

The Supply of Judicial Labour: Optimising a Scarce Resource in Australia

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Abstract

Developed societies generate a multitude of controversies between their members, which need to be resolved fairly if society is to function well. Judicial officers play a central role in that process by hearing and determining disputes according to law, but they are costly and their long tenure entrenches labour market rigidities. This is an inconvenience for modern governments, as they attempt to keep the wheels of justice turning, while facing budgetary constraints that drive them to seek ever greater cost-efficiencies. This article surveys the ways in which governments in Australia have sought to optimise the judicial labour force by creating a more flexible and cost-effective supply. The system of justice that has evolved in response to these developments is a complex one, with many complementary parts. There is no unique solution to the question of how many judicial officers society needs to quell disputes because this goal can be achieved in different ways. But great care needs to be taken to ensure that government action to find flexible sources of labour to meet the demand for judicial dispute resolution does not come at too high a price in terms of respect for the rule of law.

Key words

Judges; judicial labour; judicial appointments; judicial tenure; part-time judges; productivity; retirement

Resumen

Las sociedades desarrolladas generan multitud de polémicas entre sus miembros, y éstas deben ser solucionadas de forma justa para que la sociedad funcione bien. Los agentes judiciales desempeñan un papel esencial en ese proceso, dado que atienden y solucionan disputas de acuerdo con el derecho, pero son agentes costosos y sus largas permanencias en el puesto perpetúan la rigidez del mercado laboral. Ello es un inconveniente para los gobernantes actuales, que intentan asegurar que el ejercicio de la justicia siga su curso, al tiempo que se enfrentan a limitaciones presupuestarias que los empujan a buscar una eficiencia en relación a los costes cada vez mayor. Este artículo estudia las maneras en las que los gobiernos de Australia han procurado optimizar la fuerza de trabajo judicial mediante la creación de un suministro más flexible y más eficaz con respecto al

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coste. El sistema de justicia que ha evolucionado en respuesta a estos desarrollos es complejo, con muchas partes complementarias. No hay una única respuesta a la pregunta de cuántos agentes judiciales necesita la sociedad para mitigar disputas, porque este objetivo se puede conseguir de diferentes formas. Pero hace falta ser más prudentes para asegurar que la acción gubernamental centrada en encontrar fuentes de trabajo flexibles para satisfacer la demanda de resolución de disputas judiciales no implique un precio demasiado alto en términos de respeto al imperio de la ley.

Palabras clave

Jueces; labor judicial; nombramientos de jueces; cargo judicial; jueces a tiempo parcial; productividad; jubilación

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1. Introduction

Australia's population of 24 million people is served by a small coterie of judicial officers. They are an elite profession, performing a vital role in upholding the rule of law by hearing and determining disputes according to law. Are there enough judicial officers to adequately perform the tasks required of them? It is a question that might also be asked of other arms of government. Yet it is a question that does not readily admit of a simple answer because the optimal organisation of a complex institution, such as the justice system, does not have a unique solution. This article examines the issue by considering how the judicial labour force can be optimised by managing the supply of this scarce resource, bearing in mind the special role of the courts in maintaining the rule of law in a democratic society.

The study is confined to an examination of judicial labour in Australia, and the courts that constitute the judicial systems of its constituent federal, state and territorial polities. It is not an exhaustive study of the Australian experience, but draws selectively on examples to illustrate broader phenomena. For some purposes, it is valuable to view the Australian judiciary as a whole; for others it is useful to examine particular courts to understand how different parts of the system interact with each other. While Australia's experience is not necessarily representative of other countries, it provides valuable insights into the challenges of managing judicial labour in a common law system, especially one with a federal system of government and federal constitutional protections of judicial independence. There is ample scope, however, for further comparative research to elucidate the challenges of managing judicial labour, and to share solutions grounded in the lived experience of other countries and legal systems.

Wherever possible, this article adopts an empirical approach by utilising available data on the judicial system. Unfortunately, Australia is not well served in this regard (Opeskin 2013). Official statistics are minimal, and what there is often suffers from the opposing challenges of being either too highly aggregated or too highly disaggregated, with no common counting rules. This article utilises published data from two federal government agencies (the Productivity Commission and the Australian Bureau of Statistics), the annual reports of individual courts, survey data from a small number of academic studies, and other small ad hoc data collections. A fuller understanding of the supply of judicial labour would be facilitated by the availability of additional high-quality data.

This article surveys a range of mechanisms that have been used, or could be used, to regulate the *supply* of judicial labour. It must be observed, however, that it is impossible to assess whether the supply of judicial officers is adequate unless one also understands society's *demand* for judicial dispute resolution. Governments have made substantial efforts to temper that demand by altering rules of civil liability to remove or restrict common law rights of action; pushing matters down the court hierarchy to lower courts that can adjudicate disputes faster and at lower cost; or diverting matters outside the court system to be resolved through non-adversarial processes or through tribunals that operate with less cost and formality than courts. There is almost certainly an interrelationship between supply and demand: for example, shortage of judicial supply may lead to increasing courts delays, which may push disputants into alternative dispute resolution, thus reducing the demand for judicial labour. However, these demand-side issues are beyond the scope of this study.

Part 2 begins by examining empirical data on the number of judicial officers in Australia, to elucidate the question whether there are too few judges in society. The following Parts then examine five supply-side 'solutions' to the potential shortfall of judicial labour.

The first and most obvious solution is to augment the number of judicial officers (Part 3). Australia's experience is that the judiciary has expanded over the past

decade, but at a very slow rate, with the main barriers to new appointments being the cost and inflexibility of tenured office. To ameliorate these concerns, increasing use has been made of temporary judicial appointments, but because this threatens judicial independence, the practice has elicited substantial opposition from the legal sector. The recent creation of part-time judicial positions also has the potential to augment the judicial labour force, and lead to greater diversity, but to date the impact of this initiative has been minimal.

A second solution looks not to additions to the judiciary through appointments, but to attenuating losses from the bench from departures (Part 4). The mandatory retirement age of judicial officers forces many capable individuals off the bench when they still have much to contribute. A number of proposals have been canvassed to reduce this loss by extending the age of mandatory retirement. For judicial officers who retire before reaching that age, it must also be asked whether the rate of attrition can be mitigated through better working conditions, especially to address the stress of judicial work.

A third solution is to increase judicial productivity so that outputs, in terms of finalised cases, can be achieved with fewer inputs, in terms judicial labour (Part 5). Leaving aside the difficulty of finding a measure of productivity that adequately captures the quality and quantity of the judicial function, efforts have been made in recent years to improve the efficiency of courts and their officers. The changes have sometimes been driven by government, and sometimes by judges themselves in their attempt to manage heavy workloads. Information technology has often been touted as a key to improving judicial performance, but the evidence in Australia is equivocal.

A fourth issue relevant to supply arises from the fact that judicial services are delivered in specific locations, and this generates questions about the optimal spatial allocation of resources within the judicial system (Part 6). Within each jurisdiction, legislation provides a framework for determining where a court is to sit, and how judicial officers are assigned to sit in those places. Between jurisdictions, the appropriate spatial allocation of judicial resources is much harder to achieve because the Australian judicial system is geographically compartmentalised. Model legislation to promote inter-jurisdictional judicial exchanges has been enacted in some states and territories, but it has not been utilised to address national disparities between demand and supply.

A final supply-side solution has been to make use of quasi-judicial personnel (masters, associate judges, registrars, and judicial registrars) to free judicial officers from minor routine work (Part 7). The greater use of these positions has assisted some courts in the efficient and cost-effective discharge of their business, but it is critical that judges maintain adequate supervision over the functions delegated to such additional personnel.

Part 8 concludes with the recognition that systems of justice in developed liberal democracies are necessarily complex. They have many working parts that complement each other and, to a degree, substitute for each other. There is no unique answer to the question of how many judicial officers society needs to quell disputes and uphold the rule of law because these goals can be achieved in different ways. It is true that judges and magistrates are an expensive resource, and that mechanisms for protecting their independence (such as tenure) create labour market rigidities. However, their office enjoys protection for sound reasons of public policy. Great care needs to be taken to ensure that government action to find flexible sources of labour to meet the demand for judicial officers does not come at too high a price. The best way to ensure a properly functioning judicial system is to appoint a sufficient number of permanent judicial officers who hold office until mandatory retirement age, albeit an age that is somewhat greater than Australian laws currently provide.

2. The vanishing judge?

In the United States, Australia and elsewhere, there has been considerable discussion of the 'vanishing trial' (Galanter 2004, Spencer 2005, Langbein 2012). Are judicial officers also vanishing and, if so, are they now too few in number to properly discharge the functions that the justice system requires of them? Consider, for example, the pointed comments made by the Chief Magistrate of NSW, following sustained cuts to the magistracy of Australia's largest court (Local Court of New South Wales 2015, p. 3):

[R]eduction in judicial resources challenges the ability of the Court to maintain an adequate level of service to country regions. The Local Court of NSW already has the lowest ratio of magistrates to population in the Commonwealth. Continually lowering the resources provided will inevitably lead to a loss of capacity to provide the same level of access to justice as is current (...). Should that come to pass, the social cost in providing a lesser service may well exceed the purported cost savings to government through a short-sighted reduction in judicial numbers.

This Part examines empirical evidence from Australia and asks what light it sheds on the putative shortage of judicial officers. While there are many ways in which judicial systems can be organised, and many ways in which judicial efficiency can be measured, an examination of the data is useful because it sheds light on changing patterns over time and allows comparisons to be made between jurisdictions.

The empirical evidence can be viewed through many prisms. In 2016, the Productivity Commission (2016) reported that there were 1,072 full-time equivalent (FTE) judicial officers in Australia as at 30 June 2015. This figure includes both *magistrates* (appointed to lower courts) and *judges* (appointed to intermediate and higher courts), but excludes the seven members of the apex court, the High Court of Australia. A head count of all individuals holding judicial office would produce a larger number (although it is not known how much larger) because the Commission's data rolls up the fractional service of part-time judicial officers and the additional service of temporary judicial officers on short-term appointments.

Yet, the national aggregate of 1,072 FTE judicial officers tells us little about specifics that might be relevant to assessing different dimensions of judicial shortage—for example, how judicial officers are distributed geographically (24% are in the most populous state of NSW), by court level (53% are magistrates), by subject matter (52% are allocated to criminal matters), by state/federal court (14% are federal appointees), or by gender (35% are women) (Australasian Institute of Judicial Administration 2016, Productivity Commission 2016).

Moreover, these figures give a static picture of the judiciary at a point in time. To ask whether Australian judicial officers are vanishing suggests a *process*, which requires the matter to be examined across time. Viewed in this way, there has been a net increase in the size of the Australian judiciary, although growth has been slow. Over the 13-year period for which nationwide data are available (2003–2015), there was a 9.2% growth in the aggregate number of FTE judicial officers—from 982 to 1,072. The addition of 90 FTE positions reflects an annual growth rate of only 0.68%. Unfortunately, these statistics do not allow disaggregation of full-time permanent, part-time permanent, and temporary judicial positions (see Part III below).

This growth has not been experienced uniformly across all states and territories, or across all court levels. On a national basis, almost all the growth occurred in the lowest tier of the court hierarchy, with Magistrates' Courts expanding by 18%, but District Courts and Supreme Courts each growing by less than 1%. However, the national data masks a decline in the size of the judiciary in three jurisdictions between 2003 and 2015 (–3.5% in the Australian Capital Territory; –4.0% in NSW; –7.2% in South Australia). In the latter two states, the decline was evident at all

court levels, suggesting that the problem of 'the vanishing judge' is persistent in some jurisdictions but not others.

