Case Management Reform:

A Study of the Federal Court's Individual Docket System

Caroline Sage
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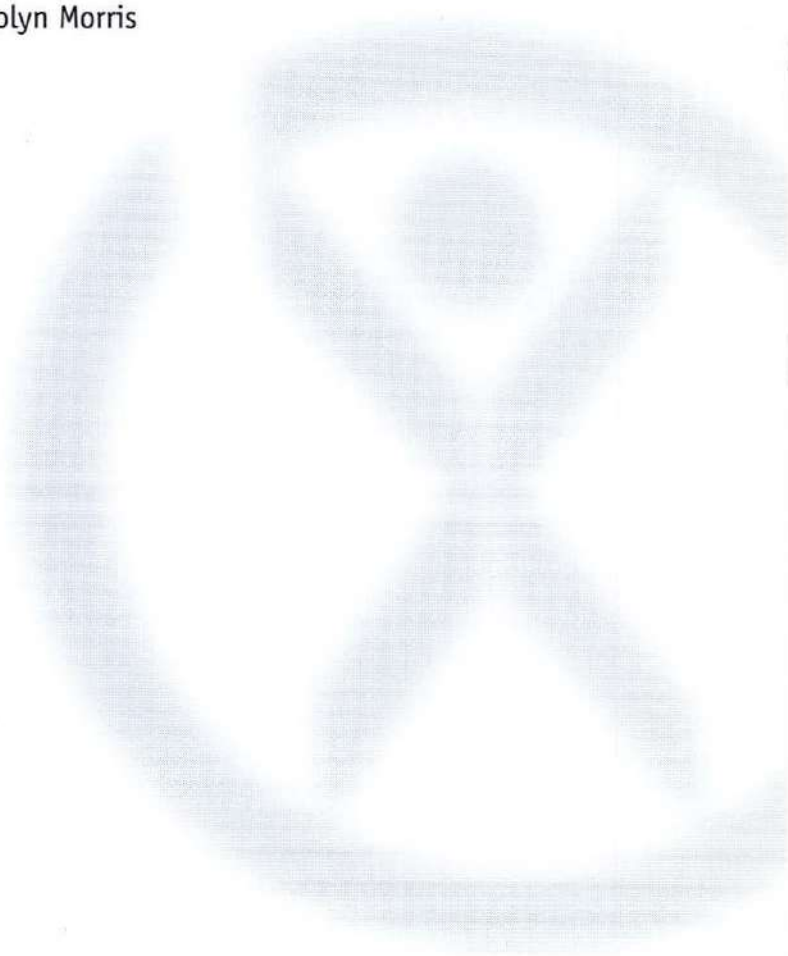
with Carolyn Morris



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Caroline Sage and Ted Wright
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June 2002

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1

Introduction

In 1997 the Federal Court introduced one of the most distinctive and significant models of case management to be found in an Australian superior court.[1] The essence of the 'Individual Docket System' is that each judge is responsible for the management of their own list of cases from commencement to finalisation. The system aims to promote more active and effective judicial case management in order to streamline processing, encourage early settlement and, overall, to dispose of cases more efficiently.

The system is the product of extensive, detailed planning by the Federal Court. This addressed, among many things, aspects such as case allocation and associated workload issues, development of a recommended case management model, compliance monitoring and sanctions, organisational and administrative changes including staffing and resources, transitional issues, and related procedural reforms. The Court has also continued to assess and adapt aspects of the system as issues or complexities arose.

The aim of this study is to describe the Individual Docket System as it has been implemented and identify areas of difficulty as well as possible model practices or useful ways of doing things. It gives members of the Court and the wider legal community insight into the experiences, views and practices of participants in the system. Importantly, because the system largely leaves the actual management of dockets and cases to the judges, individually[2], the report endeavours to document the case management practices of the judges systematically and comprehensively.

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1 As we shall see, the system was not a completely new innovation in all registries and, particularly in the smaller registries, some features of it had been established practice for many years prior to its adoption as a national system in 1997.

2 While the Court developed a model for case management and recommended a number of practices, it was left to the judges to take up these suggestions as they saw fit.

The report is significant for reasons that extend beyond the precincts of the Court. The research it describes is an important contribution to current debate about civil process reform, occurring on both a national and international level. It offers valuable insights into the issues and challenges involved in developing and implementing system reforms in environments similar to the Federal Court of Australia.

From a very early stage, the Court recognised the need to evaluate the effectiveness of the Individual Docket System. It is, of course, of great interest to both the Court and the wider legal community, whether the system is achieving its aims. The first necessary step in addressing this question is to examine how successfully the system has been implemented and is operating. This is particularly the case given the extent and complexity of the changes it introduced, and because, as we shall see, its success is actually predicated upon altering the behaviour of the principal participants in Federal Court litigation—that is, changing 'culture' This study considers in detail how people responded to the new system and what actually occurred as a result of its introduction.

Genesis of the Individual Docket System

The Individual Docket System, as it was initially introduced, evolved from a number of initiatives taken within the Court between mid-1995 and late 1997. Prior to the introduction of the Individual Docket System, each registry had run their own 'master calendar system', which, in the larger states, included the use of specialist lists.

In August 1995, judges and senior registry staff took part in a 'strategic planning' workshop which identified the need to review practice and procedure in the Court. A Practice and Procedure Committee was set up to make recommendations for change. These recommendations included: having the same judges hear directions wherever possible; reducing the number of directions hearings needed to progress a case to trial; enforcing orders and time limits by monitoring compliance and using cost sanctions; setting aside fixed time for judgment writing; and giving judges the power

to order compulsory mediation.[3] The principal recommendation adopted by the judges at this time was a case processing time standard requiring 98% of cases to be finalised within 18 months of commencement.

In June 1996 the Court engaged an American expert, Maureen Solomon, to review case listing, processing and management in the Court. Her central recommendation was that the Court should adopt a case management system in which judges would be allocated cases at their commencement, and would remain responsible for managing them until their finalisation—that is, an Individual Docket System.[4] This recommendation was adopted in principle by the Court, and the 'central goal' of the proposed system was identified in these terms —

> *A system of disposition of cases appropriate for resolution by the Court, whatever it may be and whether or not the same in each state, which is practical, predictable, reliable, understood and accepted by the Court as a whole, understood and hopefully accepted by the profession, which has the effect of disposing cases within a reasonable period of their commencement. As a general rule that period not to exceed 18 months except in the most unusual circumstances.*[5]

A number of resolutions about the new system were made at a special judges' meeting in June 1996, confirming that—

- Each judge should hear matters from beginning to end.
- Cases should be randomly allocated.
- Judges would have the right to say that they were unable to take matters because of work pressure, but they could not opt out just because they do not want to hear them.

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3 See Federal Court Internal Document September 1995 – Recommendations for change; Federal Court Internal Document October 1995 – Composite report of P&PC Report, judges' meeting minutes, Master Action Sheet, Individual Action Sheets.

4 Federal Court Internal Document June 1996 - Practice and Procedure Committee, *Notes For the Practice and Procedure Committee of the Special judges Meeting Held June 1996*, Federal Court, Unpublished.

5 ibid.

- The Chief Justice has to approve any decision to remove a judge from allocation.
- The duty judge will take urgent matters and retain them.
- Judges should be organised into groups with one registrar to act as case manager.
- The court should audit its pending caseload.

A proposed Individual Case Management System Timeline was accepted in principle at this time.[6] There was also general agreement that, where possible, the use of alternative dispute resolution processes needed to be encouraged and facilitated.

Areas highlighted by the Practice and Procedure Committee as needing refinement included the setting up of a system for early referral to more suitable jurisdictions and alternative dispute resolution, minimising the number and maximising the usefulness of directions hearings whilst maintaining continuity between them, and enforcing time limits on interlocutory steps. The task of developing and refining court procedures to enable the introduction of an Individual Docket System was delegated to a number of Sub-Committees, namely a Transition Committee, a Staff and Resource Committee, a Full Court Rostering Committee, a Case Management Conference Committee and an Audit Committee.

These Committees identified and addressed the design and implementation issues involved in the new system in extensive detail. The Transition Committee made recommendations about the process of implementation. The Staff and Resources Committee examined the potential impact of the new system on court resources and identified ways in which staff roles and administrative support systems would need to be adapted. The Full Court Rostering Sub-Committee considered the most effective way to run Full Courts under an Individual Docket System. The Case Management Conference Sub-Committee refined the details of the new case

6 Federal Court Internal Document July 1996 - *Individual Calendars - Action arising from the judges' meeting on 11 June 1996* and Meeting with Maureen Solomon on 12 June 1996. Details of this model are set out below.

management system and the events identified in the adopted timeline. For the most part, the reports of these committees show that the Court anticipated virtually every area that has in fact proved to be, in some sense, problematic in the new system.

The recommendations of these Committees are significant, in part because they emphasise the critical nature of the implementation process, and in part because some problems they anticipated may not have been adequately addressed. In some cases, the original recommendations were not included in the final design of the system for reasons that are not always evident. In other cases, it was decided that different approaches or procedures could be introduced on an incremental basis once it was clear how the system would work. Other recommendations, while forming part of the system as introduced, were not taken up by many of the participants. In some cases the recommended solution to a possible problem did not successfully address the issue. Our research indicates that a number of these problem areas are in need of further consideration by the Court or by other courts considering implementing similar reforms.

The Transition Sub-Committee made recommendations in relation to both the assignment of pending cases and the allocation of new cases to judges.[7] While they gave some consideration to weighting pending cases, they suggested that the random allocation of new cases could occur through a rotating duty judge system. However, recognising the possible inequity that may result, it also recommended that each registry should have a nominated 'Listing judge' who could redress anomalies by transferring cases among judges.[8]

The Transition Sub-Committee suggested the adoption of a team approach to the disposition of cases, with one judge being nominated to moderate the

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7 Federal Court Internal Document September 1996 - *Transition Sub-Committee Report on the Allocation of New and Pending Cases in the Implementation of an Individual Calendaring System for judges.*

8 ibid.

caseload of the judges within a particular team. It was noted that this would enable some degree of 'double listing' in a docket.[9] The Transition Sub-Committee also recommended that the team structure could be used to establish a specialist mentor system that would facilitate a greater spread of specialist work among judges.

While there was some discussion amongst judges during the development period in relation to the abolition of specialist lists, it was agreed by the Chief Justice that random allocation would not be appropriate for certain case types and that special treatment needed to be given to these. At the same time, it was agreed that it was desirable to spread different types of work to a wider number of judges.[10] Expanding specialist lists and opening up specialist work to a wider ambit of judges was seen to promote a more equitable distribution of the variety of work within the court.

The Staff and Resources Sub-Committee identified a number of restrictions that would need to be considered in implementing a new system, including the fact that government resources were limited and were also being reduced, and that the physical layout of Registries would affect how support staff for judges could be organised. The committee also identified a number of issues that would need to be addressed under the system. They considered that the current allocation of resources might not be appropriate depending on workloads and case mixes in different Registries, and that appropriate information technology support was critical. They also recommended that strategies should be implemented to address potential diminishing collegiality on the bench, and potential conflicts caused by resource allocation. The Sub-Committee clearly felt that there was a need for flexibility to cater for individual needs—

> *The staffing and resource needs for individual judges in an individual case management system will be influenced by each judge's background, experience, work habits and personal judicial philosophy, particularly how each judge interprets his or her role in the adversary process.*[11]

9 ibid.

10 ibid.

11 ibid.

The Full Court Rostering Sub-Committee identified both workload and timetabling issues that needed to be considered under an Individual Docket System, and set out a proposed system for Full Court sittings that aimed to address these issues. The main objectives the proposal sought to address included—

- setting a time standard for the disposal of appeals
- standardising the sittings of the Full Court to ensure minimum interference with individual case management required under the Individual Docket System
- reducing the number of weeks required from judges in larger states and spreading the total judge weeks required evenly across states
- allowing (with approval of the Chief Justice) judges to opt out of Full Court sittings in a particular year or period to concentrate on first instance work
- establishing a system to ensure judges are provided with preparation and judgment writing time for Full Court matters without undermining the system of individual dockets.[12]

The Case Management Conference Sub-Committee made recommendations concerning the way in which proceedings should be commenced; the early directions hearing requirements; Case Management Conference requirements; Evaluation and Trial management conference requirements; the timing of different events in the management of cases and matters concerning the conduct of the Trial.[13] The committee also highlighted the benefits of a 'teams system', to allow for the transfer of cases between judges. It also made a number of other, related recommendations, including—

12 Federal Court Internal Document September 1996 - *Full Court Rostering Sub-Committee Report.*

13 Federal Court Internal Document 1996 - *Case Management Conference Sub-Committee Report- Individual Case Management.*

- re-allocating Duty judge matters randomly if they are not disposed of by the sitting Duty judge
- using standard form directions
- giving early notification of trial date ranges to parties
- regular and consistent monitoring to ensure compliance with directions and timelines
- using case progress reporting— where parties provide the Court with information about the progress of a case and what needs to be done to progress the matter to disposition.

At the beginning of 1997, the Individual Docket System was piloted in the Melbourne Registry. It was decided that new cases would be allocated to judges on a random numerical basis from the beginning of the 1997 law year. During this time, there were 163 cases ready for hearing in the Melbourne Registry, corresponding to an estimated 19 weeks of hearing per judge. It was decided to hold a call-over in February 1997 to set down outstanding cases for a May 'blitz'. Any matters remaining after the May blitz were divided into individual dockets.

Although a number of possible systems for weighting cases and redistribution were considered by the Court at this time, it was thought to be too difficult to accurately assess the weight of matters prior to the introduction of the system. Hence, it was seen as preferable to assess weighting and caseload once the system was underway.[14] Specialist panels were established by the Chief Justice and, partly in order to broaden the base of expertise across the court, the judges were encouraged to nominate for any panel they wished to join. A type of team structure was also established at this time with different members of registry being assigned to groups of judges to assist them with the management of their dockets.

14 It is important to note that the court was aware at this time of possible problems concerning inequity that could arise in a purely numerically based allocation system.

Following the introduction of the pilot scheme in Victoria, the docket system was introduced in all Registries. South Australia, Western Australia and Queensland Registries had been running a system similar (in varying degrees) to an Individual Docket System for some time, so the transition to the Individual Docket System appears to have been fairly smooth. The introduction of the docket system in NSW was also accompanied by a hearing 'blitz' held between 16 June 1997 and 15 August 1997, in order clear up outstanding work. After the 'blitz' both pending and new cases were randomly allocated to judges' dockets on a panel and non-panel basis. The allocation of current cases was supervised by the Chief Justice's Executive Assistant in consultation with the List judge, with some discretion being used both to maintain parity between judges and in the allocation of sensitive or difficult cases. Although the idea of judges working in floor-based teams was clearly considered at this time, it is unclear whether there was any attempt to implement this system. A duty judge system was introduced to deal with urgent applications. The new system was up and running across the entire court by September 1997.

The Victorian Registry produced a protocol document that set out the procedure for allocating cases to individual dockets.[15] In New South Wales a similar protocol was drafted but, apparently, not formally finalised.[16] In other registries, we understand that the procedures were not documented in a comprehensive form.

The new system changed everyday practice in all of the Registries of the Court in differing ways and to different degrees. For example, under the previous system, the larger Registries managed centralised listing systems, allocating directions hearings and trials to judges as they had time available. In Sydney, some 'specialist' matters (such as taxation cases) were, apparently, often managed by the same judge throughout, but this was not a general practice. In some of the smaller Registries, however,

15 Federal Court Internal Document February 1997 - *Individual Docket Protocol*, Victoria Registry.

16 Federal Court Unpublished Document - *A guide to Litigating in the NSW District Registry of the Federal Court*, NSW Registry.

individual cases were often dealt with by the same judge, from start to finish. Even so, in these Registries listing ultimately depended on judge availability, however much continuity could be maintained *de facto*. Under the Individual Docket System, listing (after initial allocation) has been fully devolved to the individual judges.

Elements of the Individual Docket System

The key elements of the Individual Docket System as it was implemented, are described by the Court as follows—

- cases are randomly allocated at commencement to the docket of the next judge in a rotation, or in specialist list cases, to the next judge in the specialist panel.
- cases so allocated ordinarily stay with, and are managed by, the same judge from commencement until disposition.
- a time standard of no more than eighteen months for the disposal of most cases.
- a model time frame for key case events to occur, encouraging minimum appearances with maximum returns.
- an emphasis on active judicial management, including monitoring of parties' compliance with directions and maintaining regular contact with parties regarding the progress of a case.
- an emphasis on earlier and more effective identification of cases suitable for assisted dispute resolution.[17]

The Court also developed and published a model of the case management process. The model was intended to act as a guide to managing cases under the docket system, and was not adopted as a prescriptive model by the court. The model consisted of four interlocutory hearings or 'key

17 Federal Court of Australia, *Annual Report 1997/1998* (1998) FCA: Melbourne pp. 36-37.

events' scheduled to occur at different intervals along the overall time standard of 18 months. These key events were—

- **Directions Hearing,** designed to enable early assessment of cases, transfer from the Federal Court cases that should have been brought in other courts and make directions to prepare the case for the Case Management Conference.
- **Case Management Conference,** designed to consider settlement, administer dispute resolution options, review compliance with directions made at the Directions Hearing, set a trial date range and make such further directions as may be shown to be necessary.
- **Evaluation Conference,** designed to focus on disposition without trial, arrange a mediation conference if desirable, evaluate state of preparation of the case including compliance with directions given at the Case Management Conference, and attempt to dispose of the case and, if not, allocate a trial date.
- **Trial Management Conference,** designed to establish the ground rules for the conduct of the trial.[18]

Other pre-trial hearings and conferences were to be held if required, but the aim was to minimise events and maximise results. Timing of each key event was intended to take into account the expected state of case preparation at that time while achieving the Court's overall time standard.[19]

Another significant element of the system was the increased emphasis on 'Alternative (or Assisted) Dispute Resolution' (ADR). Section 53A of the *Federal Court of Australia Act* was amended in mid-1997 to allow judges to order parties to participate in ADR. Combined with an emphasis on

18 Federal Court Unpublished Document - *A guide to Litigating in the NSW District Registry of the Federal Court,* NSW Registry. See also Federal Court of Australia Website <http://www.fedcourt.gov.au/aboutct/aboutct_IDS.html#events.htm>, (Accessed April 2001).

19 Federal Court of Australia Website <www.fedcourt.gov.au/aboutct/aboutct_IDS.html>, (Accessed April 2001).

early identification of cases suitable for ADR, this change was intended to promote earlier settlement of cases.

Aims and Objectives of the Individual Docket System

The Individual Docket System was expected to have a number of benefits, for reasons that might be said to follow logically from giving judges responsibility for managing the individual cases, from start to finish. The system was designed to involve degrees of responsibility, continuity, autonomy and accountability that the previous system did not have.

Thus, when the system was introduced, the Court suggested that its benefits for the legal profession, the parties and the Court would include—

- the absence of a need to explain a case afresh each time it comes before a judge – it comes before the same judge, who is familiar with it
- savings in time and cost resulting from the judges' familiarity with the case
- consistency of approach throughout the progress of the case
- fewer events with greater results
- improved management of individual cases
- fewer formal directions and events requiring appearances in the case management process
- better identification of cases suitable for ADR
- earlier settlement or at least narrowing of issues
- greater efficiency and flexibility in setting dates for interlocutory applications, short hearings and trials
- better capacity for judges to manage their own time and calendars.[20]

20 Federal Court of Australia Website <http://www.fedcourt.gov.au/aboutct/aboutct_IDS.html#benefits>, (Accessed April 2001).

The Individual Docket System in Context

The Individual Docket System can be clearly located within current trends and developments in civil process reform throughout the common law world.[21] It was developed in a context of dissatisfaction with cost and delay in the courts, so apparently deep and widespread that even the courts' most temperate advocates spoke of an emerging sense of 'crisis' in the Australian court system.[22] Remarking upon popular concern about 'Access to Justice' has now almost become a cliché. It is nevertheless true to say that access to justice, and in particular access to the courts has become a major focus of the law reform effort of the last decade in Australia.[23]

The so-called 'twin evils' of cost and delay in the courts are not, of course, new concerns. What is new, however, is an analysis that identifies the 'root cause' of these problems as being 'excessive adversarialism' in our system

21 Cf Special Issue: Understanding Civil Justice Reform in Anglo-American Legal Systems, *Justice System Journal* (1999) vol 20(2).

22 See for example G Brennan 'Key issues in judicial administration' (1997) 6(3) *Journal of Judicial Administration* 138 and S Parker 'Islands of Civic Virtue? Lawyers and Civil Justice Reform', Inaugural Professorial Lecture, Griffith University, 5 Dec 1996. The Federal Court's reforms have also emerged in the separate but coincidental political contexts of 'economic rationalism' and micro-economic reform policy, directed at reducing public expenditure and increasing the effiency and accountablity of government 'services'. There is no doubt that the Federal Court saw the Individual Docket System as a way of responding to these pressures as well. Were we to attempt to explain to the interested reader how a change of the significance of the Individual Docket System was possible in an organization like the Federal Court, in this epoch, we would no doubt wish to examine the wider political and institutional contexts at some length. Such an exercise is clearly beyond the scope of this paper. See however T Wright 'Australia: A need for clarity' (1999) 20(2) *The Justice System Journal* 13.

