, Gustavson and Williams, 'Can Justice Be Measured?' (n 39) 16–24.

<sup>233</sup> Kosar (n 9) 1596.

with a majority of independent *non-executive* directors in order to minimise the management's (agents) potential influence on the board of directors (principals).<sup>234</sup> In contrast, the so-called stewardship theory has a preference for a board of *executive* directors.<sup>235</sup> That arrangement appears to be suitable for certain types of 'loosely coupled organizations' (such as the courts)<sup>236</sup> where the organisational interests of the principals and management appear to be less conflicting.<sup>237</sup> Future cross-disciplinary research in this area should investigate whether any of the corporate governance or public sector governance theories and normative prescriptions can be adapted to judge-managed courts, or whether there is a need for an *organic* theory of 'judicial board design' for different organisational units, such as court divisions, court management boards, judicial councils, judicial commissions and so on.

Another important area identified by Kosař is the effect of judicial self-governance on key *values* and *drivers* that influenced the reform.<sup>238</sup> The present study has highlighted a range of potential positive and negative effects of judicial self-governance on judicial independence, transparency and efficiency that will require future study and analysis. However, there are many other competing values that ought to be studied in this context as well, such as the effects of judicial self-governance on the quality of justice, public confidence in the judiciary, democratic legitimacy of the judiciary and the organisational effectiveness of the court system. The practical dimension of these issues cannot be disregarded either. As the experiences of Hungary, Poland, Turkey, New Zealand and the Australian federal courts vividly demonstrate, the journey towards self-governance is not a 'one-way path', because the government can abruptly decide to impose a different 'model' of court administration on the courts without even consulting the judiciary.<sup>239</sup> From a scholarly — *and the judiciary's* —

<sup>234</sup> See generally Henry Hansmann and Reinier Kraakman, 'Agency Problems and Legal Strategies' in Reinier Kraakman et al (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2004) 21. See also ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (at 1 July 2014) 16. Recommendation 2.1 recommends that 'a majority' of the board's nomination committee should be independent directors: at 14.

<sup>235</sup> Melinda M Muth and Lex Donaldson, 'Stewardship Theory and Board Structure: A Contingency Approach' (1998) 6(1) *Corporate Governance: An International Review* 5, 9.

<sup>236</sup> Mary Campbell McQueen, 'Governance: The Final Frontier' (Paper, Perspectives on State Court Leadership, Executive Session for State Court Leaders in the 21<sup>st</sup> Century, Harvard Kennedy School et al, June 2013) 1, 7.

<sup>237</sup> Muth and Donaldson (n 235) 6, 10. See also Lex Donaldson and James H Davis, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns' (1991) 16(1) *Australian Journal of Management* 49, 51.

<sup>238</sup> Kosař (n 9) 1603–10.

<sup>239</sup> See *ibid* 1599.

perspective, it is difficult to oppose or endorse such initiatives when we are still lacking a comprehensive understanding of the effects of judicial self-governance on the key values and drivers that led to the reform in the first place.

Kosař's study provides an initial, non-exhaustive, list of topics to be included on the future research agenda. It is intended to guide future research in this area and stimulate researchers to consider each of the identified dimensions in terms of the unique theoretical and normative requirements of judge-managed court systems.<sup>240</sup> The present article offers a further contribution to this process by identifying specific areas for future research for consideration and adaptation by Australian scholars who may be interested in examining the operation of judge-managed institutions from a legal, political, institutional, managerial, theoretical or constitutional perspective.

<sup>240</sup> Ibid 1598.