The optimal size of the judiciary cannot be assessed in isolation from the size of the population that it services. Other things being equal, one would expect larger populations to require larger judiciaries to meet the need for dispute resolution. Thus, if the growth in the judiciary has not kept pace with the growth in the population, this may be a symptom of developing judicial shortage (assuming the initial position is one of equilibrium between demand and supply). For Australia, growth in population has regularly outstripped the growth in the judiciary (Figure 1). The indices show that the population grew by 19.5% between 2003 (base year=100) and 2015, but the judiciary grew by only 9.2% over this period, leading to a fall in the level of servicing. For Australia as a whole, the average number of judicial officers per 100,000 population deteriorated by 8.7%, from 4.93 in 2003 to 4.51 in 2015.

FIGURE 1

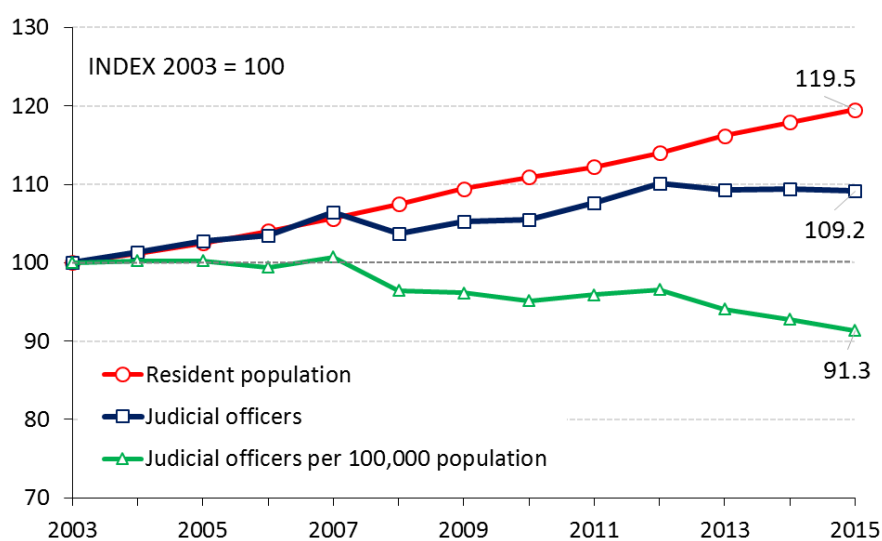


Figure 1. Indices of judicial officers, population, and the ratio of judicial officers to population, Australia, 2003–2015.

Source: Australian Bureau of Statistics 2016, Productivity Commission 2016 and prior years.

These data suggest that judicial officers are becoming scarcer per capita, but they do not necessarily mean that judicial officers are in short supply. There is a high degree of variability in the level at which societies are serviced by judges. The European Commission for the Efficiency of Justice (2014), operating under the auspices of the Council of Europe, collects data on the judicial systems of 47 European countries. In 2012, the average number of 'professional judges' per 100,000 population varied between 102.4 (Monaco) and 3.1 (Ireland), with a mean of 21.0. While it is difficult to draw contrasts between Australia and civil law countries, jurisdictions following the common law tradition are more useful comparators. In contrast to Australia's ratio of 4.51 judicial officers per 100,000 population in 2015, the level of servicing in Europe in 2012 was 3.5 in Scotland, 3.6 in England and Wales, and 3.8 in Northern Ireland.

This casts Australia in a favourable light, but it still does not arm us with the knowledge necessary to assess whether there are too few judicial officers in any of these jurisdictions. Judicial systems can be structured and operated in different ways, which impact on the appropriate level of servicing. For example, Australia's Northern Territory has a far greater number of magistrates per capita than any other state or territory, which is partly explained by its small population, scattered in remote communities across a vast territory—nearly six-times the size of the

United Kingdom (Opeskin 2013, p. 508). Many other factors can influence the level of judicial servicing, such as the volume of the activity (e.g. crime, motor accidents, marriages) that gives rise to litigation; the number of legal rights recognised by a legal system; the predictability of the law; the cost of litigation; and avenues for appeal (Casper and Posner 1974). This creates a complex and dynamic picture of supply shortage, which is distinctive to each society. The following Parts examine the mechanisms that have been used, or could be used, to redress the putative shortage of judicial officers in Australia.

3. Augmenting judicial appointments

3.1. Tenured appointments

One of the most obvious solutions to a perceived shortage of judicial officers is to appoint more of them. This may not be an immediate solution in civil law countries with career judiciaries, where long term workforce planning may be required to bring about change. However, in the Australian legal system, judicial officers are selected by the Executive government largely from the ranks of the practising profession or from the pool of existing judges. Judicial appointments are capable of being made expeditiously when the need arises.

It is relatively rare for legislation to specify the number of judicial officers that must be appointed to a court (although statutes do regularly specify the number of judges that comprise a sitting of an appellate court). Examples include the High Court of Australia (comprising seven justices), and some state courts of appeal (Opeskin 2001). In these instances, Executive tardiness in filling vacancies might be said to result in a shortage of judicial officers, but this assessment is made by reference to the legislative standard rather than the demand for judicial services.

For the vast majority of Australian courts, the constituting legislation authorises the Executive to appoint as many judicial officers as are necessary for transacting the business of the court. In these instances, a shortage of judicial officers might be assessed in comparison to historical staffing levels or the demand for judicial services.

It is important to bear in mind that governments in Australia do make frequent appointments to tenured judicial office, even where the growth in the aggregate size of a court appears to be sluggish, zero, or even negative. This is so because there is often considerable attrition from a court due to resignation, retirement or death (see Part 4). This can be illustrated by statistics on appointments and departures from NSW courts over the period 2004–2014 (Figure 2). Over this 11-year interval, the *net change* in the number of judicial officers was modest—a net increase of just 13 appointments (5.5%) from a base of 235 judicial officers in 2004.¹ However, this masked significant turnover in the workforce—189 judicial appointments were largely offset by 176 departures.

¹ This increase in the number of judicial officers is not necessarily inconsistent with the decline of 4% in NSW reported in Part II above: the periods are not congruent, the counting rules differ (FTE versus head-count), and it does not adjust for movement between courts within a state judicial hierarchy.

FIGURE 2

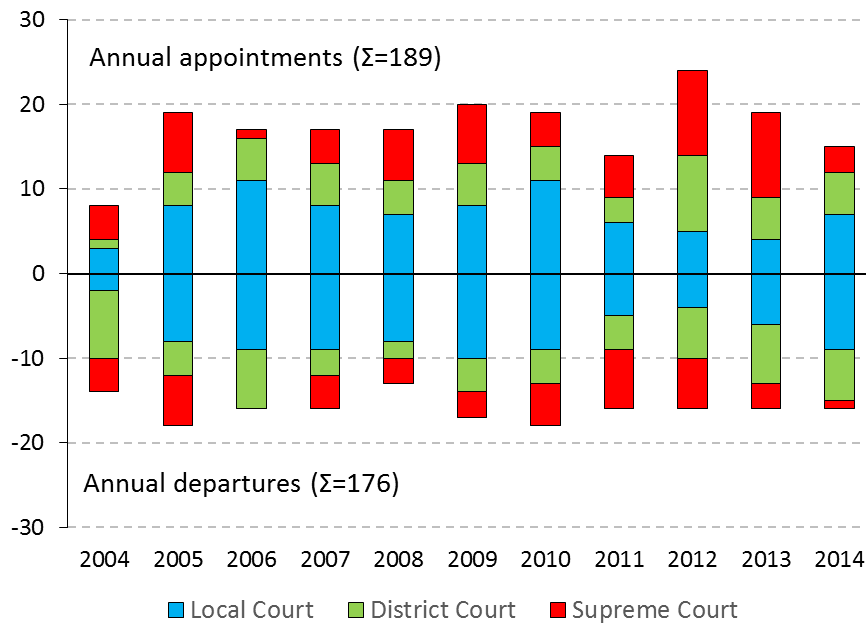


Figure 2. Annual Judicial Appointments and Departures, NSW Courts, 2004–2014.

Sources: (District Court of New South Wales 2015, Local Court of New South Wales 2015, Supreme Court of New South Wales 2015), and prior years.

The reluctance to appoint judicial officers beyond replacement levels may be the result of many factors, but financial cost and inflexibility are key considerations. Judges of most state and territory Supreme Courts are remunerated according to a benchmark set for judges of the Federal Court of Australia, who currently earn an annual salary of AUD 420,810 (USD 315,000) (Remuneration Tribunal 2015). This is six times the level of average male earnings (Australian Bureau of Statistics 2015), and this gap has widened steadily over the past 40 years. Moreover, governments have little control over judicial remuneration because it is set by independent tribunals, subject only to parliamentary disallowance.

Of equal importance is the cost of judicial pensions, which is largely hidden from public view. Judicial service that meets specified thresholds can generate a long tail of pension entitlements for the judge (from retirement until death) and for the judge’s spouse (until the spouse’s death). Depending on the circumstances of appointment and retirement, the aggregate value of pension entitlements may be many times greater than the salary paid to the judge during the years of active service (Opeskin 2011). Not all Australian jurisdictions have such generous taxpayer-funded pension schemes for judges, but for the majority that do, the combined cost of salary and pensions—together with the additional cost of allowances, offices, ancillary staff and libraries—impose a substantial burden on the public purse, which the Executive is usually keen to minimise.

A further constraint on judicial appointments is that they are inflexible. Judicial tenure ensures that judges and magistrates are entitled to hold office until they reach the statutory retirement age, regardless of the demand for their labour or (bar exceptional cases) the quality of their performance. If there is a general decline in demand for judicial dispute resolution, as has occurred in civil matters in recent years, a court may be left over-resourced. Similarly, if the Executive wishes to restructure courts, or push more matters into lower or intermediate courts, judicial tenure may create institutional rigidities that make reform slow or costly. In Australia, this is especially so for the federal judiciary, where judicial independence

is entrenched by the Constitution, but less so for the state judiciaries, where the Executive has greater latitude in restructuring the courts (Kirby 1995a).

Historical examples of these rigidities can be seen in the field of federal industrial disputes, where there has been substantial restructuring of courts over time (French 2000). After the Commonwealth Court of Conciliation and Arbitration was disbanded in 1956 and replaced by the Commonwealth Industrial Court, the old Court was not formally abolished for a further 17 years, when its last member retired from office. Similarly, when the jurisdiction of the Industrial Court was transferred to the newly created Federal Court of Australia in 1976, the Industrial Court was not formally abolished for a further 22 years, when its last member ceased to hold office. In the intervening years, the judges of the defunct Industrial Court retained federal judicial office 'with the title, rank, salary and pension rights of that office', including those judges who were given no duties on the new Court (Kirby 1995a, p. 188). One can understand why such experiences may dampen the Executive's enthusiasm in filling vacant judicial positions or creating new ones.