23 Including Australian Law Reform Commission, *Managing Justice: A review of the Federal Civil Justice System* (2000) ALRC: Sydney; Law Reform Commission of Western Australia, *Reforming the Justice System*, (1999) WA LRC: Perth; Litigation Reform Commission, *Civil Justice Reform: Streamlining the Process* (1996) Litigation Reform Commission Conference, Brisbane, March 6-8 1996.

of litigation.[24] The 'old conventional wisdom'[25] of cost and delay was that they were problems of inadequate resources and inefficient procedures.[26] The insight of the 'new conventional wisdom' was that the problems had more to do with the *actors* in the system than its processes or capacity. This analysis argues that the adversarial system, in its classic form, is essentially an unmanaged process susceptible to the inefficiencies of legal practice (institutionalised as 'the local legal culture') and lends itself to 'strategic abuses' and other excesses.

The elements of reform

Thus, virtually all recent examples of civil process reform are attempts to 'take the combat out of litigation' and are based on two major elements or strategies.[27] These are that the court should take an active role in the management of proceedings[28] and the parties should be encouraged to

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24 GL Davies 'The Changing Face of Litigation' (1997) 6(3) *Journal of Judicial Administration* 179; GL Davies 'Justice reform: a personal perspective', Background Paper prepared for the Paths to Civil Justice Reform Conference, Bellagio Conference Centre, March 17-21 1997; GL Davies 'A Blue Print For Reform: Some Proposals of the Litigation Reform Commission and Their Rationale' (1996) 5(4) *Journal of Judicial Administration* 210; GL Davies and JS Leiboff 'Reforming the civil litigation system: Streamlining the adversarial framework' (1995) 25 *Queensland Law Society Journal* 11; GL Davies and SA Sheldon, 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rational', A Paper delivered at the Legal Ethics Symposium, National Institute of Law, Ethics and Public Affairs, Griffith University, Brisbane, 13-15 August 1993; ALRC *Managing Justice* op. cit. reference, T Wright 'Australia: A need for clarity' (1999) 20(2) *The Justice System Journal* 13.

25 TW Church 'The 'Old and New' Conventional Wisdom of Court Delay' (1982) *Justice System Journal* 395. This now classic paper addressed the problem of delay but the analysis extends easily to problem of cost as well.

26 In fact, to a very great extent, the problem of cost was identified with the problem of delay, and that tendency remains evident.

27 Compare with the Woolf Report (Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, (1996), and the Blair Report in Ontario (RA Blair et al, *Civil Justice Review: Supplemental and Final Report*, Nov 1996, Ontario Civil Justice Review).

28 In the earliest forms, the role of the court was confined to taking responsibility for the *progress* of cases and the term used was 'caseflow management'. The shift in terminology to case management reflects a change of substance and an evolving active role for the Court in the 'development' of proceedings, as well as their 'prosecution. Cf RW Millar 'The formative principles of civil procedure' (1923) 18(1) *Illinois Law Review* 1.

resolve their dispute by settlement, through the use of formal processes or mechanisms such as mediation, if need be.[29]

The Federal Court's Individual Docket System involves a particularly strong commitment to both an active role of the judge in civil litigation, and a policy of promoting settlement as the preferred outcome of the process. Indeed, there is an explicit connection between the two strategies. The system was designed to promote more active judicial management, which in turn was intended to enhance opportunities for achieving settlements. What was expected to produce these, was assigning judges individual responsibility for individual cases, from 'go to whoa'. Thus, the fundamental structural feature of the Individual Docket System—its instrumental 'heart'—is the method for allocating the work of the Court among its judges.

The Federal Court case managed before the introduction of the Individual Docket System and, indeed, it was one of the first courts in Australia to do so. Its method has been (virtually from the time it was established) to supervise the development of proceedings through a succession of directions hearings that operate as a kind of 'managerial overlay' on the rules of procedure. Prior to the introduction of the Individual Docket System, however, differing policies were apparently followed in different registries and in relation to different types of cases. In some, the practice was for the same judge to convene all of the directions hearings in a proceeding, but not necessarily to preside in the final hearing. In other cases, the same matter could be listed for directions before a number of different judges (in some registries the practice was to rotate judges through a roster as the 'directions judge').

Notwithstanding that the emphasis on active judicial case management and promoting settlements reflects a general trend throughout the common law world, these ideas are not wholly uncontroversial, and the debate

29 These two strategies have, typically, also been pursued along with the more conventional tactic of reforming the rules of procedure to address perceived inefficiencies of particular processes, such as discovery. But this is, discernibly, a minor, third element of the reform strategies which characterise the so-called 'Woolf reforms' in England, the Harris reforms in Ontario, and the many examples of 'case management' reforms in Australia.

surrounding them raises some important questions which the Federal Court considered. The decision to build the Federal Court reforms around individual dockets involved, at the very least, a belief in the net efficiencies of this listing method. The Individual Docket System also committed the Court to new and significantly different principles, of equity in the distribution of workloads, and accountability of individual judges.

The comments made about these basic elements of the system by the interviewees in this study tended to reflect, perhaps not surprisingly, the full extent of the general debate. The attitudes and perceptions of key players about these aspects of the system have significant implications, at two levels. First, of course, they are an indication of how well the system is operating on the ground. Second, whether participants agree with the changes, are willing to embrace elements of the system or perceive the changes to be working as they are intended, may prove to have significant implications for the success of the system. The docket system ultimately depends to a significant extent on changing the roles, behaviour and attitudes of the principal figures in Federal Court litigation. Even with the best intentions and designs, attempts to achieve cultural change of this kind can be slow and difficult if faced with resistance by key players. It is therefore fairly important, as the starting point in change management, to consider and address the different sides of the debate in order to gain support for the proposed reforms.

The active role of the judge

As we have said, the central idea of case management is that the court takes some responsibility for and control over the progress and development of proceedings rather than leaving this solely to the litigants (as in the traditional model of the adversary system). The central aims of case management are to reduce delays and costs by making the litigation process more efficient.

Active judicial management techniques are seen to reduce case preparation time by enabling judges to control the progress of cases, curb abuses of court processes and encourage both settlement and alternative

modes of dispute resolution. It is argued that left to their own devices, parties will behave in inefficient ways. Judicial control of the litigation process is seen to reduce the inefficient use of court time by inexperienced or incompetent litigants, ensuring more efficient use and equitable distribution of the limited resources of the court system and increasing the confidence of potential litigants in the system.[30]

> *Litigants who clog up the caseload with disputes that should settle, load the judges with unnecessary interlocutories and prolong the agony with applications for amendment and adjournment and then top it all by an unnecessarily turgid and detailed presentation on the substantive case, effectively deny access to others who are prepared to be reasonable, and who are represented by responsible and competent counsel.*[31]

Case management is also seen to allow courts to develop a framework to monitor their workload; to collect, collate and disseminate information; to evaluate performance in different areas; and to channel resources into areas of need.[32] Courts are therefore able to manage their own affairs more productively, thereby increasing public confidence in the courts.[33]

Active judicial management, however, is seen by some as threatening important elements of the traditional adversarial model. It is argued that the 'passive' role of the judge in the adversary system served to preserve a degree of judicial independence and impartiality that is placed at risk when the judge assumes an active role in litigation. A strong critic of case management, Resnik has argued that it may lead judges to become biased by views formed in the pre-trial process, and removes other safeguards which protect litigants from potential abuses of judicial power.

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30 JLT Olsson 'Civil caseflow management in the Supreme Court of South Australia: Some winds of change' (1993) 3 *Journal of Judicial Administration* 3.

31 R Smellie 'Case management: Some recent observations' (1998) 3(4) *Judicial Review* 271 p272.

32 PA Sallmann 'The impact of caseflow management on the judicial system' (1995) 18(1) *University of New South Wales Law Journal* 193.

33 PA Sallmann 'Life beyond caseflow management' (1993) 3(3) *Journal of Judicial Administration* 143.

> *[M]anagement responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.*[34]

Opponents of case management also argue that giving judges an active role in the management of cases may not increase efficiency but, rather, may only result in costs being shifted from the court to the litigants or, indeed, may increase the costs of both.[35] Further, early intervention by the court, it is argued, tends to 'front-load' litigation costs, as well as simply generating more work, with the result that costs are incurred where they would otherwise have been avoided, by a settlement of the proceeding in due course.[36] The additional administrative duties placed on judges are also seen as a waste of judicial resources.

> *Similarly, it has been argued that the focus of case management has been on numbers and statistics over quality judgments, and management and efficiency over just procedures and the rights of the parties.*[37]

Arguably the challenge for an institution like the Federal Court is to develop a system that uses available resources in an appropriate and effective manner while maintaining the quality of adjudication and levels of fairness. As Jolowicz has observed—

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34 J Resnik 'Managerial judges' (1982) 96 *Harvard Law Review* 376 p378.

35 M Zander 'The Woolf Report: forwards or backwards for the new Lord Chancellor?' (1997) 16 *Civil Justice Quarterly* 208; GD Watson 'From an adversarial to a managed system of litigation: a comparative critique of Lord Woolf's interim report' in R Smith (ed) *Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s* (1996) LAG: London.

36 Cf T Matruglio and J Baker, *An Implementation Evaluation of Differential Case Management* (Civil Justice Research Centre, 1995) and C Guest and T Murphy, *An Economic Evaluation of Differential Case Management* (Civil Justice Research Centre, 1995) contain summaries of the resistance of the New South Wales legal profession to the Supreme Court's 'DCM' scheme on this ground.

37 J Resnik 'Managerial judges' (1982) 96 *Harvard Law Review* 376 p380.

> *Obviously, and subject to the volume of work placed upon it, a court which is endowed with far reaching powers is in a position to dispose of its cases more quickly than one which can only act on the initiative of a party, and there is a tendency to see in this a cure for the evil of justice delay. The essential question... concerns the extent to which the powers of the court can be increased without thereby sacrificing other values which are held to be vital to the due administration of civil justice.*[38]

Promoting settlements

There is a large body of literature that asserts that the courts in their current form could not cope if all litigants insisted on adjudication of their disputes. Further, the 'lose-lose' view of litigation as an excessively long and costly process has increasingly been compared to the 'win-win' view of settlement as the most satisfactory option for all concerned. It is argued that the public is becoming increasingly dissatisfied with the inaccessible nature of traditional forms of adjudication and that more consumer orientated forms of dispute resolution need to be promoted.

For these reasons courts have increasingly been actively promoting settlements and alternative forms of dispute resolution. Court-annexed mediation or dispute resolution services have been introduced into courts in all jurisdictions, and in some cases mediation has become a compulsory step in the pre-trial process. Services such as professional mediation services, conciliation, arbitration or early neutral evaluation are increasingly being seen as extensions of the court's functions.

In contrast, the traditional position has been that, while settlement may be a desirable 'by-product' of the court's process, it should only be a by-product. If the parties (or one of them) should choose to withdraw from the process, well and good, but that is not the court's concern—so long as neither delay nor the cost of its procedures are such as to make an unjust settlement preferable to asking the court to determine the parties' rights.

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38 J A Jolowicz 'The Active Role of the Court in Civil Litigation' (1975) 15 *Studies in Comparative Law* 157 p272.

The modern development of *officially* promoting settlement as the preferred outcome in the court system encounters two basic objections. The first, most practical, objection is that there is nothing to show whether the active involvement of the court, formally or informally, actually results in settlements—that is, settlements which would not otherwise have occurred if the parties were left to their own devices. It may, however, add to the cost and duration of the litigation process.

The second objection is one of principle, emanating from the view that the court is a public institution, the unique function of which is to *adjudicate*—that is, decide disputes according to *law*. The notion that the duty of courts involves something more than simply resolving disputes was firmly established in nineteenth century jurisprudence[39] but then appears to have dropped out of fashion. It has only recently re-emerged through a few, but powerful, voices.[40] In its most revealing—if, to modern sensibilities, extreme—form, this view asserts that if adjudication results in 'justice according to law' then *compromise ... is denial of justice*, since settlement will only rarely result in disputes being resolved strictly in accordance with the parties' legal rights.[41] Although these ideas may seem somewhat out of step with the modern idea that settlement should be actively promoted as the preferred outcome of disputes, the lingering ambiguity of function underlying this issue still needs to be considered by the courts.[42]

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39 The views of Jeremy Bentham are discussed by Professor William Twining in 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *Modern Law Review* 380.

40 Professors Owen Fiss and Judith Resnik, both now of Yale Law School are the leading modern proponents of this view. See e.g. O M Fiss 'Against settlement' (1984) 93 *Yale Law Journal* 1073; J Resnik, 'Many doors? Closing doors? Alternative dispute resolution and adjudication' (1995) 10 *Ohio State Journal on Dispute Resolution* 211 and J Resnik, 'Failing faith: Adjudicatory procedure in decline' (1986) 53 *University of Chicago Law Review* 494.

41 The phrase in italics is a quotation from Bentham's *Scotch Reform* cited in W Twining, op cit. The same view is reflected in 19th Century civilian jurisprudence, in almost identical terms, by the German jurist Von Ihering. See also J A Jolowicz 'The Active Role of the Court in Civil Litigation' (1975) 15 *Studies in Comparative Law* 157 p267-8.

42 Not least because of its relevance to the current debate about 'user pays' and whether civil litigation should be a publicly subsidised process: cf T Wright, 'Research and civil process reform: Comment on Lord Browne-Wilkinson's 'A Sheep in Woolf's clothing'', Paper delivered at NSW Supreme Court judges Conference 11 September 1998; See also S Parker, 'A Case for Private Courts', Martin Kriewaldt Memorial Address delivered at the Supreme Court of the Northern Territory, 14 August 1998.

Listing systems

One of the central features of any case management system is how cases are actually assigned to judges. The fundamental basis of the new Federal Court Case management system is random allocation of cases to individual judges, who then manage those cases from commencement to disposition. The Court has however implemented a number of adjustments to this basic system to deal with issues such as judicial expertise, specific case types, urgent applications and appeal cases.

There are broadly two approaches to the allocation of cases in Australian courts, and courts in other common law jurisdictions: the individual calendar system and the master list system.[43]

In the master list system, all cases are assigned to a central pool when filed. The cases are then listed before a judge, as may be required, for each step of the process, and then returned to the central pool between events or to await trial. Generally cases are assigned to any judge available on the day, and may only be listed more than once before the same judge by chance. Cases can be allocated randomly to any of the available judges of a court, or can be allocated to judges according to their specialities.

Master calendaring is designed to maximise the utilisation of judge hearing time and case through-put. It is purpose-built to allow overlisting with the highest probability that all cases which actually require a hearing will be heard on the date they are scheduled to be heard.[44] Queuing a single

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43 For discussions of the differing elements of these two approaches see BC Cairns 'Managing civil litigation: an Australian adoption of American experience' (1994) 13 *Civil Justice Quarterly* 50; PA Sallmann 'An overview of the principles of modern caseflow management' (1991) 21(1) *Queensland Law Society Journal* 71; PA Sallmann 'Life beyond caseflow management' (1993) 3(3) *Journal Of Judicial Administration* 143; PA Sallmann 'Where are we heading with court governance?' (1994) 4(1) *Journal Of Judicial Administration* 5; PA Sallmann 'The impact of caseflow management on the judicial system' (1995) 18(1) *University Of New South Wales Law Journal* 193; M Solomon and DK Somerlot *Caseflow Management in the Trial Court: Now and for the Future* Chicago: American Bar Foundation, 1987; T Sourdin 'Judicial Management and alternative dispute resolution process trends' (1996) 14(3) *Australian Bar Review* 185; D Steelman 'What have we learned about court delay, 'local legal culture', and caseflow management since the late 1970s?' (1997) 19(2) *The Justice System Journal* 145.

44 Over listing while maintaining 'hearing date credibility' is a high art, imperfectly practised by many courts but nevertheless the objective and a practical possibility of master calendar listing systems.

list into many courts allows a high degree of flexibility, which may be used to accommodate individual cases that are urgent, or to take a judge out of court if, say, he or she needs time to write judgments or for other duties.

The master calendar system is seen to compensate for the inevitability that some cases will require long hearings and the fact that some judges may be quicker than others. At the same time, however, one of the problems identified with a master calendar is the fact that some judges may not do as much work as others. It is also argued that individual judges have little responsibility for the cases in the court and some will feel few incentives to progress matters expeditiously.

In individual calendar systems—such as the Individual Docket System—cases are assigned to judges as soon as they are filed and consequently retained and managed by that judge until its disposition. Individual calendar systems are seen to have a number of advantages over master calendar systems. Arguably they allow the court to better understand and control its whole workload by having all files managed from the moment they are first listed.

Proponents of individual calendar systems also argue that they facilitate effective and efficient case management. Early judicial involvement is also seen to promote efficiency by enabling judges to become familiar with the content of a case, promote settlement and set down realistic timeframes. Management by one judge is also argued to lead to greater consistency in the directions and rulings throughout a case. Another proclaimed advantage of an individual calendar system is that judges are made more responsible and accountable for their own work and the management of cases.

Individual 'calendaring', however, involves some potential inefficiencies and presents some practical difficulties which do not have to be addressed in master calendaring systems. An Individual Docket System is arguably much less flexible than a system that is centrally managed: if a judge's time is booked for one case, it is not available for another. Contingencies posed by long cases, urgent cases or a case settling at the last minute are

potentially difficult to accommodate under an Individual Docket System and potentially may impact on all other cases in a judge's list.

It is also argued that Individual Docket Systems can lead to idiosyncratic treatment of cases depending on the management styles of individual judges, and that this could lead to inconsistencies and confusion across a court. The emphasis on chamber based management, and the need for the centralised court administration to monitor individual practices, are seen by some as having substantial resource implications. Further, if one takes the view that 'nothing resolves cases like bringing the litigants to the threshold of the courtroom', then there is no doubt that individual calendaring is not designed for throughput the way master calendar systems are.

As we have noted, the two systems involve very different principles of workload equity and accountability for the court's performance, and each has different advantages and disadvantages. Master calendaring operates under what might be described as rough-and-ready principles—that all judges are busy if they are in court, and cases take the time they take. As a consequence, responsibility for performance tends to be corporate rather than individual. It can be argued, then, that master calendaring can encourage either the perception or reality that some judges will not 'pull their weight'. It is also said that because the system operates like a treadmill, it is a disincentive to being efficient (the harder one works, the harder one is worked). On the other hand, the responsibility and accountability promoted by the Individual Docket System may be a double-edged sword. It creates potential incentives for efficiency, so long as a judge's workload is manageable; otherwise, it has the potential to be oppressive and isolating. It may also seem to prize efficiency measured in terms of quantity over quality. Moreover, it creates a need to achieve some kind of balance in the caseloads of individual judges to preserve equity. This is no mean feat, especially in a court with jurisdiction as diverse as that of the Federal Court.

Previous Evaluative Research

Although there is currently a great deal of enthusiasm for case management reforms, very little empirical research has been undertaken in this area. The research that has been undertaken has been fairly ambiguous in its findings.[45] While there has been some encouraging evidence that case management reforms have been effective in reducing delays, the results might also have been attributable to a number of other factors. Virtually no studies have actually attempted to assess the effect of case management on the use of court resources or litigant costs, it being generally felt that if case management resulted in reduced case processing times, then it must also follow that it reduced costs. This assumption is, in fact, not supportable.

A major contribution to the research picture was the completion, at the end of 1996, of the RAND Corporation's Institute for Civil Justice evaluation of case management reforms implemented in the U.S. Federal Court Civil Justice Reform Act.[46] The *Civil Justice Reform Act 1990* required each federal jurisdiction in the US to develop a plan for civil case management to reduce costs and delays in the courts. In a rather novel approach (to Australian eyes in any event) the Act itself laid out the basis for an independent empirical evaluation for assessing the effectiveness of procedures adopted under it. Ten districts were designated as 'pilot' districts, and these were required to implement plans that incorporated specified 'case management principles'. The evaluation was designed to provide a quantitative and qualitative assessment of how these case

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45 R Cranston 'The rational study of law: Social research and access to justice' in AAS Zuckerman and R Cranston (eds) *Reform of civil procedure: essays on 'Access to justice'*, Clarendon Press: Oxford, 1995, 31-59; T Wright, 'Research and civil process reform: Comment on Lord Browne-Wilkinson's 'A Sheep in Woolf's clothing'', Paper delivered at NSW Supreme Court Judges Conference 11 September 1998.

46 Published in four volumes: J Kakalik, T Dunworth, L Hill, D McCaffrey, M Oshiro, N Pace, and M Vaiana *Just, Speedy and inexpensive?: an evaluation of judicial case management under the Civil Justice Reform Act* (1996) RAND: Institute for Civil Justice; Kalalik et al *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts* (1996) RAND: Institute for Civil Justice; Kakalik et al *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (1996) RAND: Institute for Civil Justice; Kakalik et al *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (1996) RAND: Institute for Civil Justice.

management principles affected costs, time to disposition, litigant and lawyer satisfaction and judge work time.

The mandated case management principles fell broadly into four categories: differential case management, early active judicial management, judicial management of discovery and referral of appropriate cases to ADR programs.[47] Each of these categories, of course, comprehended a range of possible techniques.