3.2. *Temporary appointments*

In most states and territories, the Executive can supplement tenured judicial labour by appointing temporary judicial officers, who are variously called 'acting', 'additional', 'auxiliary', 'reserve' or 'special' judges or magistrates. Depending on how the legislative scheme is structured, the facility can be used to reduce short-term court backlogs, fill a temporary judicial absence, import expertise in a particular case, manage conflicts of interest, or test the suitability of potential appointees for tenured judicial office. Temporary appointments answer some of the concerns about high cost and inflexibility associated with tenured office because individuals are appointed for a short fixed term and are often paid on a sessional basis, but they raise concerns about the potential loss of judicial independence (Appleby *et al.* 2017).

The arrangements just described are not replicated at the federal level in Australia. Federal judicial officers cannot be lawfully appointed on a temporary basis because the only tenure recognised by s 72 of the Australian Constitution is appointment until the mandatory retirement age, subject only to prior removal on the grounds of 'proved misbehaviour or incapacity'.

Among the states and territories, practice differs as to who may be appointed as a temporary judicial officer. Recognising that mandatory retirement laws can deprive courts of fine talent, many schemes contemplate the appointment of retired judges to ameliorate the consequences of forced departure. Other schemes allow for the temporary appointment of current legal practitioners (as is the practice in the United Kingdom, with its system of Recorders). In some states it is also possible for a judicial officer who holds a tenured appointment in one court to be appointed temporarily to a higher court. This does not add to the total capacity of the court system—since the addition of labour in one court is matched by subtraction in another—and can give the impression that the Executive is trialling a person for promotion. These issues erupted recently in South Australia in relation to the temporary promotion of three District Court judges to the Supreme Court of that state, and the refusal of one of them to accept the appointment (Woodhill 2016).

The Supreme Court of NSW provides a salient example of the use of temporary appointments. Judges of the Supreme Court face compulsory retirement at age 72, but a qualified person may be appointed as an acting judge of the Court until age 77 for a period not exceeding 5 years (*Supreme Court Act 1970*, s 37). Although acting judges are not required to be retired judges, the facility is widely used in this way. In 2014, 7 persons held office as acting judges or acting judges of appeal, compared with 52 permanent members of the Supreme Court (Supreme Court of New South Wales 2015). Of the 7 acting appointments, 6 were former

judges of the Supreme Court or the Federal Court, and one was a judge of an intermediate court (the District Court) who was acting in a higher capacity.

Temporary appointments have been well-utilised in Australia as a flexible tool for supplementing judicial labour, but they come at a potential cost to judicial independence. This is because a judge nearing the end of a permanent appointment may court the Executive to secure a later temporary appointment, or because a judge on a short term temporary appointment may court the Executive to secure reappointment for a further term. This has prompted legal challenges across the common law world, including Australia.² In the *Forge Case* (*Forge v Australian Securities and Investments Commission* 2006), the High Court considered a constitutional challenge to the legislation authorising the appointment of acting judges to the Supreme Court of NSW. It was claimed that s 37 of the *Supreme Court Act 1970* (NSW) compromised the independence and impartiality that the Supreme Court was required to possess in order for the Court to be a suitable recipient of federal jurisdiction. By majority, the High Court rejected the challenge, stating that judicial independence is secured by a combination of institutional arrangements, of which tenure is only one aspect. In the majority's view, the independence of acting judges was preserved by the fixed term nature of the appointment; by the constitutional prohibition on removing an acting judge during the fixed term other than for proved misbehaviour or incapacity; and by the independent determination of their remuneration.

However, it is Kirby J's dissent that throws into sharp relief the risks posed by temporary appointments to public perceptions about the courts. While acknowledging that acting judges had been used occasionally from early colonial times, he noted that a significant change in practice occurred around 1989. From that point, there was a substantial increase in the number of acting judges and the duration of their appointments. Because this sizable cohort lacked the tenure of permanent judges, Kirby J held that the Supreme Court no longer enjoyed the perception of independence and impartiality demanded of it by the Constitution. Data published in his judgment (reproduced and updated in Figure 3) shows that in NSW there has been substantial supplementation of judicial labour by acting judges. This is especially so in the District Court, where in 2015 there were 26 acting judges compared with 68 permanent members.

The statistics presented in *Forge* did not include the amount of time that acting judges actually spend in service, but was limited to a head count of appointees and the duration of their appointment. Since 2006 the Supreme Court has reported annually on the total number of workdays contributed by acting judges. Table 1 shows that over the period 2006–2014, the number of acting judges has fallen, but the average number of days contributed by each judge has increased. In sum, the aggregate use made of acting judges has not diminished, suggesting there is a permanent need for additional judicial labour (currently about four positions on the Supreme Court), which is not being met by permanent appointments.

² See e.g., *Valente v The Queen* (1985), *Kearney v Her Majesty's Advocate* (2006), *Wikio v Attorney-General* (2008).

FIGURE 3

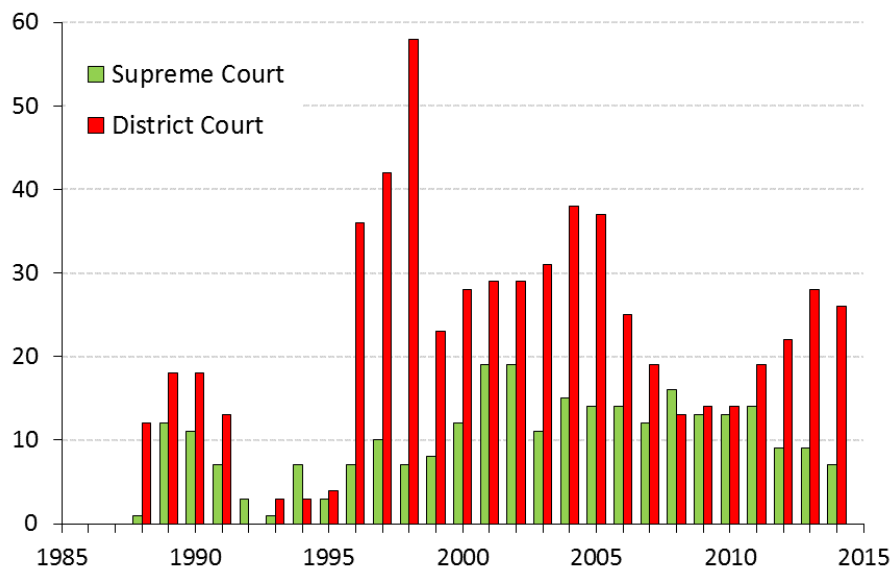


Figure 3. Number of Acting Judges, NSW, 1985-2014.

Source: 1985–2004: *Forge v Australian Securities and Investments Commission* (2006). 2005–2015: District Court of New South Wales 2015, Supreme Court of New South Wales 2015 and prior years.

TABLE 1

Year	Number of Acting Judges	Total Days as Acting Judge	Average Days Per Acting Judge
2006	14	778.0	55.6
2007	12	749.0	62.4
2008	16	826.5	51.7
2009	13	1,099.5	84.6
2010	13	1,053.5	81.0
2011	14	980.5	70.0
2012	9	816.0	90.7
2013	9	801.0	89.0
2014	7	839.0	119.9
Average 2004-14	11.9	882.6	78.3

Table 1. Days of Service of Acting Judges, Supreme Court of NSW, 2006–2014.

Source: Supreme Court of New South Wales 2015 and prior years. The data include Acting Judges and Acting Judges of Appeal.

3.3. Part-time appointments

This section considers the potential of part-time judicial work to augment the judicial labour force. However, since there does not appear to be an overall shortage of potential candidates for judicial office in Australia, the greatest impact of part-time appointment is on the diversity of the bench, due to the gendered nature of part-time work.

Many industrial economies have experienced a significant rise in the prevalence of part-time employment. This has been encouraged by the increasing demand by

firms for flexible labour supply to accommodate peaks in consumer demand, and by the entry into the workforce of people combining employment with other activities such as raising children or caring for disabled or elderly family (Euwals and Hogerbrugge 2006, Abhayaratna *et al.* 2008). Australia has shared this experience. In the mid-1960s, less than 10% of employed persons worked part-time; today more than 31% do so, which is one of the highest rates among OECD countries (Abhayaratna *et al.* 2008).

Until quite recently, the Australian judiciary was immunised from these broader social trends. Judging was seen as full time work: as the Council of Chief Justices of Australia (2007, [6.2]) remarked in its *Guide to Judicial Conduct*, 'judicial office is a full-time occupation and the timely discharge of judicial duties must take priority over any non-judicial activity'. Yet it is clear that part-time work may be attractive to judicial officers with family or carer responsibilities, and may thus facilitate the entry of individuals who would otherwise be excluded from the judicial labour market. Similarly, part-time work may be attractive to older judges or magistrates who want 'a bridge between employment and inactivity' in the years leading up to mandatory retirement (Bollé 1997, p. 568). This may slow judicial attrition, which is a matter addressed in Part IV below.

While countries such as the United Kingdom have long made use of part-time judicial officers, Australia has been a late adopter. New South Wales was the first state to act when it legislated for part-time magistrates in 1999. In the same year, the Commonwealth made similar provision for federal magistrates (now titled 'Federal Circuit Judges'); Queensland and Tasmania followed in 2003, Victoria and Western Australia in 2004, South Australia in 2006, and the Northern Territory in 2015. In each instance, part-time work has been confined to lower courts, with the exception of Victoria, where it has been permitted across all court levels since 2013.

The introduction of part-time judicial work has been justified mostly on grounds of recruitment and retention. When the NSW legislation was debated, the Attorney-General explained the change as a measure to remove barriers to appointment, stating that the government hoped to facilitate appointment to the magistracy of women whose family responsibilities made them unable to take on a full-time appointment. (New South Wales, Legislative Council 1999, pp. 2507-2508). In the Victorian Parliament, the part-time provisions were said to facilitate the appointment and retention of judicial officers who have personal or family commitments, or who might otherwise contemplate earlier retirement or resignation due to a lack of work-life balance. (Victoria, Legislative Council 2013, p. 3171-3173)

These provisions create the *capacity* to appoint part-time judicial officers, but the extent to which they have been utilised is more difficult to assess due to the paucity of published data. At the outset it is worth observing that the courts to which part-time appointments could be made account for over half the Australian judiciary—54% of the 1,072 FTE judicial officers at 30 June 2015 (Productivity Commission 2016). While the potential for part-time judicial work is thus high, the number of such positions appears to be very low. In a survey of magistrates and judges conducted by Mack and Roach Anleu in 2007 only 8 magistrates (3.3% of 242 respondents) and 5 judges (1.6% of 309 respondents) self-reported as being engaged in part-time work.³ This is corroborated by data on appointments to Australia's largest court, the Local Court of NSW. Of the 121 magistrates appointed to that court between 1999 (when part-time appointments were introduced) and 2014, only 4 appointments (3.3%) are identified as part-time, all of them women. This suggests that the uptake of part-time work in the Australian judiciary has been

³ I am grateful to the authors for providing the data extracts.

very modest compared to the general Australian labour force where, in 2015, over 31% of all workers worked part-time.

The limited uptake of part-time judicial service leads to the question whether there are impediments to part-time work that might be mitigated if the legislative schemes were better designed or executed. A particular difficulty arises from the possibility of part-time judicial officers holding outside employment or office. The threat to judicial independence is illustrated by a Canadian case, *R v. Lippé* (1991), which considered whether a statutory scheme in Quebec, allowing part-time judges to continue to practise law, violated the right to a fair hearing guaranteed by s 11(d) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada upheld the validity of the provincial arrangements, but only because various safeguards minimised the risk that an informed person would have a reasonable apprehension of bias when having his or her claim adjudicated by a part-timer.

While outside employment poses a threat to judicial independence regardless of the officer's full-time or part-time status, the problem is more acute in the case of part-timers because they have more time in which to engage in other activities and may have greater financial need to do so. Accordingly, some jurisdictions make special provision for part-timers, either specifying the type of work that is prohibited or articulating an underlying principle (incompatibility with judicial functions) and prohibiting work that jeopardises the principle. Typically, part-time magistrates are absolutely prohibited from practising the profession of law for reward but may hold other offices or engage in other remunerated work with the approval of the head of jurisdiction or the Executive.

In summary, part-time work has significant potential for augmenting the judicial labour force. This is especially so if it allows full-time judicial officers to work part-time in their senior years, and thus lessen attrition (see Part 4.2. below). However, this potential has been under-realised in Australia, where part-time commissions have been available only for a short period of time, predominantly in lower courts, and not at all in some jurisdictions. This contrasts with the persistent rise of part-time work in the general labour force for both men and women. These considerations led a committee of the Australian Senate to recommend that guidelines be developed to promote part-time working arrangements for judicial officers in federal courts, and that these be presented to the states as a possible model for adoption (Legal and Constitutional Affairs References Committee 2009). It has been said that part-time judicial appointments will in time become increasingly common (Campbell and Lee 2012), but unless barriers to part-time work are addressed, any movement in that direction is likely to be glacial.

4. Minimising judicial attrition

The preceding discussion observed that the *stock* of FTE judicial officers in Australia has increased slowly over time, at least at the national level, and that this appears to have been aided by a rise in temporary judicial positions. However, changes in the stock of judicial officers is the net effect of two contrary dynamic *flows*, namely, the process of appointment and the process of departure. Although the number of judicial officers has been relatively stable over time, this may disguise considerable turbulence in the processes that diminish and replenish that stock. The question that arises in the present context is: what can be done to mitigate the impact of workforce attrition?

The answer depends on a proper understanding of the ways in which a judicial officer may cease to hold office. A judicial officer may exit *involuntarily* by reason of (a) death, (b) removal for cause (i.e. 'proved misbehaviour or incapacity'), (c) reaching the end of a fixed term appointment, or (d) reaching a mandatory retirement age. A judicial officer may also exit *voluntarily* by reason of resignation to (e) accept appointment to another court or (f) leave the judiciary. In practice,

death in office is now uncommon due to declining mortality rates; removal from office is extremely rare; fixed term appointments are generally unknown (except for temporary appointments, discussed in Part 3 above); and re-appointment generates few problems in the present context because officers are retained within the judicial system as a whole. This leaves two matters for consideration, namely, mandatory retirement and voluntary retirement.

4.1. *Extending the age of mandatory retirement*

All judicial officers in Australia today face a mandatory retirement age. For most judicial officers that age is 70 years, but in two jurisdictions (NSW and Tasmania) the retirement age is 72 years, and in two others (Western Australia and the Australian Capital Territory) magistrates must retire at 65 years. In short, they face what one English Law Lord described as a 'statutory presumption of judicial incompetence' at the prescribed age. (*Ruxley Electronics and Construction Ltd v. Forsyth* 1996, Lord Bridge of Harwich).

This was not always the case. For a long time Australia followed the English constitutional practice of appointing judges for life, subject to their 'good behaviour'. Nevertheless, the life tenure model did not go unchallenged. NSW was the first state in Australia to introduce a mandatory retirement age for judges of superior courts when it legislated during the First World War (Cunneen 2010). The retirement age was set at 70 years. This choice proved influential, and other states followed with similar constitutional or statutory amendments. For federal judges, life tenure remained enshrined in the Australian Constitution until 1977, when a successful referendum led to a constitutional amendment. Section 72 now provides that justices of the High Court must retire at age 70, while for judges of other federal courts, 70 years is the maximum age but Parliament can set a lower limit if it so chooses.⁴

A question that has been debated in Australia is whether 65, 70 or 72 remain appropriate retirement ages for judges or magistrates (Legal and Constitutional Affairs References Committee 2009, Moses 2010). When the NSW Parliament first selected age 70 (100 years ago) the choice was justified with a passing reference to the biblical lifespan of 'three score and ten years' (Cunneen 2010, p. 77). When the same age was selected for federal judges in 1977, the desire for uniformity with state practice was a weighty factor (Standing Committee on Constitutional and Legal Affairs 1977). Today, policy makers must contend with the fact that life expectancy has improved markedly. Australians enjoy one of the highest life expectancies at birth of any country in the world—80.3 years for males and 84.4 years for females, and this is projected to rise to 92.1 years and 93.6 years, respectively, by 2060 (Australian Bureau of Statistics 2013). Moreover, older Australians are increasingly enjoying these extra years in good health and free of disability (Australian Institute of Health and Welfare 2014).

Two potential policy implications are that mandatory retirement ages could be increased from their current levels (Opeskin 2011), or that age-based limitations could be removed altogether (Blackham 2016). Each of these reforms has the potential to reduce attrition from the bench, and so lessen reliance on the discretion of the Executive in filling judicial vacancies. Previously we observed that there is a correlation between the annual number of departures from, and appointments to, a particular court (see Figure 2). Nevertheless, minimising attrition lessens the potential for supply shortages that arise if judicial vacancies are not filled, or are filled only after considerable delay.

But would an increase in the mandatory retirement age actually encourage judicial officers to give more years of service? Anecdotally, many retiring Australian judges express a desire to continue sitting, but ultimately this is an empirical question: the

⁴At one time the Parliament set a lower age for Family Court judges (65 years) but it no longer does so.

answer depends on the real world behaviour of judicial officers who are unconstrained by a maximum working age.

The potential of this solution can, however, be gleaned using a natural experiment that arose from the circumstance that federal judges appointed before 29 July 1977 enjoyed life tenure, while those appointed thereafter have faced a mandatory retirement age. Figure 4 plots the age of departure of the 45 High Court justices who left the court between 1903 and 2015, of whom 29 enjoyed life tenure and 16 were subject to mandatory retirement at age 70.⁵ The mean age at departure of the life tenure justices was 70.1 years. But 15 of 29 life tenure justices (52%) left beyond 70 years of age; and those who did so gave an average of 7.0 years of additional service. By contrast, the mean age at departure of the justices subject to mandatory retirement was 68.3 years—1.8 years lower than the unconstrained cohort. The constraining influence of mandatory retirement is apparent from Figure 4. This is accentuated when regard is had to rising life expectancy, which is illustrated by the line showing the expected life span of a 50-year old male (50 being a typical age for judicial appointment). The impact of increasing longevity is reflected in the widening gap, since the mid-1970s, between the horizontal line at age 70 and the expected life span of a new appointee.

It is plausible to conclude that relaxing the retirement age could call forth additional judicial labour, without the financial burden that attends fresh appointments. It is surprising that state and territory governments, often so parsimonious in their expenditure of funds on the judicial system, have thus far failed to embrace this possibility. The reluctance with respect to the federal judiciary is easier to understand given the significant burden of constitutional amendment.

FIGURE 4

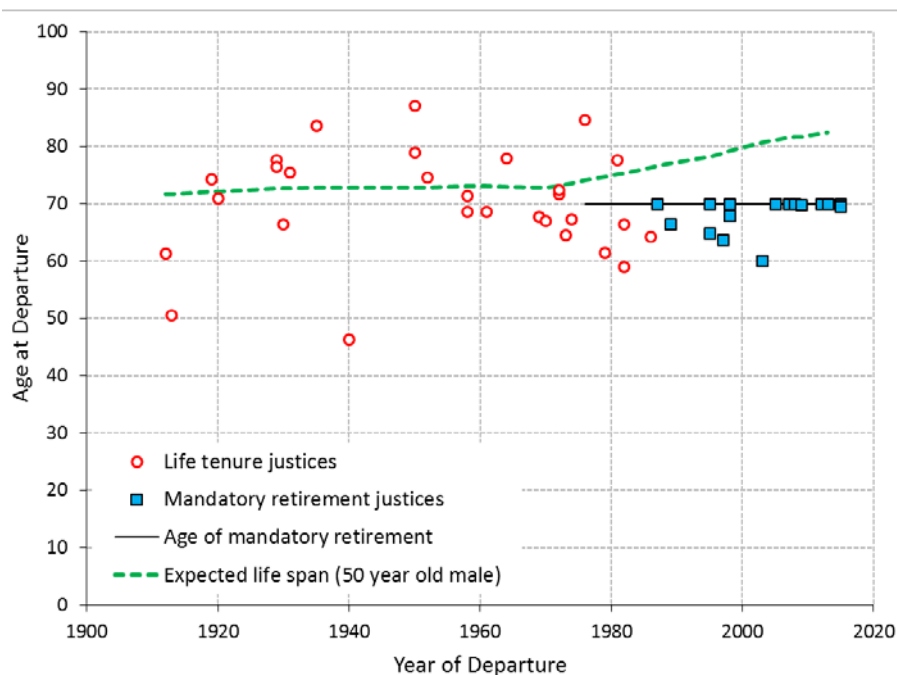


Figure 4. Age of Justices at Departure, High Court of Australia, 1903–2015. Sources: Coper *et al.* 2001, Australian Bureau of Statistics 2014, ConnectWeb 2015.

⁵ Two justices, Gibbs and Mason JJ, were appointed to life tenure but later became subject to mandatory retirement upon becoming Chief Justice, in 1981 and 1986 respectively. They are included in the mandatory retirement cohort.

4.2. Premature resignation

Some judicial officers resign from office before reaching their mandatory retirement age. Where they resign to accept judicial appointment to another court, there is no net loss to the judicial system; where they move to non-judicial positions or leave the labour force entirely, there is a net decrement. This represents a significant loss of human capital in a small, elite profession. Understanding the reasons for early departure may help in developing strategies for minimising avoidable attrition. The determinants of judicial departure are complex, and different methodologies can be used to shed light on a decision that is typically in made private and subject to minimal public scrutiny.

One approach, utilising an historical–biographical method, is to interrogate the circumstances of individual judges *ex post facto* to ascertain their motives for departure. Consider, for example, departures from the High Court of Australia since the introduction of mandatory retirement. To date, 16 justices subject to mandatory retirement have left the Court—ten at the maximum age of 70 years and six before attaining that age. Of the six early departures, two resigned to fulfil a higher calling—Wilson J as President of the Assembly of the Uniting Church, and Deane J as Governor-General of Australia. Three others (Dawson, Toohey and Gaudron JJ) resigned prematurely for a variety of reasons including stress and poor health; while Crennan J is said to have retired several months early to avoid the simultaneous departure of two justices, and the consequent difficulty for the Court in hearing constitutional cases (Byrne 2014). While this is informative, it is doubtful whether this methodology can be applied to other judicial populations because detailed biographical information is typically available only for prominent judges of the highest courts.

A second approach is to undertake statistical modelling of judicial behaviour to ascertain the importance of personal, economic, and political factors in the judicial retirement decision. For example, using an econometric hazard model, Maitra and Smyth (2005) have examined the determinants of retirement of High Court justices between 1904 and 2001. They concluded that the most important predictors of when a judge retires are: pension eligibility, whether the judge was an active participant in the Court's work, and the political persuasion of the appointing government. However, the experience of the apex court—with its attendant prestige, resources, and modest caseloads—may not be representative of the departure decisions of judicial officers of other Australian courts.