If the relative dearth of rigorous empirical research accounts for the significance of the RAND report, its findings account for its controversy. Although far from being purely negative, it was greeted with dismay by case management and ADR proponents[48], and subjected to some quite unwarranted attacks on its methodology.[49] The study's most important findings were—

- Early judicial case management[50] significantly *decreased* time to finalisation by about 25%[51] but significantly *increased* litigant legal costs by about 30%. The report suggested that the latter was because, in those cases that would previously have settled before judicial involvement, the early involvement of the judge increased lawyer work hours in responding to the judge's requirements.

47 J Kakalik, T Dunworth, L Hill, D McCaffrey, M Oshiro, N Pace, and M Vaiana *Just, Speedy and inexpensive?: an evaluation of judicial case management under the Civil Justice Reform Act* (1996) RAND: Institute for Civil Justice: California p3.

48 See special edition of *Alabama Law Review* (1997) vol 49(1).

49 See S Flanders 'Case Management: failure in America? Success in England and Wales?' (1998) 17 *Civil Justice Quarterly* 308. Cf T Wright, 'Research and civil process reform: Comment on Lord Browne-Wilkinson's 'A Sheep in Woolf's clothing'', Paper delivered at NSW Supreme Court judges Conference 11 September 1998.

50 Embracing any process for 'early and ongoing control of the pretrial process through involvement of a judicial officer in assessing and planning the progress of the case' including planning and scheduling discovery, motions processing and the trial. It appears that the typical vehicle for 'early judicial management' was 'case conferences' akin to the Federal Court's Directions Hearings.

51 In cases taking more than 9 months overall to finalisation.

- Of the range of early judicial case management strategies or techniques, simply fixing an early trial date for final hearing had by far the most significant effect, and did not affect litigant costs.
- Managing 'discovery'[52] by imposing a short discovery 'cut-off' date significantly decreased case processing time *and* litigant costs. However, a leave procedure limiting the number of interrogatories had no effect on case processing times or costs.[53]
- Neither early judicial management nor discovery management had any impact on lawyer or litigant satisfaction and fairness judgements.
- Where ADR procedures were voluntary, they were used in only about 5% of cases; even where mandatory, there was no statistical evidence that ADR affected case processing times or litigation costs one way or another.
- The time spent by judges on cases under the CJRA regime was the same as the time spent prior to the CJRA reforms.

A further point of interest was that most judges who participated in the study stated that they were not managing their cases differently as a result of the changes brought about by the Act.

Although many Australian courts have adopted case management reforms, very few comprehensive evaluations of these initiatives have been undertaken or completed.[54] An evaluation of the Western Australian District Court's caseflow management system indicated that the introduction of a 'milestone'[55] system had led to both a quicker disposition

52 What the Americans call 'discovery' is of an entirely different order of magnitude compared to the Australian procedure. In general terms, the American procedure is more complex and liable to be more contentious. Furthermore, the Americans have a procedure for 'deposing' both parties and witnesses in an oral examination. This process is said to represent the major cost component of most cases, and to be subject to a range of serious abuses.

53 Interrogatories are a comparatively unimportant procedure in American litigation, because of the deposition procedure.

54 The Justice Research Centre is currently completing a report on civil process reforms in the County Court of Victoria and NSW District Court.

55 In a milestone system of case management, a case timetable is automatically issued on a case being filed, and covers appearance, close of pleadings, discovery, entry for trial, pre-trial conferences, trial, and finally, judgment at trial.

of cases and a reduction in the number of matters going to trial.[56] This study combined analysis of court caseload data with practitioner feedback about the system. From the data presented, it appears that the principles of caseflow management were well received and understood by the WA profession. At the same time, there was a view amongst practitioners that the system went too far and that the court should take a more passive role in the process. Similarly, an evaluation of a series of case management pilots in New Zealand found that these had acted to reduce case processing time but highlighted problems concerning increased costs to clients and lack of support for the changes within the judicial culture.[57]

ALRC Review

During the period of this study the Federal Court was also the subject of a review by the Australian Law Reform Commission (ALRC), as part of a wide-ranging reference on the federal civil justice system.[58] The Individual Docket System was the object of significant interest in that reference, although of course not the only important aspect of Federal Court process considered by the ALRC.

The ALRC report records that—

> *There was unanimous positive feedback in consultations and submissions about the operation of IDS. This is a significant accolade. The Commission consulted with several hundred practitioners from around Australia, experienced in Federal Court litigation, with expert witnesses, some litigants and judges and administrative staff from the Court. Submissions and consultations were overwhelmingly supportive and complimentary of IDS, although practitioners did record some areas of concern.*[59]

56 C Petroboni *District Court of Western Australia: Evaluation of the Civil Caseflow management system Preliminary Report* (1998) Civil Justice Review Project: Perth.

57 See J Hansen 'Case management in New Zealand courts' (1998) 9(2) *Otago Law Review* 319 and M Von Dadelszen 'Caseflow management – in search of the 'meaningful event'' (1997) 6(3) *Journal of Judicial Administration* 171.

58 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (Report No 89, 2000).

59 ibid, para 7.6.

It appears from the ALRC report that submissions and consultations identified the benefits of the Individual Docket System in terms very similar to those used by the Court to promote it when it was introduced.[60] The ALRC cited practitioner opinions suggesting that the goals of reducing the number of directions hearings in proceedings and increasing earlier settlements were being achieved. Some quantitative data on settlements were referred to by the ALRC but this is not subjected to a full analysis and it is not suggested that these data directly supported the conclusion.[61]

The ALRC also referred to quantitative statistics indicating that case processing times had improved (in relation to the Court's performance standard) '*since* the introduction of IDS' (emphasis added). This is not a claim that the Individual Docket System is the cause of the improvement. It is noted that '[a]dditional factors may have contributed to the improvement [including] ... a temporary decrease in the number of applications filed in the Court and the changing nature of the case mix — [although] the Court reported that IDS was probably the most significant factor.'[62]

A number of areas of concern were noted, and the ALRC made two specific recommendations about the operation of the Individual Docket System. It was observed that differences had developed between the way the system operated in practice and the way it was described in guides to its operation prepared by the Court when it was first introduced. The ALRC's report acknowledges that these differences had 'developed in response to the different circumstances in each registry or in particular judges' dockets' but stressed that 'it is important that published guides are an accurate reflection of current practices.'[63]

60 ibid, paras 7.7 – 7.9.

61 ibid, para 7.8.

62 ibid, para 7.9.

63 ibid, paras 7.11 – 7.12.

The issue of consistency presented itself as problematical. The ALRC commented adversely on differences in procedures between registries, and recommended that the Federal Court should develop a 'national procedures guide ... [which] should be regularly revised to correspond with the current practices of the Court.'[64] However, it was also acknowledged that 'within the framework of IDS, judges manage their dockets in different ways'. The ALRC had been at one stage minded to recommend that the judges should be encouraged to produce personal guides to the management of cases in their dockets, and that the 'Court should review judges' particular management styles to ensure that they are consistent with the aims of IDS'. However, the ALRC report concluded that, at least for the 'comparatively early days in the development of the docket system' differences in particular management styles should not be discouraged but rather monitored for their practical effect.[65]

The main area of concern noted by practitioners was delays in obtaining hearings. The ALRC report records that 'the Commission was told by practitioners that IDS allows greater flexibility within a docket but less flexibility across the Court' and that 'problems arose when one or two day matters, not strictly urgent, or interlocutory matters of half a day duration, were unable to be heard by the docket judge for 6 months or more.' Sydney practitioners were reported to have observed 'that certain judges were reluctant to transfer cases between dockets in order to facilitate earlier hearing dates.' It was noted that although the 'busier registries of Sydney and Melbourne' had listing managers, 'the Commission's consultations indicated practitioners are not aware of the role of the listing manager or their equivalent in different registries.' The ALRC concluded that 'a transparent arrangement is needed to solve the problem of hearing delays' and recommended that a 'protocol or practice note [should be] circulated for listing and dealing with cases which are ready for hearing but are not listed for hearing by the docket judge within a reasonable time' and that 'listing management practices [should be] adequately publicised.'[66]

64 ibid, para 7.13 and Recommendation 71.

65 ibid, paras 7.14 – 7.16.

66 ibid, paras 7.19 – 7.21 and Recommendation 72.

The ALRC report noted practitioner concerns that 'since the advent of IDS, judges appear to have a heavier workload with increased time in court and ongoing docket management responsibilities.' The report observes that judges 'are undertaking new managerial responsibilities' and that the Court had 'acknowledged to the Commission that specific training may assist some judges to develop the skills necessary to perform these functions.'[67]

Finally, the report notes that the ALRC heard a range of opinions on the operation of the specialist panel system.[68]

> *There are differing views within the Court and the profession on the role and composition of judge panels. Essentially this is a debate about whether judges should be generalists or specialists. ... The Federal Court is well aware of and appropriately sensitive to the competing needs in the formation of panels. The Commission is not disposed to make any recommendations on these matters.*[69]

Insofar as the impressions we convey in this report differ from the views of the ALRC, it is significant to note that the ALRC report prefaces its observations on the Individual Docket System by noting that this study was being undertaken.[70] It is clear that both submissions made to the ALRC[71] and its comments and recommendations about the Individual Docket System were qualified pending the completion of the JRC study.[72] We should also draw attention to some important aspects of our approach or methodology, and the data we report, that may help to explain some apparent points of difference between our findings and the ALRC's.

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67 idid, para 7.22.

68 See section 'Specialist Panels' in Chapter 4.

69 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (Report No 89, 2000), paras 7.23 – 7.24.

70 ibid, para 7.4.

71 Most notably, those of the Federal Court itself and the Law Council of Australia. cf Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (Report No 89, 2000), para 7.5.

72 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (Report No 89, 2000), para 7.5.

It is most important to note that, whereas the ALRC's mandate was to assess, evaluate and recommend policy, our undertaking was to systematically gather, synthesise and convey information. In accordance with established practice in conducting qualitative research, we have done this by attempting to reflect the full range of opinion expressed by the participants in the study. (In so doing, we might add, we have honoured a promise given to them in exchange for their participation.) This information should be useful for both the Court and other legal institutions in assessing whether there are any issues of policy or practical aspects concerning the operation of the Individual Docket System that need to be rethought and perhaps modified.

Differences in results also need to be understood in terms of how we gathered our data. The ALRC's views of the Individual Docket System were informed from many sources, including a formal submission from the Court itself, as well as formal submissions from a number of professional associations.[73] The Commission also held consultations with the Principal Registrar and, separately, a group of the judges. It met with several groups of Federal Court practitioners. Further, a judge of the Court was a member of the Commission throughout the life of the reference (and was joined by another colleague towards its completion). The ALRC's consultations took place over a period of about two years, extending from well before (and indeed in the very early days of the new system) to just about the period in which our data were collected.

Our data is predominantly drawn from interviews conducted privately with individuals, rather than formal submissions or consultations with groups. Our interviews with judges and court staff took place over a few months in the first half of 1999, and our interviews with practitioners were conducted in the summer of 1999-2000. We also spoke to all but a few of the judges of the Court, and our sample of practitioners was randomly selected from a (then current) list of cases in the Court.

73 ibid, para 7.6, note 14.

A note on currency

Data on which this report is substantially based were gathered in 1999 and early 2000. The data, then, relate to the system as it operated over two years before publication of this report. The Court has continued in that time to develop and refine the Individual Docket System. It is, of course, inevitable that the report of research of this kind will be 'historical', in the sense that it can only be an account of data representing a 'snapshot' of a system as it operated at a particular time.

Notwithstanding this, we are confident that the report will be found to have great interest in the community of court administrators and researchers. At very least, it offers a detailed account of the experience of one court with the planning, implementation and operation of a major experiment in civil process reform. In so doing, it identifies many of the issues, problems and pitfalls that any other court, contemplating reforms of similar magnitude and significance, would wish to address or avoid.

2

Methodology

This chapter describes the research methods used in this study. As the success of these reforms, or any other form of major change, would require a change of culture, it was decided to use qualitative research methods. Such methods elicit a deeper understanding of the underlying beliefs and practices of social actors at the actual 'coal face' of the reforms.

The main research methods used in the study consisted of interviews with the principal actors in Federal Court litigation, a comprehensive review of published literature and the internal court reports, memorandums and other documents, and a survey of chamber based administrative systems. Interviews were undertaken with Federal Court judges, their associates[74], registry staff, and legal practitioners. Published literature was reviewed in order to identify significant issues surrounding case management systems and court administration generally.

Associates and some registry personnel were asked to provide written explanations and supporting documentation about their file management systems and their use of technologies in administrative and management practices which served to supplement interview data.

The Federal Court provided a range of internal memorandums, committee minutes and practice and procedure reports dealing both with the feasibility and practicality of an individual docket system and addressing its specific elements. These internal materials provided general background information on the work of the court and its current policy

74 In a number of cases the judges' personal assistants were also interviewed, either instead of or as well as their associates. In most cases this was because they played a more active role in the management of their judges' dockets.

directions, providing useful insights into the context within which the Individual Docket System was developed and the process by which it was introduced.

The data collected provided an in-depth picture of the background and everyday functioning of the case management reforms. It is important, however to make a few general observations. Clearly people's perceptions of their actions do not always correspond with everyday practice. This is highlighted by the fact that different interviewees sometimes have very different experiences of the same events or practices. However, people's beliefs about their role or actions still have fundamental effects on institutional culture and practice.

It is also important to note that opposition to a change does not necessarily mean that such a change is not warranted or does not have merits. For example, court based case management may place different demands on practitioners and may control some of the perceived 'excesses of adversarialism'. At the same time, such controls may be unpopular amongst practitioners. In our research a number of practitioners argued that litigants should be able to run cases as they saw fit. While this may be seen as a valid argument, there is a similarly convincing argument that the court is a publicly funded institution and is obliged to spend money responsibly.

Adverse responses to reforms are not, of themselves, a measure of the success of those reforms. However, the attitudes which those responses reflect may substantially affect the operation of reforms and may stifle real change. Alternatively, adverse opinions may in fact shed light on genuine problems with aspects of a reform that may therefore need to be addressed. In both cases, understanding people's attitudes and practices is an essential element of planning, understanding and assessing the reform process.

Interviews

Aims and procedures

Interviews were conducted in two stages. The first series of interviews were conducted with key players within the Court—judges, their associates and personal assistants, and registry staff. A second series of interviews was undertaken with practitioners, both solicitors and barristers, who had experience of practice in the Federal Court across all registries. In total, formal semi-structured interviews were undertaken with 40 judges, 45 court staff and 93 practitioners.

The majority of interviews were conducted face to face in the interviewees' own work environments— in offices and chambers of the Federal Court and various law firms and barristers' chambers around the country.[75] The interviews took approximately 1 to 1 1/2 hours each, although in a number of cases they ran for as long as 3 hours. Nearly all of the interviews were tape recorded with the permission of the interviewees, to ensure that an accurate transcription of their responses was produced.[76]

The interviewing process did not give the interviewees any preparation time, or any time to reflect over the issues. This was done in a deliberate attempt to gain a snapshot of everyday practices, rather than idealised accounts. This method is generally recognised in the social sciences as presenting a more accurate picture of actual practice and embedded belief. We also made it clear to interviewees that we were not conducting an audit of how well they, or others operating in the system, were living up to projected ideals or expectations. Rather the aim was to glean a more realistic view of the contingencies, factors, and beliefs that affect individual practices, and hence need to be taken into account in any organisational reform.

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75 A small number of face to face interviews were conducted at the Justice Research Centre. Phone interviews were conducted with a number of interstate associates and staff, two interstate judges, and six barristers and five solicitors, where face to face interviews were not possible.

76 Two members of registry and three solicitors preferred not to be recorded and their responses were noted by the interviewer and typed up along with the other transcripts.

All interview transcripts were indexed according to central themes, specific practices and differing attitudes. The data coding was informed by both the literature review and the interviews themselves, and has acted to inform a large part of the structure of this report (see Appendix C).

Research instruments

In order to ensure consistent coverage of all of the relevant issues, standard interview schedules were developed (See Appendix B). In addition to the literature review, the design of the interview schedules was informed by a number of unstructured discussions with selected key players. Pilot interviews were also undertaken with each of the interviewee groups. These were not included in the final analysis.

Most of the associate interviews were conducted in a less structured fashion before any other interviews were commenced. This was done in order to obtain a clearer understanding of the everyday workings of chambers before finalising the other interview schedules.

The judge and court staff interviews covered aspects of civil litigation, case management and Federal Court systems and processes. Interviewees were asked about the Individual Docket System model, their current case management practices, timeframe issues, case allocation, court relations, the use of court technology and general attitudes towards case management systems. Practitioner interviews were modelled on judge and court staff interview schedules, but more comparative questions with other systems were included.

In order to obtain data of reasonable quality, comparability and consistency, the structured interview schedules were followed fairly rigorously. This also allowed for comparison both within and between groups. However, the open-ended nature of many of the questions still allowed interviewees to raise or elaborate on matters of particular concern or interest.

Sampling

Associates and other chamber staff

Twenty-eight judges' associates or former associates were interviewed. Random sampling was not used. As the associate interviews were being used to provide some background data to inform the development of the judges' interview schedule, associates were selected in a deliberate attempt to obtain the widest possible spectrum of different chamber practices and experiences. In Victoria and New South Wales the Principal Registrars provided a list of judges from their state that was intended to reflect a variety of backgrounds, practices, and experience. Approximately half of the associates in these registries were included in the sample. In the smaller Registries, associates from all the chambers were included in the sample to ensure adequate representation of possible divergent practices across different states.[77]

A number of the associates interviewed were no longer employed at the court, but were included because of the need to interview people who had adequate experience in the court.[78] Current associates were interviewed when they had been in employment for a reasonable period of time (generally more than 3 months). In a small number of cases, both past and present associates of the same judge were interviewed.

Most of the interview questions were open-ended allowing the interviewee to raise or explain different matters that were particular to their work environment or of particular concern or interest to them. These issues were then often followed up by the interviewer in cases where they appeared to be unique or otherwise of special interest. This schedule acted more as a checklist than as a structured protocol, to ensure that all the identified relevant topics had been covered.

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77 In one situation neither past nor present associate had adequate experience in the Federal Court to be included in the sample as the judge had only just returned to the court after a different appointment.

78 These associates had been employed at the court in at least twelve months prior to the interviews.

Two chambers' personal assistants were interviewed using a semi-structured interview schedule loosely based on the associates' interview protocol. These people were interviewed because they were identified in other interviews as having some role in the operation of the Individual Docket System at chambers level.

Registry Staff

Twenty-seven interviews were conducted with registry staff. Again their selection was not random. They were selected for interviews because of their particular involvement in the docket system. In some cases the Principal or District Registrars recommended interviewees.

Where the interviewees were directly involved in case management procedures and practices, the structured interview schedule was closely followed. Where registry staff had particularly diverse or unique roles within the court some departure from this protocol was necessary to ensure that the most valuable data could be collected.

Judges

Forty of the forty-four judges sitting on the Court at the time the research was undertaken agreed to be interviewed.[79] Two of these interviews were conducted as pilots. Information from these interviews was used to inform both the interview schedule and the study generally, but was not included in the data analysis.

The distribution of court interviewees by group and registry is show in Table 2.1

79 One judge declined to be interviewed, one judge was on leave during the interview period, one judge was in the process of retiring, and another judge had taken up another position for a period of time and therefore did not have a functioning docket at the time of the interviews.

Table 2.1: Judge, associates and registry staff interviewed by state (excluding pilots)

Group	NSW	WA	VIC	SA	QLD	ACT	NAT	Total
Associates	10	3	6	3	5	1	-	28
Registry staff	5	4	6	3	3	1	5	27
Personal Assistants	1	-	1	-	-	-	-	2
Judges	15	3	11	3	5	1		38

It should be noted that the sample of judges who were interviewed is extremely comprehensive. Nearly all the judges sitting on the Federal Court bench at the time the study was undertaken participated in the study, which lends weight to the reliability and validity of the results. Many of the judges were extremely open and forthcoming about their views, and in general they seemed extremely keen to participate and have their experiences and opinions noted. Many of these interviews ran for extended periods of time.

Practitioners

Practitioners in the sample were identified from the dockets of all judges in the Court. This was done to ensure that experiences of the practices across the Court were covered, and to ensure proportional representation of practitioners in each state.

Each judge's associate was asked to provide details about two recent matters in their judge's docket, one being the first administrative law matter commenced after 30 December 1998, and the other being the first case from any other area of law commenced after 30 June 1998. Sampling was weighted in this way because of the high volume and rapid turnover of administrative law cases and the need to ensure coverage of the spectrum of case types across the Court.

Associates were requested to provide the names and contact details of both the solicitor and counsel acting for the first named plaintiff and defendants in each case. If a matter included an unrepresented party, this was to be indicated. No confidential information about the details of the case was sought.

All forty-one associates of the judges contacted responded, providing between two and six names of practitioners, with an approximate average of four names per chambers. From this information, two samples of practitioners were compiled, including in all 95 barristers and 122 solicitors.[80] A letter was sent to each of these individuals explaining the project and requesting their assistance, with a covering letter from the Chief Justice encouraging participation. Overall, 47 barristers and 46 solicitors participated in the research. The sample and response details are shown in Table 2.2. Again, this sample represents a high response rate. Generally, practitioners expressed enthusiasm about participating in the research.

80 Numerous practitioners were involved in more than one matter and were hence only included once in the sample. A small number of practitioners were excluded as they had been involved in informal discussions about the research. In each state a number of solicitors employed by the Australian Government Solicitor were excluded due to the over-representation of this group within the sample.

Table 2.2: Practitioner sampling and response rate

Group	State	Agreed	Willing, not able*	Refused	No response	Total pop'n**
Barrister	NSW	16	3	1	19	39
	WA	6	-	-	2	8
	VIC	11	6	-	11	28
	SA	6	1	-	2	9
	QLD	7	-	1	2	10
	ACT	1	-	-	-	1
Total		47	10	2	36	95
Percent of total		(49.4%)	(10.6%)	(2.1%)	(37.9%)	(100%)
Solicitor	NSW	14	4	1	30	49
	WA	6	6	-	5	17
	VIC	13	3	1	7	34
	SA	7	2	-	4	13
	QLD	6	3	1	7	17
	ACT	-	-	-	2	2
Total		46	18	3	55	122
Percent of total		(37.7%)	(14.8%)	(2.5%)	(45.0%)	(100%)

* - the code 'willing, not able' refers to those practitioners who responded to the letter, but were either unavailable for interview during the periods required, or felt they had not had enough experience in the Federal Court to have anything useful to offer

** - the 'total population' refers to the total practitioners sampled.

Use of Interview Data.

Data from interviews is used in a number of ways in the report. First, generalisations are made and inferences drawn based on the response patterns of interviewees. Thus, for example, if a majority of judges responded in a particular way to a particular question, it can be inferred that this is the majority position, view or experience of judges in the court. If there was a marked divergence of responses to a particular practice or

belief then it can be inferred from these differences that the question may raise important issues that may warrant further examination or consideration.

Results have been reported in general terms, rather than using percentages or number of responses. We have, however, been careful to indicate response patterns. In addition, we have attempted to indicate when interviewees have discussed issues in a general and theoretical form, or from their actual experiences and practices. We should particularly note that we observed a pattern of response to questions favouring respondents' opinions rather than their direct experiences of processes or reforms. Practitioners, noticeably, and judges, to a lesser degree, were inclined to answer these questions theoretically, and the range of responses reflected the full range of general debate on the particular issue.[81]

Quotations from interviews are used to illustrate a particular point or to represent particular views that emerged in response to interview questions. As the text makes clear, such quotations do not always represent the majority position. In some cases it is important that a particular opinion has been expressed although it is a minority view or even that of one interviewee. This is particularly the case given the number of judges and the size of the registry in the smaller states. The experiences in these states, as well as the experiences between states, may have many important suggestions on how the court, as a federal body, should be effectively run.

Elucidating differing opinions and concerns is important considering the individualised nature of the docket system, the isolated nature of a great deal of the work in the court and the considerable influence wielded by different court players. It was clear that a large number of those interviewed had little knowledge of what different members of the court were doing or how different chambers were managing their cases, and many showed great interest in other experiences and practices throughout the Court.

81 This can be compared directly with the experience of the ALRC, for example, see the discussion of practitioner opinion on specialist panels: Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (Report No 89, 2000), para 7.24.

In some cases we have drawn out seemingly isolated issues or small scale practices as it was felt that they may prove to be a useful guide to possible improvements in wider application, or alternatively may give insight into possible problems that may arise in other areas at a later time.

Further, different case types are in constant flux due to continuous changes in jurisdiction and legislation.[82] Accounts given by a small number of interviewees, such as accounts about native title cases, are important because they may indicate a developing problem.

Diverging ideas or minority views may exist in the very matters where practices and opinions are changing. In other situations where experience or practice is directly connected to a particular case type or state, concepts such as majority and minority are not particularly meaningful or helpful.

Information technology and administrative data

In September 2000, each associate was asked to provide additional detailed information about the use of technology in case management in their chambers, including the systems of record keeping, administration, data management and tracking. Information requested included general descriptions about the frequency of use of particular systems, the type of information recorded and accessed, and the maintenance and organisation of different systems. More specific information was requested relating to the use and maintenance of centralised court information systems (such as FEDCAMS) and chamber-based manual or computer systems used to collect, store and maintain information about individual cases and judges' dockets generally (for example, hard copy files, diaries in any format, Word based systems, Access databases, Excel spreadsheets, etc). This information was supplemented with manuals and 'information folders'

82 For example, the recent cost-vesting decision in *Re Wakim ex parte McNally* (1999) 198 CLR 511 forced a large number of corporations law cases to shift from the Federal to the State Courts. The effect of *Wakim* was subsequently reversed by legislation. Changes also resulted from the Native Title Amendment Act and the proposed Human Rights legislation.

about FEDCAMS, provided by the Information Technology Officer at the court.[83]

Of the forty-one chambers contacted, thirty-two provided relevant information.[84] The sample and response details are shown in Table 2.3.

Table 2.3: Associate technology data response rates

State	Provided information	Refused to participate	Unable to participate	No response	Total
NSW	17	-	1	-	18
WA	1	1	-	2	4
VIC	7	-	1	4	12
SA	3	-	-	-	3
QLD	3	-	-	2	5
ACT	1	-	-	-	1
Total	32	1	2	8	43
Percent of total	(74.5%)	(2.3%)	(4.6%)	(18.6%)	(100%)

The written descriptions of chamber-based practices were used in conjunction with data from chamber-based interviews to provide a more detailed picture of how various chambers manage information under the docket system. As associates had generally changed since the first round of interviews, this data also allowed us to track any obvious changes in chamber-based management systems, as well as continuity between associates working in a particular chamber.

83 These folders set out the different interfaces of the FEDCAMS data base and gave examples of the search and monitoring functions.

84 One refused to participate, two were not able to do so as their judges were not currently at the court, and the remaining eight did not respond within the allocated time period.

3

Design and implementation of the Individual Docket System

This chapter provides a summary of general views of the Individual Docket System. It examines the attitudes of interviewees towards the implementation process, aims and core elements of the design of the Individual Docket System.

Success of systemic change, particularly of this degree, depends to a very great extent on the level of shared values and purpose among the main actors in the system, and how willing or able people are to embrace new ideas. As much as the new system involves changes in court procedures, many of the elements are fundamentally concerned with the players, both individually and collectively, and their roles in and approaches to litigation. How the participants felt about the development of the system, its elements and aims, therefore, has significant implications for the way the system works. As one judge stated, changes in case management are more about a change in philosophy, rather than just a change in specific practices—

> *I suppose the success of the system so much depends on the approach and enthusiasm of the judges who are administering it. If you just treat it as a formal standardised process, 'oh well we've got to go through it', I don't think you are going to find any change between this system and the old. But if you try and implement the underlying philosophy of it, I think there is a chance of change. My experience is that it actually works. (judge)*

Views of the implementation process

There were differing views across the court about the way the Individual Docket System had been implemented. The majority of judges and other court staff were positive about the implementation process, feeling that it was inclusive and thoroughly planned. Many judges commented on the fact that they had been briefed at different stages of the implementation process and had been given the opportunity to contribute to discussions about different aspects of the system.

Satisfaction with the way the system was implemented was particularly widespread in Melbourne where the system was piloted, with many of the judges commenting that the implementation process was both involved and inclusive. The list judge and the list manager worked closely to develop a protocol through a process of trial and error. Consultation with the rest of the judges was apparently extensive, and the monthly judges' meetings were used regularly to discuss issues as they arose.

> *We worked out a solution, we had monthly meetings of judges on a regular basis so any time a problem threw up an issue of principle we discussed it and resolved it. So we developed in an evolutionary way. We developed a protocol incrementally and consensually. That meant that by the time we actually got through what was called the Melbourne pilot ... we'd set up a protocol and procedures that had pretty well ironed out most problems in advance. (judge)*

There was, however, some dissatisfaction among a considerable minority of judges with the introduction and implementation of the system. There appear to have been two main sources of dissatisfaction. First, some judges felt that there was not sufficient participation and consultation in the development of the system. Second, there was some negativity and scepticism about the need for change in the first instance.

One judge said the decision to implement the docket system 'came right out of left field' and had 'undone' a lot of the work the Court had undertaken in previous years to make itself more efficient. Another judge said that he was not convinced that the docket system was a useful change, largely

because he could see few problems with the way work was organised under the old system. He was also less than impressed with the American consultant, whom he believed had been given a brief to 'sell' the docket system.

One judge was critical of the fact that there had not been any close review of the research on the American experience which, in his view, tended to show that the docket system had diminished rather than increased efficiency in the courts which had introduced it. This view was supported by a number of other judges who were doubtful about whether the Individual Docket System was really suited to the Federal Court, as they believed that experience with it was largely limited to American courts where the caseload consisted of predominantly jury trials. These, it was suggested, were typically comparatively short, simple cases, which did not require the judge to prepare considered and detailed written judgments.

A number of judges commented on the fact that the central principle of random allocation to individual dockets was not appropriate in a court where differences between case types are considerable. It was suggested by one judge that the system had only seemed to work well in some states because they had dealt with their backlogs before it was introduced and that it was a 'failure' as a national initiative from the outset because of state differences in the implementation process.

The majority of practitioners interviewed were aware of the introduction and implementation of the new system, although many were unclear about the exact nature of the changes and when these changes had occurred. Practitioners in the smaller states, particularly in South Australia, were generally less aware of the introduction of the new system, as they had experienced little change in practice. A few practitioners who worked in more than one state commented on the lack of uniformity in the implementation across different registries. A number of these practitioners felt that differences in state practices, both on a registry and a chamber level, were considerable.

Aims of the Docket System

The majority of the interviewees were aware of the central aims of the docket system. 'Efficiency', in terms of reducing both delay and cost in the litigation process, was consistently identified by judges, court staff and practitioners as a key objective of the new system. Numerous related aims were also identified, such as streamlining the litigation process, improving the control, tracking and management of cases, allowing for quicker disposition of cases and creating a more cost-effective, consumer focused service.

> *The aims of the Individual Docket System are to provide a more efficient, expeditious, cost-effective, user-friendly service. (judge)*

Active judicial management and establishing court-based control of the litigation process were also seen as central aims of the system. Participants stated that the system was aimed at allowing judges to monitor compliance and effectively control interlocutory processes and disputes, control practitioner tactics and effectively identify appropriate cases for settlement or ADR processes. Again these aims were seen as directly related to the 'efficiency' goal.

> *One aim is I think to ensure that a judge will give time to a matter earlier than the final hearing and give attention to it and concentrate on it. ... So, it makes for a closer involvement and therefore more efficient involvement, I think, of the judges at all the stages. (judge)*

> *I'd imagine to more effectively manage cases in the sense to keep a closer eye on how the matters are being prepared and to ensure that the preparation of them proceeds in an orderly fashion, and that timetables and so forth that are made in respect of those matters are complied with. (barrister)*

The individualised nature of the system was seen as aimed at enhancing familiarity and consistency in how a case was dealt with, as well as being directed towards making judges more responsible and accountable for their own work and the work of the Court.

> *I think it's continuity of control so that there's one judge who controls the case from cradle to grave and thus you don't have people re-visiting different judges for things that have been done before, and it secondly introduced a level of accountability in terms of progressing the case to this position. (judge)*

A number of judges and practitioners cited equity in the distribution of the Court's workload, in terms of both type and amount of work, as a central aim of the docket system. The system was also said to be an attempt to promote procedural uniformity and consistency at a national level.

The general consensus was that overall the system was achieving its stated aims. Some were very enthusiastic about it.

> *I'm a great enthusiast for the docket system. I think in my docket that the first two aims in particular have been extraordinarily successfully implemented. (judge)*

Some interviewees felt that efficient processes and active case management were necessary elements of a modern court, and that the Federal Court was leading the way in these respects.

> *So, I see the Individual Docket System as working very intimately with a modern view of courts, which I guess involves extensive case management, but not on the footing that all cases must inevitably be tried or have an arbitrated resolution. So, I see that the Individual Docket System is about modern notions of efficient courts of justice and subsidiary notions of courtesy and access and a whole range of things. It's far more profound than getting the list done. That's my vision of it. (judge)*

Some members of the court drew attention to its reputation for innovation and its performance, and stated that they were happy to be part of such an institution. This pride in the court was seen by some to have a significant positive effect on morale and collegiality, and it was suggested that this directly affected the workings of the court.

> *I don't say that trivially but courts in which the morale of the judges is high, are likely to be operating a great deal better and for myself I think that is one of the explanations for this Court working fairly well, as I think it does. Not perfectly but fairly well in comparison with a number of the other courts. The morale of the judges is noticeably higher... (judge)*

Having control over their working life, in terms of the ability to manage and control their own work and time, was seen by many judges as the biggest benefit to come out of the system.

> *... [T]he fact that judge has a greater sense of control over his or her life ...I think is very important for morale and it is important to the output of work. Instead of having somebody else—whether it's an administrator or Chief Justice or somebody—telling you where you are going to go or what you are going to do, you can actually work it out for yourself and I think that that is a great incentive to not only run more effective operations but very good for morale. (judge)*

The majority of both judges and court staff felt that the introduction of the Individual Docket System had had a positive effect on their attitudes and approaches to their work.

> *My attitude to my work has improved in the sense that I have an incentive to remember the progress of a particular case. That's the good thing. (judge)*

It was also felt that the judges were more familiar with their cases, and as a consequence were able to manage them more closely and effectively.

> *Yes, it enables me to have a greater understanding of the litigation so by the time I start a trial I know all about it because it's in my memory. I mean it comes and it goes, but it is always still clear in the subconscious or the unconscious and once you ginger it up again it comes back to you. (judge)*

Dealing with one judge was also seen to create an easier and more user-friendly service for both practitioners and litigants. In this way the system was seen to be achieving its consumer oriented focus.

> *[The] element of continuity I think is enormously important. It prevents a sense, I suspect—I can't prove it—but I suspect that it prevents a sense of alienation and uncertainty that would have otherwise affected litigants. (judge)*

There was also a general feeling that the docket system had had positive effects on how practitioners approached the litigation process. (In some cases this change was attributed to the 'contagious' effects of the underlying philosophy of the docket system, and in others, to the practical implications of active judicial management).

> *I think it has substantially reduced interlocutory and tactical skirmishes, unnecessary steps and I think they try harder to narrow the issues...I think they have a feeling that someone's going to be asking them questions, so they do actually look at the matters a bit sooner than they would in the old days, when they'd just let matters run out until it got close to a hearing and then think about how they'd actually run it on trial. So I think they end up managing their cases a bit better as well. (judge)*

Many of the interviewees believed that the ability to control workloads and more effectively manage cases would ultimately reduce the time and cost involved in litigating in the Federal Court.

> *I think that with a greater deal of judicial management there is less opportunity, if you like, for the lawyers to simply allow it to drift on. So the litigants should have the advantage of exposure to a more efficient system and a system which also effectively raises issues of ADR at the appropriate time and so forth and also actively looks for more efficient and economic ways of dealing with, if it is necessary, the trial process. (judge)*

Although there was generally a fairly positive attitude towards the Individual Docket System, even among its enthusiasts there were some concerns about whether it was achieving some of its stated aims or whether those aims were even appropriate in the first instance.

The most commonly identified concern was that the system was not achieving an equitable distribution of the court's workload. In fact, many

interviewees felt that a random allocation system based purely on case numbers could not, as a matter of principle, produce equity[85]. Many also felt that the processes for redistributing work across the court were problematic and inadequate. As a result, many judges felt their workloads had increased, with some clearly feeling overloaded, and many practitioners felt that the efficiency of the system depended, at least in part, on which docket a case was allocated to and whether that judge had a heavy caseload or not.

> *It has a disadvantage in that you tend—I find I tend—to say 'Oh, I'll fix this case for four days and then I've got a day left over to do some preparation for my other judgments' and then I find that something else comes up and I see a spare day in my docket, so I pop something in there for hearing; whereas under the old system, if I had a spare day set aside and the registry rang and asked can I do a case, I would probably have said 'No, I've set aside that time for judgment writing'. (judge)*

There was some concern across all interviewee groups that the central aim of efficiency may lead to a valuing of quantity of output over quality of adjudication - 'efficiency' at the expense of justice.

> *I think there is always a risk that one could end up turning the system into a kind of sausage machine and that you might be overcome by the culture of bureaucratic concepts of productivity and efficiency as distinct from delivery of justice. There will always be a tension between those two things...But we have to keep in mind that there is this tension between the quality of outcomes and the efficiency with which they are produced. (judge)*

Quite a few judges had reservations about how efficiently judge time was utilised in the docket system. Some of them felt that they had begun to spend a disproportionate amount of time on administration of their docket. Others commented that personal control and autonomy could not always be seen as unqualified 'goods'.

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85 This point is dealt with in more detail in the next chapter.

> *Well, just as the docket system facilitates the efficient judge, it facilitates the inefficient judge. When you give individuals total control over their work you have to accept the pluses and the minuses, and there is no audit of that as far as I can tell, apart from the publication of reserved decisions lists for each judges' meeting. (judge)*

There also appeared to be differing levels of commitment to the concept of active judicial management. Judges and court staff were generally more supportive of court based case management than practitioners, although there were fairly divergent views within each of the groups of interviewees. At least a few interviewees suggested that the system—or some judges—might tend to 'over-manage' litigation.

> *I don't see myself as managing private litigation but there are judges who think that's what they were born to do. They like lots and lots and lots of directions hearings—I see them, the same matter over and over again for motions, and their long and detailed decisions on things that are discretionary and the like. To me that's just making work but it's also about their view as to what their judicial role is. (judge)*

It was suggested by some judges that close involvement of one judge in a case from start to finish was not necessarily, in all respects, a positive thing and that in some cases 'familiarity' could lead to some apprehension of prejudice.

> *It's not necessarily a good idea for judges to be too familiar with cases before they know what the case is about and you only really know what the case is about when you hear the evidence. There might be a tendency sometimes to form a preconceived view. There is a risk of that and it's a fair criticism. It might not be a risk in the real sense that you get a wrong result but it might be a problem about perception. People might think that the judge will—especially if he has dealt with substantive interlocutory applications where you do get into the detail of the case—then it's sometimes impossible, realistically speaking, not to form a view about the*

> *merits. Most judges would deny that. They would say, 'No, it's no different to any other case, we've always got an open mind, we decide the case on evidence and argument we hear on the day', but I suspect that that's just a bit of self protection. It's not necessarily a true statement. (judge)*

A number of interviewees did not feel that the system had been implemented across the court in any sort of uniform way. Practices were seen to differ markedly at both the chamber level and between the different registries.

> *I suppose the other thing that it was intended to do and probably hasn't done, is achieve greater consistency across the Court...As a national court somebody dealing with us, regardless of whether they dealing with us in Darwin or Sydney, should have a basic understanding of how they are going to deal with us. We shouldn't be putting in place purely local rules for the convenience of the locals or because of local conditions only. [This] makes it very difficult for others to work out what is going on. (registry)*

At the same time, we found some dissenting opinion about whether such uniformity was even a desirable objective.

> *The reality of the situation is, it seems to me, that the small registries can deal with the system in their own way. I think there is a risk in adopting a monolithic approach within this court and having a system that everybody has to adhere to without variation, because the manner in which the three South Australians can run their affairs is quite different from the manner in which even just one floor in Sydney can run its affairs. (judge)*

Summary

- Interviewees felt that the Individual Docket System was aimed at improving efficiency, increasing active judicial management and court-based control of the litigation process, enhancing familiarity and consistency, and making judges more responsible and accountable.
- Generally, interviewees thought that the aims and goals of the Individual Docket System were being achieved, and the Federal Court was praised for its innovation.
- Judges said that the greatest benefit of the Individual Docket System was increased control over their workload and time. Practitioners generally considered that the new system had a positive impact on how they approached litigation.
- Concerns were raised about whether the Individual Docket System was achieving an equitable distribution of work. In particular, the random allocation system of assigning cases was thought to be problematic.
- Some interviewees thought that the aims of the system valued efficiency over the quality of adjudication.
- Judges and court staff generally expressed positive views about the process of implementation of the system. There was, however, some dissatisfaction about the level of participation, consultation, and transparency, and some skepticism about the need for change. Some interviewees considered that the implementation process had not occurred uniformly, while some others were unsure if uniform implementation should even be a desired goal.

4

Allocation of Cases and Listing

The pivotal feature of the Individual Docket System is the mechanism for allocating cases. The basic mechanism for allocating cases under the Individual Docket System is random assignment to individual judges upon filing.[86] At the time of our research there were a number of exceptions or non-random elements in the allocation process. These included: allocation of cases with common subject matters or issues to the same judge; a specialist panel 'overlay' in the Sydney and Melbourne Registries; a system for handling urgent originating applications; and the use of a centralised allocation system for particular case types, such as migration and native title cases.

Moreover, the Federal Court does not have a separate Court of Appeal and instead exercises its appellate jurisdiction by convening 'Full Courts' consisting of judges who also exercise its first instance jurisdiction. Therefore we also describe how the listing of appeal cases has been integrated with the Individual Docket System. Finally, this chapter describes modifications, or other responses, to deal with difficulties that became apparent after the system was introduced.

General Allocation

As a rule, cases are supposed to be allocated to judges on a strictly rotational basis. Random allocation is regarded as an important feature of the system because it is believed to promote an equitable distribution of the Court's workload, both in terms of sharing the labour, and fairly distributing the interesting cases and the 'dross'. For this reason, although

86 Note that matters in the 'Registrar's list' remain outside the docket system.

consideration was given to a system of 'weighting' cases, no such system was ultimately implemented. However, the court did recognise that some system for redistribution would need to be considered if overloading became a problem.