While there has been little published work that informs the question of why Australian judicial officers retire before the mandatory retirement age, empirical research provides some insights into this question (Roach Anleu and Mack 2016a, 2016b). Their assessment, using a third methodology, is the outcome of a national survey of magistrates in 2002 and 2007, and a national survey of judges in 2007. The studies reveal that judicial life can be highly demanding. In the 2007 surveys, judges and magistrates reported that: the volume of cases was unrelenting (75% for magistrates, 74% for judges); making decisions was very stressful (38% for magistrates, 32% for judges); work was emotionally draining (47% for magistrates, 31% for judges); and difficult decisions sometimes kept them awake at night (29% for magistrates, 36% for judges) (Mack *et al.* 2012).

These concerns may filter into career decisions. When asked '*Would you like to change the direction of your career in the future?*' 29% of 230 respondents to the 2007 magistrates' survey replied 'Yes' (Mack and Roach Anleu 2010). For some, the desired change was a modification in the type of work (which many regarded as routine and unchallenging) or promotion to a higher court. For others, the unrelenting nature of the work was seen as an impetus to early retirement.

There is a clear need for further empirical work in Australia to better understand the reasons judicial officers may want to leave office, akin to Thomas's (2015)

study in the United Kingdom. This investigation needs to be conducted not only prospectively, but retrospectively through surveys of those who have ceased to hold office. Only with such understanding can evidence-based policy be formulated to mitigate the impact of avoidable judicial attrition.

5. Increasing judicial productivity

A shortage in the supply of judicial officers might also be addressed by improving judicial productivity—the more productive judicial officers are in performing their work, the greater the number of matters that can be determined by a given number of officers. Two questions that follow are: (a) how can judicial productivity be *measured* so that changes can be tracked over time, and (b) how can judicial productivity be *improved* through changed policies or practices. The answers are interrelated because the use of specific measures of productivity is likely to drive changes in individual and institutional behaviour, especially if resources are allocated on the basis of observed productivity.

5.1. Measuring judicial productivity

Productivity is a supply-side measure that captures technical production relationships between inputs and outputs. According to the Productivity Commission (2013), 'it is calculated as the ratio of the quantity of outputs produced to some measure of the quantity of inputs used'. The concept is easy to state but difficult to apply to the determination of legal disputes. One difficulty is conceptual. Chief Justice Spigelman (2006, p. 70) has been an outspoken critic of attempts to measure judicial productivity. In his view, 'the most important aspects of the work of the courts are qualitative and cannot be measured', such as fairness, accessibility, openness, impartiality, legitimacy, participation, honesty and rationality.

Reflecting this difficulty, the Productivity Commission (2016) has not yet found a suitable indicator of the quality of courts for its annual review of government services. Consequently, its productivity measures focus on the *quantity* of outputs. Puzzlingly, its three published indicators measure inputs per output rather than outputs per input. However, it is possible to generate three intelligible measures of productivity by inverting their indicators, yielding: (a) finalisations per \$1000 in real net recurrent expenditure; (b) finalisations per judicial officer; and (c) finalisations per court staff.⁶ Some measures are available only for recent years.

All three indicators utilise a single measure of output (cases finalised) but different measures of input (money, judicial labour, and court labour). They are best viewed as a package in which each indicator focusses on a different dimension of court operations, namely, *cost* efficiency, *judicial* productivity, and *court* productivity. There may be trade-offs between the measures: for example, the addition of more judges' associates (law clerks) might increase judicial productivity but at the cost of adversely affecting court productivity.

Table 2 shows data for the three indicators in a start year (2003, 2005 or 2010) and in 2015 by type of case (criminal or civil). For example, in 2005 each judicial officer finalised an average of 1,479.5 criminal cases but by 2015 this had grown to 1,649.1 cases, representing a productivity increase of 10.3%. Because the indicators are measured in different units, for comparability they have also been shown as an index, with 2015 as the base year (index = 100). By comparing the indices, one can see there has been an increase in productivity in criminal cases according to two of the three indices, but a decline in productivity in civil cases across all indicators.

⁶ A fourth indicator is said to be 'clearance rates', which show the ratio of annual finalisations (a measure of output) to lodgments (a measure of demand). This is not a measure of productivity in the same sense as the other indicators, but a measure of whether output is keeping up with demand.

The temporal trends are shown in Figure 5, which plots the index for each productivity indicator by type of matter. In civil matters (dashed lines), productivity has been steadily declining for a decade across all indicators, since more inputs (money, judicial labour, court labour) are needed to produce a given output. The reasons for this are multifarious, but a common explanation is that civil cases are becoming more complex because simpler matters are being determined through alternative dispute resolution or outside the court system (Wright 1999). In criminal matters (solid lines) the story is mixed. In the past four years productivity has been steadily improving across all indicators, but the longer term trends are equivocal.

TABLE 2

Productivity Indicator	Case Type	Start Year			2015		Change in Productivity
		Year	Value	Index	Value	Index	Per cent
Finalisations per \$1000 real net expenditure (\$2014-15)	criminal	2003	1.22	108.5	1.12	100.0	-8.5
	civil	2003	1.23	112.9	1.09	100.0	-12.9
Finalisations per judicial officer	criminal	2005	1,479.5	89.7	1,649.1	100.0	10.3
	civil	2005	1,647.7	133.6	1,232.9	100.0	-33.6
Finalisations per court staff	criminal	2010	202.4	88.6	228.5	100.0	11.4
	civil	2010	183.6	117.5	156.2	100.0	-17.5

Table 2. Three Productivity Indicators for Australian Courts.
Source: Productivity Commission 2016 and prior years.

FIGURE 5

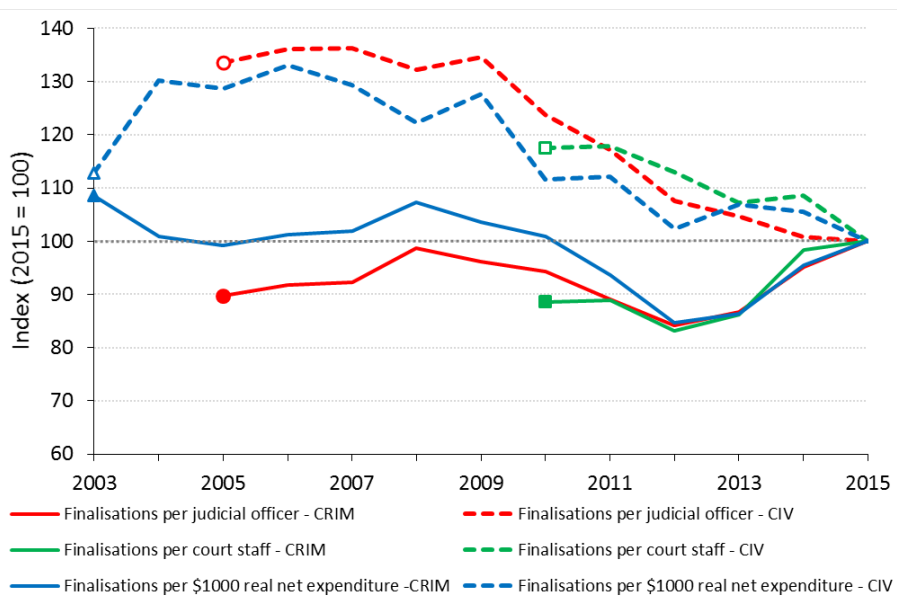


Figure 5. Productivity Indices for Australian Courts, 2003–2015.

Source: Productivity Commission 2016 and prior years.

Notes: 1. Data for civil matters exclude family courts, the Federal Circuit Court, and coroners’ courts. 2. Costs are based on real net recurrent expenditure (including payroll tax) in 2014-15 dollars. 3. Judicial officers and court staff are based on full-time equivalents.

5.2. Improving judicial productivity

Documenting changes in judicial productivity is not as challenging as finding effective ways to improve it. Long term progress requires systemic reform at the

institutional level and is likely to take a significant period to become evident. Over the past decades, there have been many endeavours to improve judicial productivity through changes to court practices, procedures and substantive rights. Some have been initiated by judicial officers themselves in an attempt to mitigate workload pressures; others have been initiated by legislatures seeking greater cost-efficiency in the judicial system. The changes have been described elsewhere (Opeskin 2001) and include:

- Increasing the sitting time of courts, thus raising output per judicial officer (Supreme Court of New South Wales 2015);
- Limiting the time allowed for oral argument in court;
- Tightening the rules for discovery of documents (Australian Law Reform Commission 2000);
- Requiring parties to better assist the court through use of written submissions;
- Delivering short form reasons for judgment; (*Supreme Court Act 1970*, s. 45)
- Increasing the proportion of joint or concurring opinions in appellate cases;
- Constituting smaller panels of judges in appellate cases;
- Delivering *ex tempore* decisions in lieu of reserved judgments (Kirby 1995b);
- Curtailing rights of appeal, such as by requiring parties to obtain leave to appeal;
- Curbing jury trials in civil (and to a lesser extent criminal) cases;
- Consolidating related civil actions through class actions;
- Enhancing judicial education to improve the quality of decision-making (Martin 2013); and
- Facilitating the use of information technology in the courts.

The last point merits elaboration. Since the late 1990s there has been extensive discussion of the capacity of information technology to transform the operation of courts and the delivery of court services to the public. In an influential Australian report, Parker (1998) envisaged that information technology would provide efficiency gains in court operations in the coming years, freeing up resources to improve other court services. In similar vein, the Parliament of Victoria, Law Reform Committee (1999) anticipated efficiency gains from electronic filing of documents, case management, video-conferencing, translation, court reporting, and electronic publishing. In the intervening years there has indeed been widespread deployment of technology to manage various aspects of court operations. But the use of information technology remains uneven, and there are significant deficiencies in the interoperability of systems in some jurisdictions. In consequence, scholars have suggested there is little empirical evidence to demonstrate that anticipated efficiency gains have been realised, or that court resources have been thus freed up for other purposes (Wallace 2013). In sum, productivity gains from the use of information technology remain elusive.

6. The spatial dimension

The supply-side solutions discussed above have been directed to ensuring that aggregate judicial labour is adequate to meet aggregate demand. But the overall size of the judiciary is not the only concern. Judicial services are delivered in specific locations, and this generates important questions about the spatial allocation of resources within the judicial system.

The spatial geography of courts of justice has a long history. It was of such significance that it was enshrined in Chapters 17 and 18 of the Magna Carta in 1215

(McKechnie 1914). The Great Charter provided for judicial centralisation, in so far as ordinary law suits were to be held in a fixed place rather than following an itinerant Royal Court from place to place. It also provided for judicial decentralisation, in so far as justices were henceforth to be sent to each county four times a year to dispense the King's justice rather than requiring aggrieved persons to come to Westminster or await the infrequent arrival of travelling justices (Baker 1979). The notion that access to justice requires proximity between courts and people has thus been an *idée fixe* for over 800 years.

The spatial delivery of judicial services requires alignment of three geographies: the location of demand (disputants), the location of supply (judicial officers), and the location of infrastructure (court houses). This section focusses on labour supply by investigating how judicial officers are allocated to particular places for the purpose of determining disputes, bearing in mind legal boundaries (e.g. state borders) and administrative divisions within those boundaries. When considering the optimal spatial allocation of judicial officers, it is useful to distinguish between their allocation within a specified court, and their allocation between courts in different jurisdictions.