In most registries, the system assigns the first case to judge A, the second is given to judge B, and so on. In the ACT, where there is only one resident judge, cases are simply allocated to that judge when filed. In South Australia, cases are allocated on monthly rotation, that is judge A is assigned all cases filed in one month, the cases filed in the next month are given to judge B, and those filed in the third month are given to judge C. Efforts were made to document the allocation system in the two larger registries.

Despite having systems in place for case allocation, we encountered many judges who knew little about how cases were allocated to their dockets. Most of the practitioners interviewed were also unaware of how the allocation system operated.

Opinion in the Court was divided as to whether the random allocation system was working as originally intended. The majority of judges and Court staff believed that the system was working reasonably well, in that it was random, efficient and largely equitable. Interestingly, a number of both judges and practitioners suggested that the transparency of random allocation limited 'judge shopping' and protected the Court's reputation for impartiality.

> *As I understand the system, it's an allocation which is not dependent on any human decision maker so that when cases are filed they are allocated on the basis of a rotation. That is absolutely fundamental and critical to the proper working of the system. (judge)*

A significantly large group of judges, however, felt the allocation system was not working well. Quite a number of judges simply did not believe that the system was random or equitable. A number of judges felt that major cases and interesting cases were not evenly distributed.

> *I might even be wrong that it's happening but it seems to me to be the case, and I know for some of my colleagues, that some judges end up with more major cases than others...It's stronger than a suspicion [but] as I say I could be entirely wrong because the Registrar tells me it doesn't happen. (judge)*

Others did not believe that it could be random and remain equitable. They felt that there was a need for a centralised person with some knowledge of all the matters in the Court, to both ensure parity of workloads and apply some system of priorities across the Court.

> *I gravely doubt whether it is done as it is supposed to be on a random ballot system. I think that is farcical. I don't think that's done at all. It's not a random system as it is supposed to be. I'm quite convinced of that.... In other words, I don't think it's just random numerical choice, there has to be fixed into the system some capacity to assess what's involved, otherwise you don't get an even share of it all. And some people are very astute in the way they are able to manipulate the system. (judge)*

Whether the distribution was random or equitable was also questioned by members of registry. A number of the registry staff argued that there were so many necessary qualifications and exceptions that consequently the system was not random at all. Significantly, there was a widespread belief amongst both judges and Court staff that there is a need for a more transparent process of allocation and more formal, and effective redistribution mechanisms. We return to this point below.

These concerns were supported by comments from practitioners. Although the vast majority of practitioners admitted that they had little or no idea of how the allocation process actually worked, many clearly felt that it was far from random. A number went so far as to say that allocation was extremely predictable and that they were usually able to tell clients which judge they would be listed before.

Many practitioners argued that the lack of transparency in the allocation process was problematic and led to a lot of (possibly misguided) speculation about the process that could have a negative impact on the

Court's reputation. Some stated that they had heard that judges could ask for the cases they wanted, or had learnt how to manipulate the system to get the best cases. Others felt that both judges and certain members of the profession could manipulate allocation.

The most common criticism that practitioners had of the allocation system (or indeed, the Individual Docket System as a whole) was that it had resulted in an inequitable distribution of work. Significantly, many thought that this was the reason some judges were overloaded. Many practitioners cited this as being the root cause of a number of the other problems detailed in this report.

Cases with Common Subject Matter

As a rule, cases that are linked by common subject matter or legal issues are supposed to be allocated to the same judge. If for some reason they are allocated to different judges, they can be reallocated. When judges are allocated two or more cases because they are linked, they will be 'skipped' in the usual sequence of rotational allocation in order to maintain parity between dockets.

We did not ask any of the interviewees directly about this aspect of the allocation system. A small number of practitioners, however, commented on their experience with linked cases, and of these all felt that the system did not have a formal mechanism for keeping linked cases together. One solicitor complained of having two cases with the same set of facts before two different judges. This solicitor stated that when neither judge seemed willing to transfer their case, they could not find anyone in the registry who was able to solve the problem.

Specialist Panels

The specialist panel system replaced the specialist lists in Sydney and Melbourne, and this system was developed for two reasons. First the panel system was intended to spread some types of cases more widely among the

judges who have an interest in them. Second, specialisation was seen to highlight the expertise of Federal Court's judges.

> *We need to maintain the public perception that the Federal Court is a boutique court with specialist workers. (judge)*

The Chief Justice constituted the specialist panels by asking the judges to nominate themselves as having knowledge or interest in particular areas of the Court's jurisdiction. Opening up specialist panels to all judges was aimed at spreading cases more widely, fitting with the overall aim of the docket system to distribute the cases equitably in terms of diversity and addressing the view that senior judges determined case type allocation. Specialist panels were established for Admiralty, Corporations, Human Rights, Industrial, Intellectual Property, Trade Practices (Part IV) and Tax cases. Cases in these areas are allocated only to members (or associate members[87]) of the relevant panel.

In order to distribute specialist cases evenly within each panel, cases are allocated to the specialist panels first and then recorded as an allocation in the 'all dockets' table. The next non-panel case is then assigned to the judge with the least number of cases on the 'all dockets' table.[88] A number of both registry staff and judges said that this process of allocation meant that judges who were members of several specialist panels were allocated fewer non-panel cases. This was seen to lead to a disparity in the types and variety of cases judges received on their dockets, and did little to spread different case types more widely in the Court.

There was divided opinion across the Court as to the virtues of the specialist panel system. The majority of judges in Victoria and New South Wales generally liked the panel system and saw it as an appropriate way of distributing the specialised work of the Court.

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87 An associate panel member is a judge who took cases in a specialist area after consultation with that panel coordinator, rather than receiving regular work in that area.

88 Federal Court Internal Document February 1997 - *Individual Docket Protocol*, Melbourne Registry.

> *I should say a very great benefit of the docket system is the panel system and that contributes a lot to the efficiencies of the docket system. So we've got panels of judges who, as it transpires, are reasonably specialist in their area, and if they are not, they become specialist pretty quickly. (judge)*

The judges in other states, and a considerable minority in Victoria and New South Wales, saw little point in having specialist panels. Many saw it as a mechanism by which judges excluded themselves from exercising significant parts of the Court's jurisdiction, which they believed was inappropriate.

A number of judges believed that the specialist panel system would erode collegiality in the Court, by creating de facto specialist 'divisions'. A few objected to the number of different panels, suggesting that areas of the Court's jurisdiction were being unnecessarily 'elevated' from 'general' to 'special'.

It seemed that there was some confusion about the objectives of the specialist panel system. In fact the objectives are, arguably, mixed. This confusion, in turn, affected people's views of the system. A few judges commented that they had confined themselves to panel areas in which they could claim expertise as well as interest. Amongst these judges, a number were critical of judges who had put themselves forward for panels where they did not have the expertise. Some judges and court staff felt that the panel system had seriously diluted the expertise within the court.

> *The downside of the docket system is in the old days you had specialist judges hearing... matters that they were specialists at the bar and being able to... [use] expertise to expedite those matters quickly. Now you are getting a tax judge hearing migration matters or whatever and he mightn't have that particular expertise. (registry)*

In contrast, other judges and court staff argued that the specialist panels had opened specialist areas to non-experts breaking some of the hierarchies within the Court and opening up opportunities for professional development.

The legal profession also have strongly opposed opinions about having specialisation within the court. Practitioners working in Sydney and Melbourne were more likely to see specialisation in positive terms, whereas those from the smaller states generally felt that judges should be able to handle any case before them. An appreciable number of barristers in Sydney and Melbourne were unhappy with the way panels were actually constituted, seeing this as inappropriately reducing the degree of specialisation, which in turn was seen to reduce efficiency within the Court.

Practitioners who were in favour of some sort of specialisation within the Court gave a number of reasons for this opinion. It was felt that specialist judges did not have to be educated or 'brought up to speed' by practitioners and hence were seen as far more efficient. Another argument was that judges were more likely to take greater interest in a case in their area of expertise.

> *I think generally speaking that's probably a good idea, the reason that they're experts in that area is probably because they have some interest in it and there's nothing worse than getting a judge who has no interest in the case that he's doing and then try to feign some interest. (solicitor)*

Many who were in favour of some sort of specialisation nevertheless felt that there was a need to avoid creating any sort of hierarchies between judges or narrow divisions within the Court. A number felt that certain panels within the Court were too small and others argued that some of the panel areas were inappropriate, in that specialisation should only occur in relation to certain case types. This argument was frequently cited in relation to industrial law, with practitioners arguing that such cases should be heard by a broader cross-section of the Court.

Among those practitioners who were opposed to specialisation, some felt that it was the judges' role to adjudicate on the materials presented to them by the parties, and they should be able to deal with any case within the Court's jurisdiction.

> *I don't see that the administration of justice is really advanced by the panel system ... The role of the judge is to adjudicate in an adversarial system on the arguments that are advanced so, theoretically, you can have a judge who knows absolutely nothing about the area of law, apart from a general knowledge of the principles that might be applicable, and just as able to reach a correct decision as somebody who's had years of experience. (barrister)*

> *I think that's wrong. I'm a generalist and I think that a judge ought to be able to handle any case. They can hear an appeal in any case, so why can't they for any trial and I think specialities don't carry many efficiencies anyway. I don't think judgment is about special knowledge. I think judgment is about judging, and any Federal Court judge who is competent can master any field. (barrister)*

Related to this argument was the view that specialisation could lead to some judges being too narrow in their area of expertise, whilst excluding other judges from broadening their knowledge. It was also stated that specialisation could lead to 'clubs' within the Court, possibly resulting in judges seeming too familiar with certain practitioners or seeming in some way fixed in their viewpoints. It was suggested that specialist judges might become indifferent to novel points of law, thereby stifling development in those areas.

> *Among other things I think that freezes the jurisprudence of the court because if you've got the same judges always deciding the same matters, then you don't get fresh ideas from new judges. (barrister)*

Practitioners also commented on the lack of transparency in the panel process. Many did not know how panels were constituted, who was on particular panels, or how judges ended up on certain panels when the practitioners felt that they did not have the expertise. There was some concern raised about the appropriateness of the self-selection process.

Urgent Cases

It was envisaged that cases requiring urgent interim relief could be allocated out of sequence, depending on the availability of judges. In Sydney and Melbourne, there is a formal 'duty judge system', involving weekly rotations. Matters allocated to a judge when they are acting as a duty judge generally remain on the judge's docket, and count as part of his or her allocated cases.

The Federal Court's practice, unlike some of its state counterparts, is not to publicise the identity of the duty judge, in order to avoid the possibility of 'judge shopping'. In Sydney, it appears that the judges nominate weeks when they are available to be duty judge. It is not clear, however, that all judges do a rotation or similar numbers of rotations as duty judge.

Several judges commented that as a consequence of the duty judge system, a 'spate' of cases could enter their docket in the space of only one week, resulting in an immediate, concentrated and difficult burden. While they acknowledged that, in theory, the practice of skipping their normal rotation in the allocation process was supposed to even this out, they thought this adjustment was not rapid enough in practice. The system was also said to lead to an anomaly when a duty judge stands over an urgent application, with the result that the substantive issues are dealt with by a different duty judge, while the case remains in the first judge's docket. In one instance when this occurred the judges simply arranged a reallocation between them.

It was originally envisaged that when an urgent matter involved a specialist panel case the duty judge could 'consult with a senior panel member, if appropriate.'[89] Panel cases were then to be reallocated through the normal panel system unless the duty judge was a member of the relevant panel.[90] Due, apparently, to some dissatisfaction among the

89 Federal Court Internal Document April 1997 - *Commencement of Individual Docket System in NSW*, NSW Registry p5.

90 ibid.

profession with non-specialist duty judges hearing specialist applications, we understand that many urgent applications in panel cases now by-pass the duty judge, and are allocated immediately to a panel member after reference to the panel coordinator.[91]

Practitioners had different opinions about getting urgent matters heard in the Federal Court. Many had experienced no problems in getting matters on urgently and a number stated that the duty judge system was fairly effective.

In contrast, a number of practitioners argued that it was extremely difficult to get urgent matters heard, sometimes apparently because a number of judges assigned to the duty judge roster were already overbooked. Another cause of difficulty was Full-Court sittings when it appeared that in some states no judges were available for duty work.

> *With the docket system you get the duty judge system, you get the duty judge usually and he's got it down on his docket and there seems to have been a perception by them that they really should keep it for the urgent interlocutory determinations because they're cheating on the system if they don't. If they're a busy judge it can be very difficult to get a proper interlocutory hearing, and that results in judges, if they're in that situation, applying much more pressure on people to achieve some course that avoids the need for a contested, an urgent interlocutory hearing and that's not necessarily good. (barrister)*

A number of the practitioners raised the issue of non-specialist judges hearing specialist cases, despite the apparent attempt to have urgent specialist cases heard by panel members.

It also appeared that practitioners were unsure of how to approach the Court with an urgent application. Many said that they simply went through the registry in order to find a judge. A number said they had to convince a registrar that they had an urgent case. A few said they directly contacted a

91 This understanding was derived from interviews. We did not find a reference to this practice in the Court's internal documentation.

judge's associate. Another contacted the Chief Justice's associate to find a judge. Two others stated that they invariably contacted the listing judge.

A number of practitioners who approached registry argued that registrars often found it difficult to find a judge to take on an urgent matter.

> *I don't know whether it's the docket system so much, as now you seem to have to go through the registrar when you have an urgent matter and get the registrar to find a judge who'll hear it, now there's a big problem with that because the registrars seem to be far too nervous about approaching judges in my experience. (barrister)*

Specific Case Types

Native title

At the outset of the Individual Docket System, native title claims were assigned to dockets, like most other cases. However, as a consequence of jurisdictional amendments in September 1998 to the *Native Title Act* (1993) a large number of native title matters were shifted to the Court from the Native Title Tribunal. Due to the concentration of claims filed in the Western Australia and Queensland Registries, the Court quickly moved to a national system of allocation. It was envisaged that all judges would participate in the Native Title Panel.

Under the national allocation system, cases are allocated to a designated Native Title judge in each state, who is responsible for overseeing the preliminary stages of a case, to the point at which there is a need to determine some substantive issue. At that point the case is assigned by the National Native Title Secretariat (Melbourne) to the docket of another judge, who retains responsibility for it until finalisation.

It was noted that native title cases present a particularly large challenge to the Individual Docket System. They can be extremely lengthy and complex, and may require hearings at remote sites. A number of judges

and court staff argued that finding judges who are available for travel of this kind, possibly over long periods, created many difficulties. A number of practitioners in the smaller states also commented on the fact that as judges were tied up for long periods of time with native title cases there was often an extremely small pool of judges available to hear other cases.

There was also some argument from practitioners that Native Title was a specialist area where judges needed to have some experience of the law. Further, the need for cases involving overlapping claims or issues to be dealt with by one judge was seen as particularly acute.

Migration cases

Migration matters are typically comparatively straightforward, and many are disposed of within three months, and after only one or two directions hearings. They require relatively less management than other cases. They are, however, filed in very large numbers, particularly in Sydney and, to a somewhat lesser degree, in Melbourne. As a consequence, migration cases filed in Sydney are allocated to the dockets of all judges in the Federal Court, except for judges in the Melbourne Registry. The judges who are not resident in Sydney generally sit in Sydney for short periods to hear these cases.

In Melbourne, migration cases are allocated to the migration docket judge, who manages them until they were ready for final hearing. At this point they are allocated to other judges. In other words, in Melbourne, migration cases are listed through a master calendar system.

Migration cases appeared to be fairly unpopular amongst judges, and there was a feeling amongst some judges that for some reason they ended up with a larger proportion of them than other judges. The judges in Victoria generally seemed to be happy with their system of management because it allowed them to manage their own lists without the distraction of a number of small migration matters. A number of Sydney judges also felt that the Melbourne system was far more organised and efficient, and avoided the

problem of having 'little bits and pieces being done all over the place' (judge).

Some other specialised aspects of managing Native Title and Migration Cases are discussed in Chapter 5.

Adjustments to Caseloads

As noted above, the case allocation system depends on the 'swings and roundabouts' of random allocation to maintain parity and diversity of workloads. At the time of our research, however, some rebalancing of workloads did occur through a number of processes operating— more and less formally— across the Court. The methods of redistribution that were identified included direct (and informal) negotiation between chambers, liaising with the 'listing judge', panel coordinator or the person in charge of listing in the registry and contacting the Chief Justice's chambers.

Notably, there appeared to be a lack of clarity and explicitness surrounding how these mechanisms operate. Many judges seemed unaware of, or confused about, them. Some judges and court staff suggested that the concept of reallocation was at odds with the general conception of the Individual Docket System. As one judge put it—

> *The really important thing is that there has to be some sort of centralised system that can take the overload. If you can't progress something sufficiently, I think there has to be some attention to tap into what spare time does become available, so there can be some shift in dockets. In a sense, I suppose, it defeats the object of the system, but it's necessary. (judge)*

Apart from isolated instances, such as cases involving a potential conflict or where, for convenience, it is desired to arrange a straight 'swap' of cases between judges, some judges are clearly of the view that reallocation of cases is either not possible in the system or, indeed, inappropriate.

Other judges plainly felt that acknowledging the need for help with their dockets would involve some embarrassment, and a number argued that they would be very reluctant to admit that they were overloaded.

> *Some judges are stoic and will fight on. As I say, it is a difficult job and people work very hard and some judges, I think, are under very considerable pressure and perhaps aren't willing enough to speak up and say 'Look, I just can't really manage this effectively.'....Perhaps we need to be bit more encouraging of people to speak up when they've got a problem. That is a genuine problem created by the system. (judge)*

A number of judges were clearly overloaded and stressed due to the types of cases that had been allocated to their dockets. Many others acknowledged that their dockets could become readily overloaded if they were allocated particularly long or difficult cases. It was widely accepted that some judges may end up with more than their share of 'unlucky dip'.

> *Eventually there will come a stage where the lists are so uneven because of two factors: that in the most random allocation in the world there will still be some cases which are allocated which are very weighty, a lengthy case of a year for instance. Now the system just can't cope with that. Theoretically you see everyone will get a year-long case eventually, but the system can't work where somebody is out of action for a year because all these other cases have to be dealt with and so essentially in those situations you take a person out of the docket system and have the rest of his or her docket allocated to be dealt with by the other judges. The system can't cope with the really long case and it is not compatible with the idea of a random allocation. Random allocation works okay when you have manageable cases but where you have a big case it just isn't equitable to assume that everyone is going to have a one-year case. (judge)*

Practitioners clearly felt that some judges were overloaded. This was seen to result in a position where timely processing of a case depended on the 'luck of the draw'. A number of practitioners believed reallocation of cases was possible, but few knew how it could occur and thought reallocation was rare or difficult, although a number had had the experience of cases being shifted due to a judge being 'jammed'. Many others, however, had

experienced cases being delayed and had had difficulties in getting interlocutory matters heard, due to judges' dockets being overloaded. A number of practitioners argued that there was a need to adopt some sort of weighting system in order to avoid cases being delayed because they were allocated to an overloaded docket.

The problem of overload might have been more widespread were it not for the intervention of other factors, some fortuitous. Firstly, most Registries launched a 'blitz' on their pending caseloads before introducing the Individual Docket System. Subsequently, at some apparently critical junctures, the system has been given the 'relief valve' of additional new judges, to whom there has been wholesale reallocation of cases from other judges' dockets.[92] Further, the Court lost its Corporations Law jurisdiction during this period.

Direct negotiation between Chambers

The method of redistribution most commonly identified, by judges and registry staff, was an informal system of transfers between chambers, negotiated either between judges or their associates. This mechanism appeared also to be the most widely preferred, particularly by judges who identified themselves as having close collegiate relationships with other judges. This process also avoided the more public request for help that clearly made some judges uncomfortable.

In Queensland and South Australia it was said that this was the only mechanism for reallocating cases. In Western Australia this was said to be the avenue of first resort.

> *The protocol is, as I understand it, that the judges should liaise among themselves and if they are not able to get another judge to deal with that matter, then it comes back to the registry for us to look for another judge. (registry)*

92 The need to unburden some judges from heavy caseloads is the only obvious reason for reallocating cases to new judges instead of building their dockets through the allocation of new cases.

Brokered transfers

Each state registry has a member of staff who is responsible for listings and for overseeing the allocation of cases to judges. The list manager (or clerk) liaises with a 'list judge' (or judges).

In New South Wales and Victoria, the list judge and, less frequently the list manager, will 'broker' transfers of cases from one judge's docket to that of another. This was cited as the mechanism of choice in Victoria but it appears to be only rarely used in Sydney. This difference may be due to different perceptions, both on the part of the list judges and those who would resort to them, about the role of the list judge.

> *But the problem is, if I can say this, is that the concept of listing judge will vary according to the judge who is the list judge....[Whether] the list judge would see that, if there was a complaint or if there was an imbalance, there had to be a solution, would vary according to who the list judge was. One judge might take the approach that there is a problem of allocations and the number of allocations [or that] the problem [is] of work load which isn't necessarily the same as allocations....Some [list] judges may see it as....[the docket] judge's management problem. (registry)*

Some judges said they would contact the Chief Justice, or his Chambers, to broker transfers. This was the practice of judges in smaller registries when the other resident judges could not take on a case. Other judges cited the panel coordinator as the agent for transferring special panel cases.

A number of judges argued that under the docket system where judges were responsible for their own docket, it 'throws an unacceptable burden on registry' to find another judge willing to take on a case out of another judge's docket. In a similar vein, registry staff spoke of the difficulty of getting judges to accept other cases, and contrasted this with the previous system when registry had more authority and control over listing. The brokering role is obviously facilitated when judges who find themselves with time on their hands, contact the relevant broker. Only a few judges told us they did this.

'Turning off the tap'

While a number of judges referred to the possibility of stopping the allocation of new cases if a docket became overloaded, only a few indicated that they knew this to have occurred on some occasions. In one instance, in one of the smaller registries, this action occurred after a collegiate decision of the judges in that registry. Several judges said that it would require an instruction from the Chief Justice. Others speculated that they could ask the registry to do it, although none indicated that they had done so.

Full Court

The Federal Court, of course, exercises appellate as well as first instance jurisdiction. Instead of having a separate Court of Appeal with an establishment of full-time appellate judges, appeals are heard by 'Full Courts' or panels of three (or, occasionally, more) of the judges. This means that in addition to managing their individual dockets of first instance proceedings, the judges also have Full Court rosters several times during the course of a year. In order to try and accommodate the demands of both duties and an increasing appellate workload, the Court introduced a new Full Court rostering system in 1998.

There are four Full Court sittings, which take place on a national basis over four-week periods in February-March, May-June, August-September and November-December. The actual dates of the sittings are settled in August for the following year. Cases are listed to a Full Court sitting at a call-over held six weeks before. Subject to the demands of the list, the expectation is that every judge will sit in the Full Court in each sitting, including one interstate 'tour of duty'. This system aimed to provide large uninterrupted periods for individual docket work between concentrated appellate rosters, enabling the judges to plan ahead.

An overwhelming majority of judges were unhappy with the Full Court rostering system. Despite the intention that it should help them to manage

their time, complaints about the opposite effect were common. Judges raised concerns having to keep four months of the year free until the last minute, which meant that they were unable to either progress cases in their dockets or list cases for trial. It was also suggested that four month-long Full Court rosters spaced throughout the year made it difficult to list long matters for hearing.

> *Full Courts are a real problem, I find. If there's so much time in the year that you have to rule out and say, well, I can't give you a hearing date during those dates as I've got Full Court commitments, when the Full Court timetable comes out, well then you find that you've got days free here and days free there. But the Full Court timetable only comes out 3 or 4 weeks beforehand, by which time, it's too late to do much. (judge)*

Summary

- Most judges considered that the allocation system randomly assigned cases, and that the system was efficient, equitable, protected impartiality and prevented 'judge shopping'.
- Some judges, however, thought that the allocation system was not random or equitable, with a number of judges also claiming that random allocation was not necessarily a desirable system.
- Practitioners generally demonstrated little awareness of the ways in which cases are allocated, although they expressed a general belief that allocation was not random.
- Some interviewees expressed concern about the lack of transparency of process, both in the original allocation and in reallocation. It was suggested that this had led to doubt about the randomness of allocation and, in some cases, distrust of the system. It also lead to confusion, both inside and outside the court, about who is responsible for different aspects of the system and hence what procedures to take if a problem arises.

- Allocation on a purely numerical basis, without a weighting system or an adequate system of redistribution, appears to lead to inequity in workloads, and in some cases serious overload. Some practitioners reported experiencing problems with delay for this reason.
- There was considerable division of opinion about the system of allocating cases to specialist panels, both as to how it operated in practice and as to whether it was a good thing in principle. It appeared to us that some measure of this division could be attributed to the fact that the system was designed to meet two, not necessarily compatible, objectives.
- While some practitioners said that they had no difficulties in getting urgent cases heard, others had experienced problems. Some practitioners were also unsure as to how to get urgent applications before the court.
- The need to modify the system for native title cases and migration cases suggests that individual calendaring may not be an appropriate system for handling either large complex cases or high volume routine cases.

5

Managing Individual Cases

One of the anticipated (and proclaimed) benefits of the Individual Docket System was that it would promote more active judicial management and greater court control over the litigation process. It was argued that having responsibility for a case from start to finish would facilitate judicial involvement in the running and progress of a case. The Court also made numerous suggestions about the use of different management tools and developed support mechanisms to facilitate certain case management practices and processes.

For example, the court developed a case management model and made a number of suggestions about the use of standard orders, standard timeframes, case management conferences, alternative dispute resolution processes, and progress and compliance monitoring.[93] Members of registry were also made available to assist judges in the management of cases and monitored the state of dockets across the court, giving judges ongoing feedback on the progress of cases in their dockets. At the same time, no definitive case management structure or set directives were implemented by the court and individual judges were ultimately left to manage cases and adopt suggestions as they saw fit.

The success of the Individual Docket System clearly depends, to a substantial degree, on both the attitudes of those involved in the process and how individual players have taken up different elements of the system. In this chapter we summarise data on what role the interviewees thought that the Court should have in case management, what they thought about

93 Approaches to settlement and ADR will be discussed in a later chapter.

models of case management, and how judges actually set about the task of managing the progress of individual cases in their dockets.

Attitudes towards the role of the Court

A large majority of both judges and registry staff believed that the Court should have an active role in case management. At the same time there was a lack of consensus concerning what this role should involve and who should have responsibility for case management, ranging from active judicial participation in the progress of a case to relatively passive monitoring by registry staff.

The most common reasons given for the Court's involvement were to reduce inefficiencies in the litigation process, control delaying tactics or other causes of delay and, as a result, reduce the cost of litigation. Court based case management was seen as the means to this end.

> *I think the role of the Court is to ensure that the cases are disposed of as expeditiously and inexpensively as they can be, consistent with the interests of the parties. (judge)*

The Individual Docket System places the responsibility for case management in the hands of the judges as opposed to other Court staff. Many judges and Court staff saw this as a particularly important feature of the system. A considerable number of judges argued that having personal responsibility and accountability for the progress of a case created greater incentive and commitment to see a case resolved.

> *You know, for example, that if you've got control of the case, you have to solve it because you're not going to solve it as you could under the previous system by saying, 'I haven't seen this case before... I'll postpone it. Or, I won't hear the matter. Someone else will. Let them worry about it'. With the best will in the world, that's the motivation, conscious or unconscious, which quite often affected people. Now, when you know you've got responsibilities, you solve the problem. (judge)*

Some judges expressed this sense of responsibility as 'ownership' of the cases on their dockets. This sense of ownership and responsibility, in some situations, also extended to the litigants.

> *You tend to feel that these are your clients... they're part of your family and you have to look after them and feel responsible for them ... and as I said, you don't like to see them hurt unnecessarily. (judge)*

A number of judges observed that the responsibility of judges for the cases in their dockets enhances their authority as case managers, partly because of their status as judges and partly because of their ongoing relationship with a case.

> *It gives you a bit more authority in relation to the users because they know that you're the trial judge more than likely and that you really have a real interest and that you have an authority when you tell them. (judge)*

On the other hand, some judges who thought the court had a role to play in case management felt that registry staff should have the primary role in managing cases. It was argued that this would free up judges' time to fulfil their judicial functions, and would reduce perceptions of bias associated with judicial case management. It was also argued that registry based case management would promote greater consistency in the way cases were managed across the court.

Only a small number of judges felt that the court should have no role at all in case management and that it was for the parties to run 'their cases' as they saw fit. These judges felt that it was inappropriate for either the court or individual judges to dictate how a case should be run, that ultimately it was a party's inherent right to be heard and that they should retain control over the presentation of their case.

> *I think it's a most naïve notion of all to suggest to the Court that judges should be managerialist judges, taking cases by the throat, and forcing them to a quick judgment, despite what the parties say, despite what the lawyers say. (judge)*

Practitioners were generally less positive about the court having a role in managing cases. While many stated that they thought the court should have some sort of role in the management of cases, most of them quickly made it clear its role should be limited to encouraging parties to conduct their cases efficiently, as opposed to being directly involved in the running of cases. Some of these practitioners also stated that it was appropriate for the court to ensure that cases were moving through the system at an appropriate speed, that parties clearly defined the issues in a case, and to make the parties feel that they cannot let matters languish.

> *I think the court needs to manage its administration to ensure that things get on, to ensure things are heard expeditiously and to ensure those that are more important or more urgent are given some priority than those who are less so, and to ensure that the parties conduct the litigation in an appropriate way and to stop people playing tactical games that are contrary to that happening. (barrister)*

There were some practitioners, however, who stated that the court should have no involvement in case management and that the parties should determine and be responsible for the management and progress of cases. One argument given to support this viewpoint was that only parties were aware of all aspects of their case, and that judges may be unaware of the particular circumstances that may call for a particular approach to the litigation process. For example, it may be advantageous to let some cases stay dormant if that would assist the parties in reaching a resolution out of court, in which case it would be inappropriate for the court to attempt to hurry the matter through the court.

> *It's problematic because if you go down the road of the court managing the case then you've actually changed an ideology from one of arbitrating justice to one of administering resources and at the end of the day the different considerations that come out of that ... if you're administering resources then it's all about cost effectiveness. If you're arbitrating a dispute, it's about justice and the two don't necessarily fit together. (barrister)*

However, many of these practitioners went on to concede that sometimes it was necessary for the court to put pressure on parties to comply with orders, where one party was continually in default. These practitioners generally felt that the court had to be tough on parties in terms of compliance with orders and timetables, but still needed to recognise the rights of the parties in running their case, such as the right to have enough time to run their cases properly. Again this generally meant that they felt that the court had a role in progressing a case to trial, but not in advising the parties on how to run their case.

It is worth noting that practitioners' attitudes towards court based case management often appeared to be directly related to their views about the conduct of other members of their profession. In situations where an unrepresented party was possibly being bullied by an able and well-resourced opponent, or where a party was clearly taking tactical advantage of a situation, increased court intervention was seen as more appropriate.

> *I think they should allow the parties to manage a case in the way that they are instructed, or in the way that they are advised by their clients to run it, so long as the interests of justice are not prejudiced and so long as the reputation of the court—that it delivers a swift and proper justice—is not brought into disrepute by a case that is run sloppily or badly or in a way that draws it out too long. (solicitor)*

Models of Case management

As mentioned above, when the Individual Docket System was introduced, the Federal Court developed a case management model as a guide for the management of cases. The model was included in the draft protocols developed by both the Sydney and Melbourne Registries[94] and was published on the Federal Court website as a guide to litigation under the

94 Federal Court Unpublished Document - *A guide to Litigating in the NSW District Registry of the Federal Court*, NSW Registry; and Federal Court Internal Document February 1997 - *Individual Docket Protocol*, Melbourne Registry.

Individual Docket System.[95] It consisted of four key events— namely a Directions Hearing, Case Management Conference, Evaluation Conference and Trial Management Conference—all aimed at progressively narrowing the issues in a case. As already mentioned, however, this model was intended as a guide only and judges were able to run their chambers and manage their dockets according to their own preferences and management styles.

At the time of this research, it appeared that the vast majority of judges had not followed the suggested model in any substantial way. Only two judges stated that they had attempted to actively apply the model in their case management, but had rarely been able to adhere to it.

> *I find it helpful to have that sort of thing in the back of one's mind to remind one as to what one should be doing, but I think there's no need to try and force cases into the model because they are so different and because you get different problems. (judge)*

Over three-quarters of the judges stated that they did not use or refer to the model at all with a considerable number having never even looked at it. Most saw it as having little use in the management of a case, particularly given the wide variety of cases in the Federal Court.

It is interesting to note the differing opinions in cases where both the judge and his or her associate were interviewed. While most of the associates believed that their judge did apply a model of some kind in the management of cases, the judges stated that they did not use any type of model in their work. This difference may be attributable to the fact that although the judges did not use the set events of the model, they did use directions hearings to progress cases through the stages of pre-trial preparation in a fairly standard order. This use of directions hearings is discussed in greater detail below.

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95 Federal Court of Australia Website <http://www.fedcourt.gov.au/aboutct/aboutct_IDS.html#events.htm>, (Accessed April 2001).

Interviewees were asked for their opinions about the utility of models of this kind generally, in order to assess the extent to which their attitudes related to the particular model suggested by the Court. Amongst the judges, only four believed that standardised case management models were useful.

> *I think they are useful for a number of reasons. One is the encouragement to try to not have a whole series of directions hearings, bringing the parties back time after time after time, and to try and have a limited series of major events in the interlocutory process. The other thing that is useful, I think, in a lot of cases at least, is the so-called pre-trial conference and that's one aspect of the model I do try to follow. (judge)*

Another larger group argued that models could be useful as guides but had limited use in practice, with many feeling that rigid adherence to them could be detrimental to the progress of a case.

Finally, most of the judges rejected a role for models altogether. Many felt that it was inappropriate to have one structure for a vast array of different cases and case types. It was generally felt that case management had to be flexible and adaptable, to be useful. A few of these said that by trying to manipulate a case to fit a model a judge may in fact be significantly altering the nature of the case. A number of judges also argued that models detract from the 'individual' element of the system.

> *A set model - no, I don't think that a model should be imposed on judges. One of the essential attributes of this system is that you can manage your own affairs. If someone then says to you, well, you've got to do it my way, it's inconsistent with the idea that you manage your own affairs. (judge)*

Opinions amongst registry staff ranged from the view that models provide useful guidelines and could promote greater consistency across the court, to the belief that they are unduly rigid. A number of registry staff felt that judges were in the best position to know what a case required, and any kind of formal structure would have a negative effect on their ability to run their cases.

Most of the practitioners interviewed were unaware that the case management model even existed and, of those who had seen an outline of it or were aware of it, few could remember details. The majority of practitioners said that their experiences of running cases in the Federal Court bore little resemblance to the suggested model of case management, but felt that cases did go through recognizably progressive stages of development. Some argued that certain judges followed a more structured process than others. Many felt that the types of matters they dealt with would not fit into the model—in that their matters were either far too complex to fit into four clear stages, or were extremely simple and consequently could be completed in fewer stages.

> *Only really very generally in that you've got to start a case and end it at trial, and obviously along that continuum you're going to have many of the events that you've spoken of. But they're not designated in that way and certainly not in the timeframe you suggested. (barrister)*

While most of the practitioners interviewed felt that a rigid case management model was both unworkable and inappropriate, many of them felt that a more flexible model would have a number of positive elements. It was felt that this could be a useful starting point of guidelines for both litigants and practitioners that would potentially make the court processes clearer, less remote and more predictable. At the same time, most still stressed that any framework used needed to be flexible to allow for the variety of circumstances that arise.

> *It may be appropriate as a general rule, but again I stress that I think one of the advantages of having judges involved in cases is it does allow them to monitor the peculiarities and quirks of particular cases and whilst a structure is an appropriate starting point, I wouldn't like to see it become a black letter procedure in itself. (barrister)*

In contrast, some practitioners were against any type of case management model, generally on the ground that a central value of the litigation process was its concern with the unique features of each case.

Well, frankly, it just strikes me as being a set of jargon... I think that the real benefit of this present system lies in its individuality. It lies in the opportunity that it provides for a particular judge, and the same judge, to manage a particular case according to the requirements of that case, and to get it on for hearing as quickly as it can be got on consistently with the court and consistently with the needs of the case. (barrister)

The Development and Progress of Proceedings

While judges were left to manage their dockets as they saw fit, there were general patterns in the way that judges managed their cases.

All the judges used directions hearings as their principal vehicle for the management of cases. These are, in effect, court convened 'meetings' (in open court) between the parties and the judge (or a registrar), in which the progress of the litigation is reviewed and the next sequence of steps to be taken by the parties is settled in the form of an order or 'directions'. In other words, directions hearings operate as a managerial overlay on the rules of procedure, which distinguish them from the 'interlocutory motion' or 'chambers application'.

Many of the judges also appeared to have implemented, to varying degrees, a number of the other suggested case management techniques, such as using case management conferences, standard orders and standard timeframes, and compliance monitoring.

Directions Hearings

Most of the judges viewed directions hearings as an efficient and appropriate mechanism to manage the progress of a case and effectively monitor compliance with procedural rules and orders. Directions hearings were seen as useful forums to get parties to meet and talk to each other, narrow issues and discuss settlement. Many judges also argued that directions hearings facilitated an appropriate level of judicial involvement

in monitoring pre-trial progress, as opposed to procedures such as case management conferences which indicated more active involvement.

> *[They] may be the most cost-effective way of keeping the parties on track and of producing early settlement. (judge)*

The overwhelming majority of judges stated that they did not have an agenda of standard issues to be addressed in successive directions hearings, rather issues specific to the particular case at hand were dealt with as the case developed. It was argued that following a set structure or procedural sequence failed to take into account the differences between cases, and could mean that unnecessary steps were taken in some cases, whilst important issues, which could lead to either a narrowing of issues or settlement, may not be given enough attention in others.

> *I don't go into court with a checklist in every case. That doesn't seem to be a judge's job. That seems to me to be turning the job into a clerical job. If you are going to have a checklist, you end up rigidly applying it to every case whether it works or not and the checklist becomes the end not the means. So I think it's, again, nonsense to think that it could be helpful. (judge)*

Although judges generally described directions hearings as not having any fixed or formal structure there was clearly a 'usual progression' of the matters dealt with which emerged from the interview data. This progression, of course, largely followed the rules of procedure.

Generally, the first directions hearing was used to establish both the jurisdiction of the court and to provide an overview of the dispute or substantive issues involved in the case. Beyond this, matters such as joinder of parties, pleadings, discovery, other interlocutory issues, preparation of witness statements, and the timeframe for these events, were dealt with in a succession of one or more directions hearings.

Moreover, whilst most judges stated that they did not follow a fixed agenda, several indicated that they used a number of standardised processes. Some had developed a statement that they gave out to parties, in

the form of a letter, which indicated in general terms how they managed cases in their docket. A number had developed their own standard or routine pre-trial orders, relating to specific aspects of proceedings. As an example, one judge used a standard order directing practitioners to outline, for their clients, potential costs of the litigation. Such orders were seen to improve efficiency in the running of cases. Few judges appeared to refer to *pro forma* orders and rules set out in the Judges' Bench Book, however.

Practitioners also stated that cases did not run to any formal structure or pattern, and generally saw the process and steps taken as dependent on the case type, size and complexity, and other factors such as the number of parties involved, the level of antagonism between them, the ability and approach of the practitioners, and the management practices of the judge. For example, practitioners practising in intellectual property or industrial relations argued that there were often numerous interlocutory injunction applications to be made in cases before they could commence properly. Other case types, such as bankruptcy and administrative law matters were more likely to run to a more standardised pattern.

Practitioners did, however, think that a degree of standardisation was developing under the Individual Docket System, albeit in an ad hoc fashion. Interestingly, many solicitors were positive about this development, while the majority of barristers were negative. Solicitors also often appeared more concerned about inconsistencies in the running of the system across the court, whereas barristers were more likely to emphasise the positive aspects of the individualised nature of the system.

Most judges and practitioners felt unable to give a clear estimate of the average number of directions needed to progress a case to trial. The ballpark figures provided by judges ranged from 1 to 2 directions in standard migration cases, to anywhere between 2 and 7 in other cases. Practitioners gave similar answers; however the numbers they offered were generally somewhat higher. Both judges and practitioners said that there were some cases that ran way over the estimated number of directions hearings due to the particular circumstances of the case. Again the numbers given by practitioners seemed to be related to their area of

practice. For example, a number of intellectual property practitioners stated that it was not unusual for complex patent cases to have between 30 and 40 directions hearings.

Party Attendance

Nearly all judges claimed that they attempt to minimise the number of directions hearings by dispensing with attendance at court in various ways. Many stated that parties were able to avoid attending a directions hearing by filing a consent order relating to the next phase of the litigation, provided that the terms of the order were reasonable. A number of judges stated that they actively encouraged parties to do this in order to cut down on unnecessary procedural steps. In two chambers, the associate contacted parties before each directions hearing to remind them of this option.

Some judges stated that they allowed parties to postpone directions when they were unable to comply with the timetable or were having settlement negotiations, although a few of these judges indicated that a number of other factors could come into play. These include whether they were otherwise satisfied with the progress of the case or whether the extension was required for reasons outside the parties' control. Some judges said they would dispense with the need for the parties to attend physically in cases where this was either not possible or would place undue difficulty on one of the parties. In these situations, directions hearings may be held via phone or video link. A few judges stated that they would use mechanisms such as conference calls in a variety of situations in order to reduce the necessary court time, thereby reducing costs.

> *If I think it's something that needs to be addressed between the parties I will arrange a conference telephone call. I've done that on a number of occasions rather than have a hearing. (judge)*

Despite the general push to minimise court attendances, some judges expressed a need for caution. A few judges stated that they would rarely dispense with the need for parties to attend a directions hearing, unless the case was expected to settle. Judges gave a number of reasons why formal directions were beneficial, including preserving the court's presence, keeping the judge up to date, bringing the parties together to encourage

settlement, controlling the progress of the case and pushing the parties along. A number of judges felt that the use of modern technology did not take away from the need to maintain the normal standards of procedures.