6.1. Allocating judicial officers within a court

The spatial allocation of judicial officers within a court depends, *inter alia*, on the level of the court hierarchy and the subject matter of proceedings. Lower and intermediate courts operate in far more locations than superior courts, and criminal matters generally require greater geographical presence due to operational requirements relating to juries, witnesses and defendants in custody. One can observe this in NSW where, in 2014, the Local Court (whose caseload is predominantly criminal) sat regularly in 150 places, the District Court in 30 places, and the Supreme Court in just 11 places (District Court of New South Wales 2015, Local Court of New South Wales 2015, Supreme Court of New South Wales 2015). Other jurisdictions show a similar pattern in the spatial penetration of courts according to the level of the court hierarchy.

The legislative framework regulating the spatial allocation of judicial officers within a court depends on provisions specifying: (a) where a court is to *sit*, and (b) how judicial officers are *assigned* to sit in those places.

The first issue—*places of sitting*—is a matter of some sensitivity. There are social considerations in ensuring that regional, rural and remote communities have adequate access to justice, yet there are countervailing considerations of cost-effectiveness. Some statutes mandate that a court must sit regularly in specified places, such as the capital city or a major regional centre. More frequently, statutes leave it to the Executive to identify regular sitting places through regulations, proclamations or executive orders. These provisions make the elected government accountable for decisions about the level of court services provided to different communities. They also allow for flexibility in addressing changing population distribution, which has been described as 'one of the most dynamic and policy-relevant dimensions of the nation's contemporary demography' (Hugo 2002, p. 1).

The second issue—*assignment of judicial officers*—is regulated by three main practices. The most common practice is for the head of jurisdiction to be given express power to direct judicial officers to sit in particular locations and at particular times. Even where express power is absent, most statutes that establish courts give the head of jurisdiction responsibility for ensuring the effective, orderly and expeditious discharge of the business of the court, and this general power includes authority to assign judges and magistrates to sit in particular places (Mack and Roach Anleu 2004). A second, less common, practice is for legislation to require a judicial officer's location to be specified by the Executive in the instrument of appointment. This embeds significant spatial rigidities in the judicial labour force because it reflects a court's geographic needs at the commencement of a

potentially long period of tenure, although there are ways to ameliorate the problem. A third practice is for the assignment of judicial officers to specific locations to be left in the hands of the Executive—not just at the time of appointment, but on a continuing basis. The direct involvement of the Executive poses a risk to judicial independence because the threat of relegation to an undesirable location, or elevation to a desirable one, might potentially influence, or be seen to influence, a judicial officer's decisions.

In summary, the location of court sittings, and the allocation of judicial officers to those locations, have long been matters of importance in the administration of justice. The statutory frameworks reveal considerable diversity, but in all jurisdictions a balance is struck between legislative, executive and judicial control over these spatial issues. Together, the Executive and head of jurisdiction have substantial control over the spatial delivery of court services, which allows judicial officers to be deployed to match demand.

6.2. Allocating judicial officers between jurisdictions

Whatever the challenges of ensuring the optimal spatial allocation of judicial officers within a single court, they pale in comparison with the problems of allocation across jurisdictions. Australia does not have a national judiciary whose members can move fluidly from the courts of one jurisdiction to another. The consequence is that:

Our present system does not ensure that we make full use of our most talented judges, particularly those with highly specialised knowledge. Nor does it ensure that there is an optimal allocation of resources to the separate institutions which administer the single body of Australian law. (Spigelman 2010, p. 50)

Two features of the legal landscape underpin this shortfall. First, Australia's federal structure is reflected in its courts—with each federal, state and territorial polity establishing its own system of courts, funding them, and appointing its own judicial officers. This has the benefit of ensuring that political responsibility for administering each court system falls on the corresponding executive and legislative arms of government (Opeskin 2000). However, it does 'Balkanise' the judicial system and make it susceptible to parochialism (French 2006).

Secondly, the potential purity of this arrangement is muddied by the fact that the federal and state judicatures are 'enmeshed in a composite system' with its own idiosyncrasies (Griffith and Kennett 2000, p. 45). This is because the High Court sits as the final court of appeal above all courts (federal, state and territorial); the common law is uniform throughout the land; and state courts can be invested with federal jurisdiction. As recipients of federal jurisdiction, state courts are not free to chart their own course, but must conform to the requirements of the Australian Constitution regarding the independence and impartiality of their judiciaries. This has had a 'nationalising' effect on state courts (McLeish 2013).

With these structural features in mind, issues relating to the allocation of judicial labour across jurisdictions can arise in three ways, each impacted by different legal considerations.

State/territory to state/territory. The first, and least complex, concerns the allocation of a judicial officer from one state or territory court to another state or territory court. This can be achieved by the judicial officer receiving a second commission in another state or territory, usually on a temporary basis. For example, in 2000 an appeal was filed in the Court of Appeal of NSW in a matter in which one of the justices of that Court, Heydon JA, was a party. To avoid the appearance of partiality that might arise if the proceedings were adjudicated by Heydon JA's colleagues, three out-of-state judges were commissioned to constitute the appellate court, as acting judges of appeal. (*Heydon v. NRMA Ltd* 2000)

Federal to state/territory. The second situation concerns the allocation of judicial officers from a federal court to a state or territory court. There is considerable

precedent for this practice, which is authorised by federal legislation.⁷ For example, in the ACT, the Executive may appoint judges from other superior Australian courts as ‘additional judges’ of the ACT Supreme Court. At present, the four permanent members of the ACT Supreme Court are complemented by 15 additional judges, all of whom have primary commissions on the Federal Court. Similar arrangements exist in the Northern Territory for the dual appointment of Federal Court judges to the Northern Territory Supreme Court; and in Western Australia for the dual appointment of judges of the Family Court of Australia to the Family Court of Western Australia.

State/territory to federal. The third situation is the allocation of judicial officers from a state or territory court to a federal court. For constitutional reasons, this situation is the most problematic (Murray 2014). Whereas a permanent federal judge can be appointed to a state or territory court on a temporary basis, the reverse is not true. Under s 72 of the Constitution, all judges holding federal office must have tenure until the mandatory retirement age. This significantly reduces the flexibility, and hence desirability, of any arrangement that seeks to utilise permanent state or territory judges in federal courts. Additionally, legal and practical difficulties arise in relation to the salary and pension of a judge whose time is shared between two courts, given the constitutional guarantee of remuneration for federal judges. Moreover, there is a danger of incompatibility in the exercise of functions by one person wearing two hats. State judges can exercise a broader range of non-judicial powers than federal judges because the separation of powers is less strict at the state level, but this might contaminate the exercise of federal judicial power if those functions are regularly exercised by the same person. These complications stymied an attempt by the Standing Committee of Attorneys-General in 2009 to create a national judiciary through the broader use of dual appointments (Murray 2014).

The foregoing account indicates why judicial exchanges between jurisdictions have been of limited benefit to date. Historically, dual appointments have been used largely as an expedient to solve short-term or transitional problems in particular courts (Gleeson 2007). But there has been some discussion of broader programmes of judicial exchange. A generation before, Rogers (1981, p. 646) proposed concurrent state and federal appointments as a practicable way of achieving a unified court system, noting ‘what a boon it would be to exchange judicial personnel when a temporary log jam in work arises in one court system or another’. Revitalising the idea, French (2006, p. 153) proposed a family of horizontal and vertical judicial exchange programs whose objectives could include ‘effective allocation of judicial resources between courts’ and ‘improved quality of decision-making and efficiency of appellate judges’.

More recently, a judicial exchange program has been developed through the Standing Committee of Attorneys-General (SCAG), permitting one-way or two-way exchanges between corresponding courts. Under the model legislation, temporary exchanges of up to six months’ duration are permitted with the concurrence of the ‘senior judicial officer’ of each jurisdiction. NSW was the first jurisdiction to introduce the enabling legislation, in 2009, but to date only the ACT has followed suit.⁸ The potential of the scheme thus remains unrealised at the present time. However, even if it were more widely adopted, the scheme does not seem well-tailored to addressing significant imbalances in workload across Australian courts, in contrast to its softer aims of facilitating the exchange of ideas between judicial officers and contributing to the development of a national jurisprudence.

⁷ Federal Court of Australia Act 1976 (Cth, s. 6), permitting a Federal Court judge to simultaneously hold office as a judge of a ‘prescribed court’, being the Supreme Court of the ACT, the Northern Territory, or a state.

⁸ Judicial Officers Act 1996 (NSW) Pt. 7. For the ACT, see Magistrates Court Act 1930 (ACT) ss. 9C–9J; Supreme Court Act 1933 (ACT) ss. 69A–69H (introduced in 2010).

7. Quasi-judicial personnel

Beyond the cohort of judicial officers who are granted the traditional protections of judicial independence, many courts have a range of additional personnel who perform judicial or quasi-judicial functions closely allied to those performed by judges and magistrates. These personnel go by a wide variety of names, including masters, associate judges, registrars, judicial registrars, and commissioners. Some positions, such as master, have a long tradition that stretches back to the practice of the English courts on which Australia's colonial courts were modelled (Silberman 1975). Others are of more recent origin. Common to all of them is the performance of a variety of functions that help to turn the wheels of justice by freeing judicial officers from more routine work, especially in civil cases.

The significance of these positions, in the present context, lies in the potential for substitution between judicial officers and other court personnel. The Executive has become increasingly reliant on the role played by such additional personnel in the efficient discharge of court business, primarily because they are a flexible and cost-effective means of supporting the process of adjudication. The variety of quasi-judicial roles makes them difficult to categorise, but two examples illustrate their benefits and limitations.

7.1. *Judicial registrars in the family court*

The first example comes from the Family Court of Australia, which was established in 1975 as a specialist federal court dealing with family law disputes. From its inception, Family Court judges could delegate certain powers and duties to court officers, such as registrars, but the range of delegated matters was limited by regulation. (Family Law Act 1975 (Cth), ss 37, 123)⁹ By 1988 the Court had become clogged by the large volume of routine and minor contested matters. Seeking a speedier resolution of proceedings, Parliament removed the limitations on the power of judges to delegate functions to registrars. In addition, the amendments devolved less complex contested matters, then handled by judges, to a new class of court officer—the 'judicial registrar'. (Family Law Act 1975 (Cth), ss. 26A–26N) According to the Attorney-General of the day, the new office was modelled on the masters of state superior courts, who relieved judges of routine matters and thus enabled 'the numbers of the judges of such courts to be minimised'. (Commonwealth, House of Representatives 1987, p. 1613-1614).

Judicial registrars enjoyed some, but not all, of the independence enjoyed by judges of the Family Court. As with judges, their office could be terminated only on limited grounds; their remuneration was determined by an independent tribunal; and they were not subject to direction or control in the exercise of their delegated powers. However, from the Executive's perspective, there were significant benefits in the appointment of judicial registrars over judges: they were appointed for a fixed term of up to seven years (rather than to the age of mandatory retirement); their salary was lower (about 75% of a judge's salary); and they were not entitled to the generous judicial pension.

Notwithstanding the convenience of these arrangements for dispatching the work of the Family Court, there was some initial doubt about their legality. The constitutional question was whether registrars and judicial registrars, who are not appointed as federal judges under Chapter III of the Constitution, could lawfully exercise federal judicial power under delegation from a federal judge. In *Harris v Caladine* (1991) the High Court affirmed the validity of the delegation arrangements, albeit in qualified terms. By majority, the Court held that a delegation of judicial power to court officers is valid provided the officers' decisions are subject to review or appeal by the judges of the court; and provided the

⁹ As enacted.

delegation is not too extensive—i.e. judges must continue to bear the major responsibility for the exercise of judicial power.