> *Even if it's a telephone conference, I make sure it's done and gets listed, so that the public face of justice is preserved. I might sit under a video camera by myself in a listed court in Melbourne. I think some things can be done over the phone but other things, you really do need to have something happening publicly. (judge)*

Many of the practitioners interviewed raised concerns about the cost implications of multiple directions hearings. Although directions hearings were seen as useful in situations where one party was continually in default, a number of practitioners felt that many stages in the process did not require appearances in court if both parties were complying with orders or alternatively were in agreement that the matter should be adjourned. Another issue raised by practitioners was that the length of directions hearings had increased due to the judge's personal knowledge and interest in the matter. One practitioner argued that, as directions hearings were often taken by junior practitioners, in-depth questions from the bench were quite often a waste of time.

Practitioners who had had experience of protocols or mechanisms for vacating directions hearings largely saw this practice as a useful way of avoiding unnecessary costs.

> *Directions hearings increase costs, the more directions hearings you have, the more costs you run up. You have to dispose of litigation as quickly and as expeditiously as you can, and you've got to have directions hearings to do that...[but] it does increase costs, there's no doubt about that. (barrister)*

Registry run hearings and conferences

As previously mentioned, when the Individual Docket System was introduced it was intended that registrars would assist judges in the management of their dockets and assist in pre-trial work such as running directions hearings.

A small percentage of judges chose to utilise registrars for some or of all their directions hearings, expressing the view that many of the procedural issues discussed at directions were a waste of judicial time.

> *He [the registrar] identifies to me the ones he has no powers to deal with so I take them home and read them, then he indicates the ones which he has power to do but he thinks the parties would rather have dealt with by a judge so I read them. The advantage of that system is that I don't waste my time reading all about something that he can do and I can concentrate on the real ones that are going to come to me anyway. And once again it is efficiency. Then the other part of the story is that getting the thing ready for trial is something I give to the registrar. (judge)*

In other cases, registrars apparently heard directions when a judge was required interstate or was otherwise unavailable.

About half of the practitioners had experienced directions hearings before registrars (that is, in cases in judges' dockets, as distinct from cases in the registrars' list). These registrar-run directions hearings were said to be usually very similar to those run by the judge, and dealt with procedural issues and directions to progress a case to trial. However, registrars apparently also often conducted ad hoc mediations and settlement conferences during directions hearings.

> *The purpose was to bring the parties to a consensus in circumstances where the registrar thought that the parties were close enough and capable of reaching consensus. (barrister)*

There were, however, differing opinions about the appropriateness of registrars conducting directions hearings for judges. A number of judges and registrars expressed concern about the practice of delegating pre-trial directions to registrars. It was argued that such a practice was a breakdown of the principles of the Individual Docket System, namely the ongoing involvement and supervision of an individual judge in the progress of a case.

Generally practitioners felt that the use of registrars to conduct directions hearings was appropriate for simple procedural matters, but was inappropriate for complex or contested interlocutory applications. Some practitioners, on the other hand, felt that delegating interlocutory matters to registrars created a number of problems and inefficiencies. A number felt that the touted advantage of familiarity with and understanding of the case was lost. Others complained that judges often over-rode directions made by registrars in any event, causing confusion and duplication of effort. A few practitioners identified the lack of appeals from registrars' decisions as a problem. A number also felt that directions hearings needed the presence and authority of a judge if they were going to be useful in managing the complexities of the case and experienced practitioners.

> *I think it's a very, very bad idea. Because it introduces a layer of administrative complexity into the system. Registrars are registrars and not judges because they don't have enough experience or the ability to be a judge- without in any way reflecting on their capacity to do what they do. I think if the case is important enough to be ultimately heard by a judge it is, at least in the federal jurisdiction, something that should be looked at by a judge early on. (solicitor)*

Out-of-court discussions with judges

A case management initiative that may have been expected to develop under the Individual Docket System was the use of more informal case management conferences and discussions to assist in the efficient running of cases. While there does not appear to have been any clear guidelines developed about how or when informal discussions should occur, a number of chambers seemed to have used informal conferences to deal with the administrative and procedural elements of managing cases.

About half the barristers and one third of the solicitors we interviewed stated that they had attended out-of-court discussions with a judge in the Federal Court; that is, an off-transcript discussion about aspects of a case.[96]

96 Representing all states except the ACT, although it should be noted that only one practitioner in Queensland reported having had this experience.

These discussions were usually held in chambers, and were said largely to have been instigated by the judge, but there were apparently occasions when the parties organised these conferences themselves. It is, however, important to note that very few of the judges mentioned using such out-of-court discussions.

These out-of-court discussions appeared to have a number of purposes but in general, it was said, they were not used to discuss substantive aspects of the case. Instead they were used to discuss issues such as settlement, compliance monitoring, logistical matters, and narrowing the issues in a case. The major advantage that this process was seen to have was the avoidance of expensive formal directions hearings.

> *Things like whether there were any practical limits that could be put on the scope of the evidence called at the trial, and those sort of things, numbers of witnesses that were going to be called at the trial, and that sort of thing. Just sort of an informal discussion about that kind of thing. I think what he was doing was giving an indication to the parties how he was looking at particular aspects at the first more informal occasion with a view to the parties then agreeing, given that he was saying what he was going to do whether they agreed or not. (solicitor)*

Out-of-court discussions were also apparently used when a matter was seen to be 'delicate' or personal. Alternatively they were said to be used to pull practitioners into line when this was seen as necessary.

> *Frankness, to allow a franker than usual discussion, things to be said that people don't want recorded, not because people are afraid of what they're saying causing some criticism, the problem is from being misunderstood. (barrister)*

> *Sometimes judges have been completely fed up with the parties and will take the practitioners into Chambers and say 'Look, this is completely off the record, stop acting like a bunch of idiots, start doing the right thing and this case will go somewhere' and then it goes back out into the Court and the practitioners behave themselves. (barrister)*

Opinion appeared divided amongst the practitioners as to the appropriateness of such informal discussions with the judges, and their place in the work of the court. Some practitioners believed that it was an extremely useful and effective practice for the court.

> *It's sometimes the case something can arise which is of a procedural nature that calls for a commonsense solution. It is appropriate and happens and I think quite appropriately in some cases where judges will ask to speak to counsel in his chambers and there'll be a discussion as to the best way to overcome whatever that problem might be and it's an eminently sensible way of resolving the problem. And there are all sorts of little things that can occur which are best dealt with that way and it's in no way prejudicial to the parties. The parties in any event are represented by their counsel and should anything arise, and indeed ordinarily the parties would be told by their counsel as to precisely what occurred, it's not something that's done in secret. It may be off transcript but it's not secret. (barrister)*

Many practitioners did, however, stress the fact that such discussions were only appropriate for dealing with procedural matters with both parties present, and that substantive issues should only ever be discussed in open court. There were, however, an appreciable number of practitioners who believed that such informality was never appropriate in their areas of practice. This was largely because of the potential for misunderstandings about the process, and the fact that clients may feel alienated and develop apprehensions of bias.

> *It's seldom appropriate and seldom helpful, because you don't really know, the judge says something in chambers ... judges will often say things on first impression that may be completely wrong. ... So I think there's a great danger in that kind of informality and the judge giving an impression that's not fully informed. (barrister)*

Some practitioners felt that such informal processes were wrong in principle, and a threat to procedural fairness and judicial accountability.

> *It has to be in public. The only system of fair justice would be to ensure that any comments a judge wishes to make about a case, or any comments by a*

party, through its counsel or otherwise about a case ought to be made in public, and transcribed for others to see and others to scrutinise if they want to.... If the judge has something to say, he ought to say it publicly and go on record as such. Similarly, if the parties have something to say to the judge, they ought to go on record. (barrister)

Standard time frames

As discussed in Chapter 3, the Federal Court adopted a time standard for case processing which aimed to have 98% of cases to be finalised within 18 months. The suggested case management model fixed time standards for 'key events' that would result in cases reaching final judgment, if necessary, within the overall time frame.[97] Some of the judges said that they aimed to finalise all their cases within the 18 month time limit, but they did not have a standard timetable for the progress of individual cases. Many stated that they aimed to move cases to finalisation as quickly as possible, and it was clear that this often meant a time less than 18 months.

The registries all seemed to have standing instructions from each judge about when to list their first directions hearings. Generally cases appeared to be listed for first directions about six weeks after initiation. Otherwise, the great majority of judges said they did not, or appeared not to, consciously follow any fixed timetable or overall time frame in their management of cases.

Most of the practitioners were unaware of any overall time standard operating within the court. Some practitioners did however feel that some judges were working to overall timeframes, although they were not able to say what the time standard was.

I think judges work to a time standard but it's not a standard which is set out in a number as such. It's 'Let's get the cases on as fast as we can, let's not muck around'. (barrister)

97 The events and time standards under this model were: Commencement, Directions hearing - maximum 2 months after commencement, Case management conference - 4 months, Evaluation conference - 10 months, Trial management conference - 13 months, Hearing - 15 months, Judgment - 18 months.

A number of practitioners indicated that time standards had developed by convention, either generally or within their particular area of expertise. Only in cases where, for some reason, a different or 'non-standard' timeframe was needed did a practitioner have to explain the circumstances.

> *It's a combination of juggling your needs in doing the particular thing, within a particular period of time, with what might be called conventional time periods that are usual as against the desire of the other side and the desire of the judge. (barrister)*

Some practitioners observed that there appeared to be a general push for cases to be heard quickly.

> *Some of them are in a bit of a hurry and a rush sometimes. It sometimes strikes me that they're trying to meet some timeframe that they want to impose on the parties. (barrister)*

> *I think they are far more orientated towards efficient resolution of matters, not them feeling as though the matter can go on for some indeterminate period, but that's beneficial. (solicitor)*

Many of the judges rejected the utility of time frames on the grounds that cases are 'unique' and there is a need to be flexible. One perceived disadvantage of stringent timeframes was that because cases and practitioners are so varied, it is impractical to impose the same set of rules on different practitioners who practice in different areas.

> *Again, it's a silly notion that there are templates that can be devised which will apply to all cases. I think people waste their time worrying about whether a template has been ticked off rather than whether that's the best way of getting cases on. (judge)*

Practitioners were also generally negative about standard timeframes. Most felt that cases were generally unique, both in terms of their content and the circumstances of the parties and it was inappropriate to force them into any sort of set mould. Some practitioners felt that such time standards

could be useful as a guide to work by, but that scheduling needed to be flexible to take into account the individual elements of a case. A number argued that there were some advantages to cases having lengthier timeframes. In some situations it allows the parties more time to pay for the costs of litigation. In some cases, parties want to build in time for their own negotiations, which can be difficult if the Court or a judge imposes a strict timeframe.

> *I think that judges probably reject ideas of working to a timeframe because ... their role is to do justice in individual cases and if there's a rule of thumb about how long it should take and the case fits in with that, well and good, but if the case doesn't, well, the more important thing is to do justice by the parties and come to the right decision. (barrister)*

Another issue highlighted by a few practitioners was that some judges were so busy, and their dockets were so full, that any sort of standard timeframe was impossible.

Judges did, however, have different methods for managing the progress of cases. Broadly there were two main sources of difference. The first concerned the timetabling of a case - whether an overall time frame for the case should be set at the beginning of a case or whether it should be dealt with in procedural 'chunks'. The second concerned who controls the progress of events - the judge or the parties.

Timetabling Cases

One of the case management techniques recommended when the system was introduced was the early setting of a final hearing date. This accorded with then prevailing notions of 'best practice' and was expected to be facilitated by the continuity of management under the Individual Docket System.

The majority of judges had not adopted this practice. Most stated that they managed case progress by directing the parties to complete a 'chunk' of procedural activity within a specified time, when they would then be brought back for further directions relating to the next 'chunk'.

The reasons given for preferring not to set a final hearing date early related to the contingencies involved — too many things can happen to push the case out of its time frame, which means finding another, later date, or a case may settle, leaving a block of 'empty' days in the judge's calendar. A few judges said specifically that they did not favour setting a trial date before mediation had been explored.

Practices appeared to vary in relation to how much of the pre-trial process judges covered at one time. A number of judges stated that they set down the timetable up until the point of pre-trial directions, whilst others tended to deal with cases in smaller stages.

> *What I do now is I, generally speaking, don't try and give directions for the whole of the case... because they are never kept. They cause more trouble than they are worth and bring people back. What I try and do is to just set directions up to the close of pleadings and then sort of bring it back after the pleadings have closed and have a look at it then and see what the issues are. (judge)*

There were some judges, however, who said they did fix a final hearing date early in the process, usually by the end of second directions hearing. The reason they gave for setting a trial date early was that it got parties to focus on the issues early, with the effect of either streamlining the process or encouraging settlement.

> *At the first directions hearing I try to set the timetable for the whole of the litigation. If that's not possible I set another directions hearing and I will give them a hearing date. Then it's up to them to get ready by that day. They usually settle which I think is very efficient. (judge)*

> *One of the great advantages of the single docket, in my view, is that...you can set the case down. You control the hearing date. At the first directions hearing, for anything that is routine, I give a hearing date immediately and then just timetable it backwards. That has several effects. One, it induces a reasonably high settlement rate. Secondly, there are very few interlocutory applications. (judge)*

Many of the practitioners interviewed had experienced these different practices with different judges.

> *This is a matter on which there is quite a divergence of approach, the approach in some cases is to fix a trial date virtually at the first directions hearing. ... Other judges would not fix the trial date until all the interlocutory steps have been completed, so there is quite a wide divergence of approach on that. (solicitor)*

There was some difference of opinion amongst practitioners about the best way to progress a case. Many practitioners felt that scheduling a case in 'chunks' was the most appropriate way to schedule a case.

> *I think the way they do it now is the only way that it can be done really effectively, simply at the beginning set each of the stages or program the stages up to the completion of discovery, and then allocate a date to come back once that's been complied with, and inspection has been completed, and at that stage, usually you're in a position where you can program it through to trial. (solicitor)*

Most also agreed with the majority of judges that it was generally inappropriate for hearings to be set down at the beginning of a case.

> *I think it's more sensible to wait for the steps to be undertaken, it's my experience that it's rare that people go through those steps without them changing or something else being required to be done. And it could easily be the case if a date is set down that other things need to be done and I could see a whole lot of cases having to be adjourned and just turning into chaos if they have dates set at the beginning. (solicitor)*

It was argued that setting a trial early could become inflexible, put pressure on the parties, and could possibly result in prejudice in cases of non-compliance.

> *There are some (judges) who seem to pride themselves on getting things done rapidly and so they want to fix a trial date before the evidence is on. I*

don't agree with that. And you have to hold them back and that often causes a degree of friction which shouldn't be there. (barrister)

However, some practitioners felt that it could be useful to set a trial date early, as this tended to make the parties and practitioners 'get their respective acts together', and gave parties certainty.

I think it focuses the parties on the fact that this is quite a serious process they're engaging in and not some sort of strategic game in which there are flexible times and no one's really serious about it. (solicitor)

Responsibility for Timetables

There were a number of different approaches to setting case timetables. Only a few judges said they imposed a schedule on the parties, and advocated taking the 'whip handle' as necessary, to ensure a case progressed at an appropriate speed. A large majority of judges appeared to follow the practice of looking to the parties to propose a timetable, which the judge may then approve. A number of judges clearly felt that it was not appropriate for the court to dictate the pace of the litigation. The extent to which this process appeared to involve active 'negotiation' varied. Some judges stated that they took an active role in setting a timetable. Others appeared to be willing to let the parties virtually dictate the pace and progress of a case. There were, however, instances where these judges said they would actively intervene, for example, if one or both of the parties were employing stalling tactics or were requesting times that were clearly ridiculous. But the general consensus among these judges was that the parties know best what the cases involve, and will thus have a more accurate idea about the time the case requires.

The majority of practitioners for similar reasons supported the prevailing judicial practice. Many stated that judges generally accepted timetables without alteration, although it was felt that some judges were getting stricter about lengthy, and for that matter, unrealistically short timeframes.

Practitioners did feel that judges differed in their practices, with some judges taking a far more active role in scheduling cases. Many of these practitioners felt that this was an inappropriate role for the Court to take,

and that parties should generally be in control of the progress of a case unless one party would not cooperate. Some practitioners had experienced a judge imposing what they saw as an inappropriate timetable that neither party agreed with.

> *There are some judges who, I think, have a philosophical view that the longer the timetable the greater the possibility that something will go wrong, the parties won't be able to meet the standard set for themselves. It's sort of a jaundiced view. (solicitor)*

Monitoring and Compliance

One of the key objectives of the docket system was to encourage active judicial management, including monitoring the development of the litigation and compliance with directions by parties. We have already described the use of directions hearings as the primary tool to achieve this purpose. However, it was also envisaged that the court would engage in other forms of monitoring between directions hearings. Therefore we investigated the extent to which this was in fact occurring. We also asked about the methods used to enforce compliance with directions.

Approximately one quarter of the judges stated that the only way that they monitored the progress of cases was at directions hearings. Other judges stated that their chambers actively monitor compliance with directions between directions hearings. The manner and extent to which this was said to be done varied widely among chambers. Different methods included—

- Checking the court files to ensure that documents had been filed when required. In some chambers the parties were not contacted when they failed to comply; however judges questioned the party at the next directions hearings. In other chambers the associate (in a few cases the judge's personal assistant) rang the parties.
- Ringing or faxing the parties and asking them to confirm compliance with previous orders prior to each directions hearing.
- Regularly ringing parties who had a history of non-compliance to check on progress.

- Ordering or otherwise reminding parties that the party not in default must notify chambers of non-compliance with a direction by the other party.
- Checking the number of extensions previously requested by parties before agreeing to further postponements of scheduled directions hearings.

The judges said that they employed a number of strategies, other than monitoring, for 'ensuring' compliance with their directions. It was clear that some judges were able to use their authority and public censure of 'delinquent' practitioners to good effect.

> *I'm very tough about that... They will usually get a very big spray if there is non-compliance. ... [I point] out ... that orders are orders and that breach of them is contemptuous and that I have no interest in making any order that is not going to be complied with and I won't. I think my reputation for doing that is now well known. I get very little non-compliance with the orders that I make. (judge)*

Some more formal sanctions were mentioned, including re-listing cases to require an explanation (sometimes by affidavit), 'guillotine orders' precluding certain steps or actions if they are not taken in time, and (apparently rarely) ordering costs. One judge stated that he had no hesitation doing this.

> *I remember when I started... I was wondering how the hell was I going to get people to comply with directions. Recognising that I felt a great sense of responsibility to make sure that time limits were complied with and I was trying to dream up some kind of low level sanction which would not thump people with a hammer. So I started using a nuisance order saying I wanted the relevant solicitor to actually file an affidavit explaining the delay. This became notorious around town but it's always easier to move from a tough position to a softer one. (judge)*

It was clear that some judges felt that more active monitoring and closer involvement in case management was inappropriate, while others saw it as impractical.

> *I don't think it's productive for judges to have to chase people to see whether times have been complied with. I think in theory it was a good idea but in reality if the parties can't efficiently manage their timetable I don't think the Court is really obliged to do it for them. (judge)*

Other judges felt that any type of monitoring in between directions hearings was inefficient, adding an impossible burden to the workload of their chambers.

> *I don't follow it up. Now, I have a particular reason for that. The reason is that it puts a huge amount of work pressure on Chambers staff. I mean I just wouldn't stab myself in the back working that way. The more time she spends on the phone chasing other people up, the less useful she is to me as an Associate because I didn't employ her to make phone calls but that's what the docket system puts on to the Associates. (judge)*

While the majority of practitioners had not experienced any sort of compliance monitoring other than directions hearings, they generally felt that the judges had become stricter about compliance with directions under the docket system. They felt this was because the judges had more knowledge about their matters so that practitioners were less able to use delay tactics or 'pull the wool over judges' eyes'. It was also argued that judges were less tolerant of delay tactics because of the more dramatic effect non-compliance could have on their work than it would have had before.

> *I think that they've become far more orientated towards compliance than used to be the case.... If there's short timeframes involved, then I'm more conscious of the flow on effects in relation to their other caseload. (solicitor)*

Some practitioners had, however, experienced associates or registry staff chasing compliance when a critical date or directions hearing was approaching. Others stated that some judges employed the tactic of requiring parties to bring non-compliance to their attention.

> *The registrars seem to chase you up a bit these days. They never used to, but they actually do nowadays, which is a good idea. (barrister)*

> *Several judges make, in effect, self-executing orders requiring the party that is not in default to bring the matter before the court if the opposing party is in default by more than three days. So, a number of judges monitor it on an ongoing basis in this way. (barrister)*

While many practitioners recognised that the biggest cause of delays was defaulting parties, opinion was divided as to whether the court should be seeking to enforce compliance with directions on its own initiative.

> *I don't think it helps the litigation if the judge is himself or herself raising the issue of whether orders have been complied with and attempting to do something. I just think that that interferes with the running of the case between the parties. (barrister)*

On the other hand, there was a general consensus that where the parties sought enforcement the court should be more willing to make use of available sanctions. It was argued that if available sanctions were not used, then monitoring was seen as a waste of court time and resources.

> *The adversarial system works on one party having its own interest and the other party having their interest and obviously the party who's being affected by the lapse of time should bear an onus to do something about it. (barrister)*

Discovery and Evidence

In addition to the Individual Docket System, the Court has introduced a number of procedural reforms designed to improve the efficiency of the litigation process. Our original research brief was confined to evaluating the case management initiatives and hence the procedural reforms were outside the scope of this study. However, when we came to develop and test our interview protocol in consultation with a number of experienced practitioners, it became clear that they saw the procedural changes as part and parcel of the Court's case management reforms. As they were seen to

impact directly on the management of cases, these practitioners felt that they were vital topics for us to canvass. The data summarised in this section are therefore mainly concerned with the attitudes of practitioners towards such reforms. The views of judges were gleaned only to the extent that they were expressed in other contexts.