With the High Court's imprimatur, registrars have remained an institutional feature of the Family Court, but this has not been so for judicial registrars. A combination of circumstances—the creation of a lower-tier court (the Federal Circuit Court) to adjudicate simpler family law matters; the transfer of funding from the Family Court to the lower court; and the appointment of the remaining judicial registrars to full judgeships—brought an end to judicial registrars in the Family Court in 2010. For reasons of judicial economy, they seem unlikely to be revived.

7.2. Masters in the Supreme Court of Victoria

The second example comes from the Supreme Court of Victoria, which has embraced a number of reforms regarding quasi-judicial officers in the past decade. Masters have been an established part of Supreme Court since the 19th century, assisting in the general business of the court. Originally, masters were state employees but with the passage of time they acquired similar terms and conditions to judicial officers, and now perform many judicial functions. (Victoria, Legislative Assembly 2008, p. 473-474) In 2008, the Victorian Parliament modernised the office of master by expanding their powers to include court-directed mediation, and changing their title to 'associate judge' to reflect their evolving judicial status. (Courts Legislation Amendment (Associate Judges) Act 2008)¹⁰ The functions of associate judges are to hear and determine issues that arise before and after trial in civil cases, including pleadings, discovery, subpoenas, damages, costs, and enforcement of judgments (Supreme Court of Victoria 2009).

Complementing these changes, a new office of 'judicial registrar' was established in the Supreme Court in 2010. (Courts Legislation Miscellaneous Amendments Act 2010)¹¹ The change was encouraged by the successful operation of a similar office established in the Victorian Magistrates Court in 2005. A judicial registrar is not a judicial officer but may be delegated some judicial functions by the Chief Justice under rules of court. The limited duration of the office—up to five years—was seen as providing 'greater flexibility in making appointments to manage demand in the court system' and assisting the judiciary in 'managing its workload in an efficient and cost-effective way'. (Victoria, Legislative Assembly 2010, p. 1374-1375).

In practice, both offices—associate judges and judicial registrars—have been increasingly utilised in the Victorian Supreme Court. Figure 6 shows the number of judges, masters/associate judges, and judicial registrars over the period of the recent reforms. From 2005–2015, the number of judges grew by 29%, but the number of quasi-judicial officers grew by 100%. An alternative way to view this change is by examining the ratio of quasi-judicial officers to judges over time (black line, right hand axis). The increase in this ratio, from 0.21 to 0.32, indicates the ongoing substitution between judicial personnel and quasi-judicial personnel. The case study thus illustrates the potential use of ancillary staff in achieving the Executive's stated goals of greater efficiency, cost-effectiveness and flexibility in the operation of the court system.

¹⁰ Amending Supreme Court Act 1986 (Vic).

¹¹ Similar positions were established in the County Court, the Children's Court, and the Coroners Court.

FIGURE 6

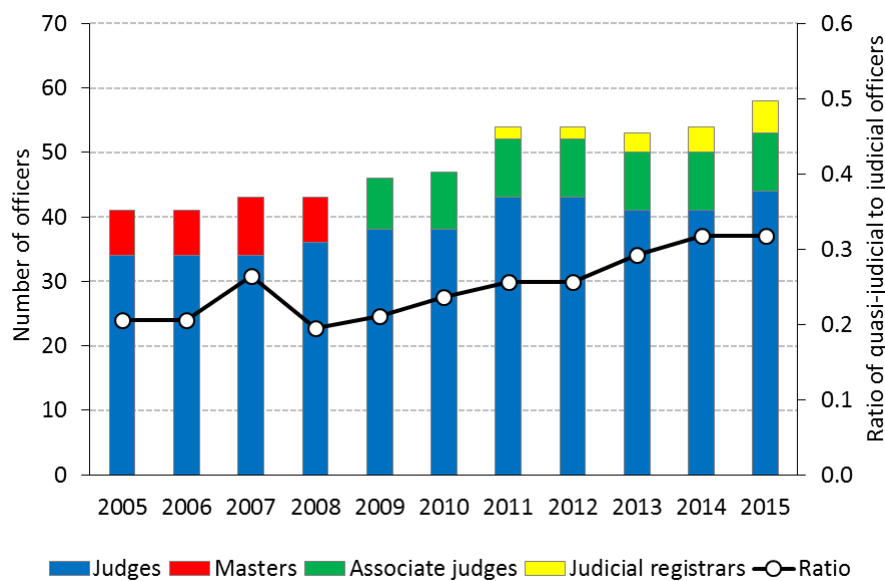


Figure 6. Judicial and Quasi-judicial Officers, Supreme Court of Victoria, 2005–2015.

Sources: Supreme Court of Victoria 2014 and prior years.

8. Conclusion

It is inevitable that disputes will arise from the interactions of numerous stakeholders in complex post-industrial societies. It is also imperative that those disputes are resolved fairly to avoid society descending into a state of nature marked by 'a war of all against all' (Hobbes 1651). Quelling disputes not only serves the private good between person and person, but enhances the public good by promoting social justice, social order, and economic stability (Genn 1999).

Judicial officers play a central role in that process by doing 'right to all manner of people according to law without fear or favour, affection or ill-will'. (High Court of Australia Act 1979 (Cth), s. 11 and sch)¹² Their independence is critical to public confidence in the justice system, and has been hard-won over centuries of evolving constitutional practice. However, the judges and magistrates who underpin the judicial system are costly and bring considerable rigidities. They are costly because their remuneration must reflect their status as the 'third arm' of government; be sufficient to entice the best lawyers from jaws of lucrative legal practice; and protect them from privation that might compromise their impartiality. They bring rigidities because, once appointed, judicial officers are not subject to direction in the exercise of their powers, and are entitled to hold office until they reach the age of mandatory retirement. Judicial tenure thus has a ratchet effect that can be released only by voluntary departure, death, or the slow passage of time.

This is an inconvenience for modern governments facing insatiable demand for finite public resources. Governments are being driven to ever greater cost-efficiency as they seek new ways to keep the wheels of justice turning faster, with less friction, and at lower cost. The system of justice that has evolved in response to these pressures is an intricate one with many inter-operable parts. The question 'What is the optimal number of judicial officers?' in such a system yields many answers, depending on how other parts of the system are calibrated.

This article has traced the way in which governments in Australia seek to manage the supply of judicial labour to keep the wheels of justice turning. Tenured

¹² Oath or affirmation of office.

appointments continue to be made to replace those departing the bench, and to augment their numbers to a modest extent. Yet the Executive is generally cautious about making new appointments, and there is evidence of resistance in particular courts and jurisdictions. A preferred response has been to make temporary judicial appointments, and to appoint quasi-judicial personnel to relieve courts of minor procedural work involved in the adjudicatory process. Supply-side solutions that appear to be under-utilised are those that focus on minimising attrition of existing judicial officers, enhancing their productivity, and optimising adjudication on a nationwide basis through the transfer or exchange of judicial officers between jurisdictions.

This article has presented empirical evidence, where it is available, to substantiate these claims. A bureaucrat observing these trends may find joy in the savings to the public purse, or the increasing speed with which disputes are resolved. In many respects these outcomes are laudable. But a system of *justice* is not reducible to the least-cost method of resolving disputation. Governments committed to the rule of law must not simply find a way to resolve controversies, but to do so according to law, or in the shadow of the law. This will often require the exercise of judicial power by judges and magistrates whose independence is the best guarantee of the impartiality of their decisions. Engaging in that process should not be seen as failure (Hayne 2008). Undoubtedly it can be expensive because legal issues can be complex, and deliberation requires time for mature reflection. Nevertheless, the exercise of judicial power is necessary in any society that is 'a government of laws, and not of men' (Adams 1851, p. 106). We should not decry the use of innovative mechanisms to achieve the efficient resolution of disputes. But we must also ensure that, in our quest for a system of justice that is affordable, we do not pay too high a price by acquiring a system that is merely cheap. To this end, there are cogent reasons for supporting the appointment of a sufficient number of permanent judicial officers (whether full-time or part-time), who hold office until a retirement age that is somewhat more generous than at present. This is the most secure way to ensure a well-functioning judicial system that is underpinned by robust judicial independence.

References

- Abhayaratna, J., *et al.*, 2008. *Part Time Employment: The Australian Experience, Staff Working Paper* [online]. Canberra: Productivity Commission. Available from: <http://econpapers.repec.org/RePEc:ris:prodsw:0805> [Accessed 9 June 2017].
- Adams, C., ed., 1851. *The Works of John Adams*. Boston: Little, Brown and company.
- Appleby, G. *et al.*, 2017 forthcoming. *Temporary Judicial Officers in Australia*. Sydney: Judicial Conference of Australia.
- Australasian Institute of Judicial Administration, 2016. *Judicial Gender Statistics* [online]. Melbourne: AIJA. Available from: <http://www.aija.org.au/index.php/judicial-gender-statistics> [Accessed 22 June 2017].
- Australian Bureau of Statistics, 2013. *Population Projections, Australia, 2012 (Base) to 2101 Cat. No. 3222.0*. Canberra: ABS.
- Australian Bureau of Statistics, 2014. *Australian Historical Population Statistics, 2014 Cat. No. 3105.0.65.001*. Canberra: ABS.
- Australian Bureau of Statistics, 2015. *Average Weekly Earnings, Australia, Cat. No. 6302.0*. Canberra: ABS.
- Australian Bureau of Statistics, 2016. *Australian Demographic Statistics Dec 2015, Cat. No. 3101.0*. Canberra: ABS.

- Australian Institute of Health and Welfare, 2014. *Healthy Life Expectancy in Australia: Patterns and Trends 1998 to 2012* [online]. Canberra: AIHW. Available from: <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549632> [Accessed 9 June 2017].
- Australian Law Reform Commission, 2000. *Managing Justice: A Review of the Federal Civil Justice System, ALRC 89* [online]. Sydney: ALRC. Available from: <http://www.alrc.gov.au/report-89> [Accessed 9 June 2017].
- Baker, J., 1979. *An Introduction to English Legal History*. London: Butterworths.
- Blackham, A., 2016. Judges and Retirement Ages. *Melbourne University Law Review* [online], 39 (3), 738. Available from: http://law.unimelb.edu.au/_data/assets/pdf_file/0019/2061019/02-Blackham.pdf [Accessed 9 June 2017].
- Bollé, P., 1997. Part-time Work: Solution or Trap? *International Labour Review*, 136 (4), 557–579.
- Byrne, E., 2014. High Court Justice Susan Crennan to Retire, Paving Way for First Abbott Government Appointment. *ABC News* [online], 25 November. Available from: <http://tinyurl.com/z7dpnzr> [Accessed 9 June 2017].
- Campbell, E., and Lee, H., 2012. *The Australian Judiciary*. Cambridge University Press.
- Casper, G., and Posner, R., 1974. A Study of the Supreme Court's Caseload. *Journal of Legal Studies*, 3 (2), 339-375.
- Commonwealth, House of Representatives, 1987. *Parliamentary Debates*, 28 October (Lionel Bowen, Attorney-General) [online]. Available from: <https://tinyurl.com/yc6tg4co> [Accessed 12 June 2017].
- ConnectWeb, 2015. *Who's Who in Australia*. Melbourne: Crown Content.
- Coper, M., Blackshield, T., and Williams, G., eds., 2001. *Oxford Companion to the High Court of Australia*. Melbourne: Oxford University Press.
- Council of Chief Justices of Australia, 2007. *Guide to Judicial Conduct*. 2nd ed. Melbourne: Australasian Institute of Judicial Administration.
- Cunneen, T., 2010. A Creature of a Momentary Panic. *Bar News: The Journal of the New South Wales Bar Association* [online], Winter, 74-84. Available from: <http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2010/19.html> [Accessed 9 June 2017].
- District Court of New South Wales, 2015. *Annual Review 2014*. Sydney: District Court of New South Wales.
- European Commission for the Efficiency of Justice, 2014. *Report on European judicial systems – Edition 2014 (2012 data), efficiency and quality of justice* [online]. Strasbourg: Council of Europe. Available from: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf [Accessed 9 June 2017].
- Euwals, R., and Hogerbrugge, M., 2006. Explaining the Growth of Part-time Employment: Factors of Supply and Demand. *Labour*, 20 (3), 533-557.
- French, R., 2000. Federal Courts Created by Parliament. In: B. Opeskin and F. Wheeler, eds. *The Australian Federal Judicial System*. Melbourne University Press, 123-159.
- French, R., 2006. Judicial Exchange: Debalkanising the Courts. *Journal of Judicial Administration*, 15 (3), 142-164.

- Galanter, M., 2004. The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts. *Journal of Empirical Legal Studies* [online], 1 (3), 459-570. Available from: <http://epstein.wustl.edu/research/courses.judpol.Galanter.pdf> [Accessed 9 June 2017].
- Genn, H., 1999. *Paths to Justice: What People Do and Think about Going to Law*. Oxford: Hart.
- Gleeson, M., 2007. The State of the Judicature. In: 35th Australian Legal Convention [online]. Sydney. Available from: http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_25mar07.pdf [Accessed 9 June 2017].
- Griffith, G., and Kennett, G., 2000. Judicial Federalism. In: B. Opeskin and F. Wheeler, eds. *The Australian Federal Judicial System*. Melbourne University Press, 37-61.
- Hayne, K., 2008. The Vanishing Trial. In: *Supreme and Federal Courts Judges' Conference* [online]. Sydney. Available from: http://www.hcourt.gov.au/assets/publications/speeches/current-justices/hayne/hayne_23jan08.pdf [Accessed 9 June 2017].
- Hobbes, T., 1651. *De Cive: Philosophical Rudiments Concerning Government and Society* [online]. Available from: <http://www.unilibRARY.com/ebooks/Hobbes,%20Thomas%20-%20De%20Cive.pdf> [Accessed 22 June 2017].
- Hugo, G., 2002. Changing Patterns of Population Distribution in Australia. *Journal of Population Research and New Zealand Population Review* [online], special issue, 1-21. Available from: <https://www.accc.gov.au/system/files/Fn%20118%20-%20Hugo,%20Changing%20patterns%20of%20population%20and%20distribution.pdf> [Accessed 9 June 2017].
- Kirby, M., 1995a. Abolition of Courts and Non-reappointment of Judicial Officers. *Australian Bar Review*, 12 (3), 181-209.
- Kirby, M., 1995b. Ex Tempore Judgments: Reasons on the Run. *Western Australian Law Review* [online], 25 (2), 213-232. Available from: <http://www.austlii.edu.au/au/journals/UWALawRw/1995/18.html> [Accessed 9 June 2017].
- Langbein, J., 2012. The Disappearance of Civil Trial in the United States. *Yale Law Journal* [online], 122 (3), 522-572. Available from: <http://www.yalelawjournal.org/article/the-disappearance-of-civil-trial-in-the-united-states> [Accessed 9 June 2017].
- Legal and Constitutional Affairs References Committee, 2009. *Australia's Judicial System and the Role of Judges*. Canberra: Australian Senate.
- Local Court of New South Wales, 2015. *Annual Review 2014*. Sydney: Local Court of New South Wales.
- Mack, K., and Roach Anleu, S., 2004. The Administrative Authority of Chief Judicial Officers in Australia. *Newcastle Law Review*, 8 (1), 1-22.
- Mack, K., and Roach Anleu, S., 2010. *Magistrates Research Project: Career Change: An Update, Report No 1/2010*. Adelaide: Flinders University.
- Mack, K., Wallace, A., and Roach Anleu, S., 2012. *Judicial Workload: Time, Tasks and Work Organisation*. Melbourne: Australasian Institute of Judicial Administration.

- Maitra, P., and Smyth, R., 2005. Determinants of Retirement on the High Court of Australia. *Economic Record*, 81 (254), 193-203.
- Martin, W., 2013. Judicial Education. In: Australasian Institute of Judicial Administration, ed. *Australian Courts: Serving Democracy and Its Publics*. Melbourne: Australasian Institute of Judicial Administration, 81-92.
- McKechnie, W., 1914. *Magna Carta: A Commentary on the Great Charter of King John*. Glasgow: James Maclehoose and Sons.
- McLeish, S., 2013. The Nationalisation of the State Court System. *Public Law Review*, 24 (4), 252-266.
- Moses, A., 2010. Increase the Retirement Age for Federal Judges. *Bar News: The Journal of the New South Wales Bar Association* [online], Winter, 20-21. Available from: <http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2010/7.pdf> [Accessed 9 June 2017].
- Murray, S., 2014. Dual Federal and State Judicial Appointments: An Australian Impossibility? *Public Law Review*, 25 (4), 284-302.
- New South Wales, Legislative Council, 1999. *Parliamentary Debates, 10 November* (JW Shaw) [online]. Available from: <https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1820781676-57492> [Accessed 12 June 2017].
- Opeskin, B., 2000. Cross-vesting of Jurisdiction and the Federal Judicial System. In: B. Opeskin and F. Wheeler, eds. *The Australian Federal Judicial System*. Melbourne University Press, 299-334.
- Opeskin, B., 2001. *Appellate Courts and the Mangement of Appeals in Australia*. Melbourne: Australian Institute of Judicial Administration.
- Opeskin, B., 2011. The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population. *Federal Law Review* [online], 39 (1): 33-70. Available from: <https://ssrn.com/abstract=1851384> [Accessed 9 June 2017].
- Opeskin, B., 2013. The State of the Judicature: A Statistical Profile of Australian Courts and Judges. *Sydney Law Review* [online], 35 (3): 489-517. Available from: https://sydney.edu.au/law/slr/slr_35/slr35_3/Opeskin.pdf [Accessed 9 June 2017].
- Parker, S., 1998. *Courts and the Public*. Melbourne: Australian Institute of Judicial Administration.
- Parliament of Victoria, Law Reform Committee, 1999. *Technology and the Law*. Melbourne: Parliament of Victoria.
- Productivity Commission, 2013, 23 May. *Productivity Primer* [online]. Canberra: Productivity Commission. Available from <http://www.pc.gov.au/research/productivity/primer> [Accessed 23 May 2013].
- Remuneration Tribunal, 2015. *Determination 2015/18: Judicial and Related Offices, Remuneration and Allowances*. Canberra: Remuneration Tribunal.
- Roach Anleu, S., and K. Mack, 2016a. *Judicial Research Project*. Adelaide: Flinders University.
- Roach Anleu, S., and K. Mack, 2016b. *Magistrates Research Project*. Adelaide: Flinders University.
- Rogers, A., 1981. State/Federal Court Relations. *Australian Law Journal*, 55 (9), 630-648.

- Silberman, L., 1975. Masters and Magistrates Part I: The English Model. *New York University Law Review*, 50 (5), 1070-1118.
- Spencer, D., 2005. The Phenomenon of the Vanishing Trial. *ADR Bulletin*, 8 (2), 21-27.
- Spigelman, J., 2006. Measuring Court Performance. *Journal of Judicial Administration* [online], 16 (2), 69-80. Available from: <https://ssrn.com/abstract=1806782> [Accessed 12 June 2017].
- Spigelman, J., 2010. Towards a National Judiciary and Profession. *Law Society Journal*, 48 (2), 49-53.
- Standing Committee on Constitutional and Legal Affairs, 1977. *Report on Retiring Age for Commonwealth Judges, Parliamentary Paper No. 414/1976*. Canberra: Australian Parliament.
- Supreme Court of New South Wales, 2015. *2014 Annual Review*. Sydney: Supreme Court of New South Wales.
- Supreme Court of Victoria, 2009. *Annual Report 2008-2009*. Melbourne: Supreme Court of Victoria.
- Supreme Court of Victoria, 2014. *2013-14 Annual Report*. Melbourne: Supreme Court of Victoria.
- Thomas, C., 2015. *2014 Judicial Attitude Survey*. London: UCL Judicial Institute.
- Victoria, Legislative Assembly, 2008. *Parliamentary Debates, 27 February (Mr Hulls, Attorney-General)* [online]. Available from: <http://www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Feb-Jun%202008/Assembly%20Extract%2027%20February%202008%20from%20Book%202.pdf> [Accessed 12 June 2017].
- Victoria, Legislative Assembly, 2010. *Parliamentary Debates, 15 April (Mr Hulls, Attorney-General)* [online]. Available from: www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Feb-Jun%202010/Assembly%20Daily%20Extract%2015%20April%202010%20from%20Book%205.pdf [Accessed 12 June 2017].
- Victoria, Legislative Council, 2013. *Parliamentary Debates, 17 October (EJ O'Donohue)* [online]. Available from: http://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2013/Council_Daily_Extract_Thursday_17_October_2013_from_Book_13.pdf [Accessed 12 June 2017].
- Wallace, A., 2013. Courts and Their Publics: Technology and the Way Forward. In: Australasian Institute of Judicial Administration. *Australian Courts: Serving Democracy and Its Publics*. Melbourne: Australasian Institute of Judicial Administration, 17-37.
- Woodhill, S., 2016, 4 April. Judge Turns down Temporary Supreme Court Appointment. *Australasian Lawyer* [online], 4 April. Available from: <http://tinyurl.com/z8g4llb> [Accessed 12 June 2017].
- Wright, T., 1999. Australia: A Need for Clarity. *Justice System Journal*, 20 (2), 131-150.

Cases and legislation

- Courts Legislation Amendment (Associate Judges) Act 2008 (Vic).
- Courts Legislation Miscellaneous Amendments Act 2010 (Vic).
- Family Law Act 1975 (Cth).

Federal Court of Australia Act 1976 [online]. Available from:
http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/ [Accessed
13 June 2017].

Forge v. Australian Securities and Investments Commission (2006) 228 CLR 45.

Harris v. Caladine (1991) 172 CLR 84.

Heydon v. NRMA Ltd [2000] 51 NSWLR 1.

High Court of Australia Act 1979 (Cth).

Judicial Officers Act 1996 (NSW).

Kearney v. Her Majesty's Advocate [2006] UKPC D1 (6 February 2006)

Magistrates Court Act 1930 (ACT).

R v. Lippé [1991] 2 SCR 114.

Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344, 354.

Supreme Court Act 1933 (ACT).

Supreme Court Act 1970 (NSW).

Supreme Court Act 1986 (Vic).

Valente v. The Queen [1985] 2 SCR 673

Wikio v. Attorney- General [2008] NZHC 1104 (11 July 2008)