Discovery of Documents

The first area of reform related to discovery of documents. The controversy concerning discovery is well known and documented in many sources.[98] In essence, the debate focuses on the issue of relevance. Under the 'Peruvian Guano' test that has prevailed for over 100 years, the obligation has been to discover all documents that are relevant to the litigation in the widest possible sense.[99] In recent times, there has been criticism of this test as adding unreasonable cost and delay, and providing opportunity for tactical abuses.

The Federal Court has responded to this debate by trying to control and narrow the scope of discovery. Practice Note 14 states that practitioners should expect that the court will not order general discovery, even when a consent direction is submitted, and that they will mould any order for discovery to suit the facts of the case. In requesting discovery, practitioners are expected to state whether discovery is necessary at all, its purpose, and whether the purpose could be achieved through a less expensive means of discovery, or by discovery only in relation to particular issues or defined categories, in stages, or via a general description of documents rather than by identification of individual documents. In determining whether to order discovery, the court can take into account the issues in the case and the order in which they might be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.[100]

98 See, for example Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (2000) ALRC: Sydney.

99 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

100 Federal Court of Australia Practice Note No. 14.

Amongst the judges who provided an opinion about discovery, all agreed that it was one of the most expensive and difficult areas of litigation, and thus required extensive judicial control to prevent abuse. Although they were generally in favour of limiting discovery, many were conscious of the dangers of preventing important evidence from coming to light.

> *The most difficult aspect of managing a case undoubtedly is discovery and I try to minimise discovery where I can, but on the other hand I recognise that there could be documents which are quite important, could be crucial that may be excluded if you were too narrow in defining the scope of discovery, I can see that. (judge)*

According to most of the practitioners, the new practice note has had little effect on their experiences, with more than half of those interviewed identifying no impact.[101] These data are summarised in Table 5.1.

Table 5.1: Effect of new practice note on discovery

Group	Positive	More work*	Negative	No effect	No opinion	Total
Barristers	5	4	5	21	12	47
Solicitors	7	1	2	28	6	44
Total	12	5	7	49	18	91

* 'More work' refers to responses where the practitioners indicated that using categories for discovery resulted in more work for themselves, but did not state whether they saw it as a positive or negative development.

Practitioners claimed that judges varied quite considerably in their approach to discovery, with some being willing to grant general discovery, whilst others limit it even if that goes against the wishes of the parties.

101 The reasons for this were not entirely evident and a number of explanations are possible, including that judges have not responded to the reforms or that they have not made any practical difference in most cases. There was even some suggestion that some judges had informally restricted discovery prior to reform changes.

There were significant differences of opinion among practitioners as to whether limiting discovery was a positive development. Some supported it for the reasons the Court adopted the changes in the first place. Those who were opposed to the changes argued that it could result in crucial information not being disclosed, and that it could result in arid interlocutory disputes that could be as costly as the abuses the changes were designed to prevent.

> *I think the new practice note on discovery has a very negative impact. Proper discovery, I think, is critical. I think the limitations on discovery are very unfortunate. I know that the discovery process can be costly and time consuming, but I've seen too many trials won and lost on proper discovery or adequate discovery. It can make a critical difference. To my mind, it's one of the most important processes in pre-trial litigation and it's probably one that's most abused, by people not making proper discovery. (barrister)*

> *It's a terrible idea. Well, it's something that sounds good, but doesn't work out in practice all that well. You start getting too many judgment calls on what's relevant and what's not relevant, whether it falls in the category and doesn't fall in the category, and that sort of stuff. (solicitor)*

Evidence By Affidavit

The Federal Court has increasingly encouraged the submission of testimony by written affidavit because of the view that evidence is generally more efficiently adduced in writing than orally. Parties still have the right to require the attendance of a witness for the purposes of cross-examination.

The Court's position on affidavits was not universally shared by practitioners.[102] Many practitioners saw it as a positive way to reduce the time spent at trial examining witnesses, and hence lower the costs involved in litigation, at least where the evidence was uncontested.

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102 According to a number of practitioners, some of the judges were also against using affidavit evidence or witness statements in their courts.

> *From a cost point of view it's slightly cheaper in preparing statements because you don't need to actually have the client come in again to swear the affidavit and annexures and exhibits, you can just simply have the statement and they can just sign it and away they go and they adopt that statement when they give evidence in court. (solicitor)*

There were, however, some strong criticisms of the system. A major criticism was that the written statements were invariably made redundant by the need to cross-examine witnesses at trial, and hence purely served to duplicate effort and increase cost. Their constructed nature in turn made cross-examination even more important. Further the required statements took great deal of time and expense to produce, and 'front-loaded' costs that formerly would not have been incurred when a case settled.

> *Hate it. Evidence by affidavit is typically fifty pages long, and tells you absolutely nothing that you didn't already know. It is expensive, extremely expensive because the number of drafts and redrafts that are done are frightening. The number of times counsel particularly, and solicitors and clients too for that matter, go through and change a word or a comma, because they don't like that particular inflection, and you end up with rafts of material which, as I said, really don't mean diddley, in the scheme of things. (solicitor)*

Differences in Chamber Management Practices

The general view amongst all the groups interviewed was that there were quite marked differences in the management practices of judges and their chambers. At the same time, many of the Practitioners commented on the high calibre of Federal Court judges generally and we encountered almost no complaints about individual judges' practices. Overall, practitioners felt that judges appointed to the Federal Court were of an extremely high calibre. Many of the practitioners reported experiencing the range of differences we have described above.

> *Not particularly uniform. There are certain judges who are more aggressive in their intervention in the case and there are certain judges who allow the case to be run by the parties, effectively in more like what we call the traditional method. (solicitor)*

The one exception to this was South Australia, where very few of the interviewees thought there were significant differences. We had the impression that this could be attributed to the more cooperative working relationships among judges and court staff in that registry. Moreover there appeared to be a high level of goodwill and cooperation between members of the legal profession generally in South Australia, with the result that any judicial management and monitoring was seen as less necessary.

Judges and practitioners in other states gave an interesting range of explanations for differences between chamber case management practices. A number of interviewees felt that overall the differences could be attributed to differing levels of commitment to case management philosophy.

> *Really it's a question of philosophy. You've heard my philosophy. I don't see myself as managing private litigation, but there are judges who think that's what they were born to do. They like lots and lots and lots of directions hearings—I see them, the same matter over and over again for motions. To me that's just making work but it's also about their view as to what their judicial role is. We don't discuss that in the Court. It might be a useful thing as an adjunct for evaluating the docket system. (judge)*

Some of the differences were put down to the actual state of a judge's docket and how many cases they had to contend with. Some practitioners felt that judges who were overloaded and under pressure in turn tended to put pressure on them.

Some judges and practitioners felt that differences in management practices were mainly a product of case differences.

> *I think it's a matter of perhaps individual judicial style but it's more than anything influenced by the nature of the case. I would doubt very much*

> *whether given the same cases and the same interlocutory history any judge would adopt a radically different approach to it. Such differences as there are, are perhaps more of emphasis and more dictated by the particular features of the case rather than saying that there are camps of judges who are hard-liners or soft-liners or something in between. I just don't perceive that there is such a dramatic difference. (judge)*

In some cases, differences in management styles were attributed to personality. Practitioners saw some judges as generally tougher or stricter than others. Some were also seen as just generally better managers, and this was often put down to prior work experience. Some practitioners felt that management styles differed between the older and younger judges, the latter often being more proactive and interventionist in their approach.

> *Just some judges are more aggressive than other judges and they're more robust than other judges, they're more decisive, there's all sorts of things. Everyone's an individual, some people agonise a lot about making any decision and some people make a decision very quickly. (barrister)*

While most interviewees felt there were differences across the Court, there were differing views on whether this was problematic or not. Many of the judges and practitioners felt that the differences in management styles were generally inconsequential, involving matters of detail rather than substance. It should be noted that many of these judges stated that they were generally unaware of what other judges were doing, whereas the practitioners were speaking from actual experience.

> *One of the interesting things is that I suspect judges in the Court don't really know what others do terribly much. So practices might differ quite dramatically and we aren't talking about it much, because it's really a day-to-day thing. We don't share it. (judge)*

> *I think each judge has their own preference for the particular ways that they do things, but there are certain steps that are always going to be the same because of the rules and practice notes. So, I mean, uniformity is achieved that way. (solicitor)*

A number of judges, however, were concerned that differences could have important implications for uniformity within the Court.

> *Are there differences? I think the answer to that is yes there are. Does it create problems? Yes because once you've got differences in approach inconsistencies are then inevitable. That can create difficulties in perception, in that outcomes may be seen to depend in part upon who you get and that's something I think we've got to be quite conscious of. What the answer to it is I don't know. (judge)*

A number of practitioners felt that the idiosyncratic and inconsistent nature of case management in the court causes frustration and confusion for parties. This was seen to be particularly problematic for practitioners who were less frequent users of the court and who were unfamiliar with either the individualised nature of the system, or the management practices of the particular judge concerned. A few practitioners felt that if the court was attempting to promote hands on management, there should be an attempt to enforce uniformity and hence certainty for practitioners.

Many judges and practitioners felt that, regardless of whether it was good or bad, differences in case management practices were an inevitable by-product of judicial independence and individual case management. Given this, a few practitioners felt that the docket system had made it easier to work with different judges because they could work out a judge's style in the pre-trial stages.

> *The independence of the judiciary is a very important principle. It carries with it a price, but it's a price worth paying. There are differences among judges of this Court and their attitude towards legal matters or even certain ideological issues, it's inevitable. ...Some judges are not the slightest interested in administration. (judge)*

Because each matter is personally and individually managed by a judge, the individual differences are taken into account in a genuine sense. And I personally think that it's more important to manage a case mindful of its individual requirements than it is to aim for some overall procedural system. So, the short answer is, I think there is reasonable consistency but I don't see procedural consistency as being a terribly important goal. (barrister)

Differences Relating to Specific Case Types

Individual case management was clearly affected by case type. In particular, we found significant differences in management practices in native title and migration cases.

Migration cases

As discussed in Chapter 4, migration cases are handled in very large numbers in the Sydney and Melbourne Registries. They are in many respects distinctive, and as a consequence many of the observations we have made concerning individual case management do not apply.

In migration cases, the Australian Government Solicitor (AGS) always represents the Commonwealth. At the time of our research, standard directions were used that had been developed by the court in consultation with the AGS. In most cases the hearing date was fixed at the first (and often only) directions hearing. In Victoria, standard orders were often dealt with over the telephone or by fax. Instead of directions hearings, 'non-compliance' days were held where non-complying parties are called in to account.

Migration cases were generally perceived as not suitable for mediation, as they had already been through a number of processes and reviews, and the Federal Court's jurisdiction is one of review, for error of law only. Some judges felt that there was little justification for spending substantial time on migration cases, because of the limited jurisdiction of the Court and the impression that many went on to a further appeal in the Full Court.

> *The scope for [the Court] interfering or interjecting into the decision making process is so small that there is no justification for stringing it out. I try and give as many ex tempore judgments in immigration cases as I can because a single judge's decision is never going to represent a precedent for anything. (judge)*

Practitioners working in the migration area generally stated that their cases ran to a fairly standard process — usually consisting of one directions hearing before the final hearing. In most states, the AGS had standard procedures for preparing cases and generally both the processing and scheduling of cases appeared to be done by consent.

In NSW, the AGS had been given the responsibility for the preparation of a bundle of documents (referred to as 'relevant documents' or a 'green book') to be filed at the first directions hearings.[103] This was mainly done because the large percentage of unrepresented litigants appearing in these cases were not preparing their cases properly. Generally, the Department of Immigration has all the relevant documentation from both sides, and is able to access other required documentation from the relevant tribunal. It seemed that barristers were rarely briefed in migration.

Native Title Cases

The other group that is wholly distinctive is native title cases. These cases appear likely to pose a significant challenge to the Individual Docket System.[104]

Native title cases were seen to raise complex legal and factual issues, involve large numbers of parties and witnesses, and entail complex logistical difficulties associated with the need for the court to travel to remote sites.

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103 This process was developed through discussions between the Court, the AGS and Department of Immigration, held in July 1998.

104 At the time of this study the Federal Court jurisdiction in these cases was fairly new, as a result of amendments to the *Native Title Act* 1993, and there was therefore relatively little management experience with these cases.

> *They are so complex, in terms of the interests of the Aboriginal people involved, who are often at loggerheads ...[who] are not all speaking with same voice. There are so many other interests involved. It is just nonsense to my mind to suggest that every case can be treated as a potential product unit to be dispatched from the factory complete. (judge)*

> *There's an expectation that you're going to go out and you are going to hear the evidence on site...we've got to sort of pick up stumps here...that's such a huge intrusion...it's hugely expensive. (judge)*

At the time of the research, most registries had, or were planning to develop a native title section to handle administrative aspects of case management. In some registries some aspects of native title cases, such as native title amendment applications had been delegated to registrars. The court had produced a 'Native Title Bench Book' identifying all the processes in a native title matter and containing template orders, as well as secondary research material.

Practitioners working in native title stated that they had attended case management conferences which were more informal than directions hearings, and which were designed to air grievances and organise better ways of doing things. These were seen as useful because of the nature of native title cases and the need to clearly identify the interests represented and their position in the case. Standard orders were also often used to get more detailed particulars about the claims, as well as getting expert reports from both sides.

Judges who had direct experience with native title cases expressed concern that these cases could possibly overwhelm the court with work. It appeared that some felt forced either to ignore other cases in their docket for substantial periods, or to put off their native title cases until some remote point when they hoped to have the time to deal with them. One judge put the problem as strongly as this—

> *Native title is a disaster. It's going to break the back of the system.... if we have to hear them, there will be no other work heard... for years. (judge)*

Summary

- Judges and registry staff generally considered that the court should have a role in case management, although there was a range of opinion concerning what this role should be. Some felt that case management should consist of active intervention, while others felt that passive monitoring was more appropriate. Most judges and court personnel stated that case management should be placed in the hands of the judges, although some felt that registry staff should have a primary role.
- In contrast, in response to general questions about the active role of the court, practitioners were less positive. Some practitioners thought that the court should have no involvement in the management of cases. This suggests that the Court and the profession are to some degree at cross-purposes in relation to the aim of increasing judicial participation in the management of cases.
- Most judges do not follow any prescribed model of case management in any substantial way, although they do tend to progressively develop proceedings through a series of directions hearings. Judges said that they generally tried to minimise the number of directions hearings that required the parties (or their representatives) to actually attend at the Court. The perceptions of judges and practitioners as to the average number of directions hearings involved in a typical proceeding differed, with practitioners citing more lengthy timeframes.
- Some judges use registrars for directions hearings, although concerns were raised that this may undermine the principles of the Individual Docket System. Practitioners were generally less supportive of the use of registrars to run directions hearings.
- Practitioners reported that out-of-court discussions concerning the management of cases were occurring to a considerable extent. These discussions were said to be used to address minor aspects of cases and to narrow issues, but not to discuss substantial issues.

While some practitioners saw this practice as useful, many thought that out-of-court discussions were inappropriate.

- Most interviewees did not support the use of standardised timeframes, seeing them as inappropriate or impractical.
- Although setting trial dates early in proceedings is a general axiom of case management principles, and was initially one of the recommended features of the Individual Docket System, most judges had not adopted it, preferring to progress cases by 'chunks' of procedural activity to be completed within a specified time. A few judges, however, said their practice was to fix the date early, arguing that this focuses parties on the issues early and encourages settlement. Generally, practitioners believed the early setting of a trial date was impractical.
- Most judges indicated that they would ultimately defer to parties in setting the timetable for a case. The majority of practitioners agreed that parties should control the pace of litigation.
- Some judges purported to be taking initiatives to monitor compliance by means other than directions hearings, and said that they were stricter in enforcing compliance under the Individual Docket System. However, few practitioners reported experiences of compliance being monitored other than through directions hearings and most did not regard this as a useful activity. Most judges and practitioners reported an unwillingness to use formal sanctions to enforce compliance, despite non-compliance being perceived as a problem.
- Those judges who volunteered an opinion on discovery agreed that it required judicial control to prevent abuse and were in favour of limiting discovery, although they emphasised the need for caution. There was a general feeling among practitioners that the changes to discovery procedures had had little impact. Where their effect had been observed there was disagreement over whether the changes had had their intended effect or were desirable. Practitioners also stated that judges varied widely in their willingness to grant discovery.

- Judges appeared to be increasingly favouring the use of written witness statements (by affidavit), although the majority of practitioners did not welcome this trend. There was a strong view amongst practitioners that evidence by affidavit duplicates effort and front-load costs which are then wasted if the case settles.
- There was a general view that there were marked differences in management practices across different chambers, except in South Australia. These differences were not always considered to be of any consequence, although some judges were concerned about a possible lack of uniformity within the Court. Some practitioners argued that differences could cause frustration and confusion for parties.
- The complexity of both the issues and the logistics of native title cases were seen as a potential threat to the system.

6

Managing Workloads

The Individual Docket System aims to facilitate more effective workload and time management by enabling judges to control their own timetables and manage their own workloads. There are, however, a number of contingencies in the life of proceedings that need to be taken into account in scheduling court time. A trial may run longer than planned, or a case may settle and not require the time allocated to it. A case may require urgent attention. There may be a need to find time out of court to prepare formal written reasons for judgment. Arguably factors of this nature present some difficulties under the Individual Docket System. This chapter summarises data on how judges manage their own workloads and how they deal with factors that they cannot completely control.

Case Scheduling

A majority of the judges felt that the Individual Docket System was allowing them to manage, organise and control their own timetable and schedules more effectively. Many felt that managing their own cases allowed them to plan well in advance while maintaining appropriate levels of flexibility.

> *I think an important benefit is controlling your workload. Particularly in terms of controlling listing dates and now more consciously making time available between hearings for judgment writing. I think also I get personal satisfaction out of the flexibility that I have to offer parties, sometimes to their surprise, an early hearing date. I think being able to offer people an early hearing date can either lead to settlement or a much more efficient trial process. (judge)*

Cases Running over Time

Nearly all of the judges had had occasions when a trial required more time than that allocated. There were two positions on the appropriate response to a trial running into the time scheduled for another case. The majority view was that the 'over-running' case should be adjourned part heard to the earliest available date. Some judges explained this position simply as a way of minimising the effect on their diaries. Others justified it in terms of 'fault'. It was said that it is not fair to punish innocent parties for the miscalculations of other litigants. It was also implied that penalising for underestimates in this way acts as a deterrent to unrealistic time estimates.

> *If the hearing doesn't finish in time, it gets adjourned to later. ... They don't jump the queue, so to speak. Because of their error in estimation, the penalty is that it gets adjourned, and adjourned for months. I don't give it any priority. (judge)*

In contrast, a smaller group of judges argued that it was wrong to adjourn matters part heard. It was argued that it was inefficient and costly both to the judges and the parties to a case to have to re-familiarise themselves with the case details at some later stage. Some judges therefore stated that they continue hearing the 'over-running' matter until it is finalised, moving following cases if necessary.

> *What I certainly don't believe in is cases being adjourned part-heard — I think that's just hopeless. (judge)*

Regardless of how judges resolve this difficulty, they recognised that it raises a serious dilemma. Therefore, many of them employed various techniques to avoid the problem. A common technique was to leave a day or a week between hearings, ostensibly to write judgments, but which could be available to accommodate matters that run overtime. It was also common for judges to extend their sitting hours, remind counsel of the time available and the consequences of running overtime, and by other means chide and coax the parties to finish within time.

Many judges said that they would do whatever they could to ensure that at least the evidence was completed before a matter was adjourned part heard. In this event, they could persuade counsel to provide final submissions in writing, and then it was only necessary to schedule a short hearing for argument.

Some practitioners reported experiences of the judge imposing timeframes for certain steps within the hearings if it looked like a case was going to run over (for example, suggesting that the parties had only a certain time remaining for particular witnesses or cross-examination).

Some judges suggested that the Individual Docket System had reduced the occasions when hearings ran over, because judges could be more involved in the estimation process. A number of judges claimed that cases running overtime was an infrequent occurrence or did not happen so often to be considered a serious problem. Interestingly, a few judges commented on the enviable reputation of other judges for holding trials to scheduled times.

In general, practitioners argued that judges are usually able to accommodate cases that ran over. They sat longer hours, used written submissions, were able to let cases run on or were able to adjourn the case and re-list it within a reasonable timeframe.

> *Yes, I've had a hearing running over time where the judge has sought to try to schedule it as best as possible, for example, by commencing earlier and finishing later on the days concerned. Some judges are willing to sit on weekends and other judges will try to build things around their otherwise busy timetables. (solicitor)*

A number of practitioners thought that some judges generally schedule more time than practitioners had requested to avoid problems if a case happened to run over. Although this time may have been set aside for judgment writing, we were given the impression that practitioners saw this as time to be used if needed. Judges' practice in this respect may therefore tend to be self-defeating.

Some of the practitioners had experienced situations where cases had to be adjourned for what they perceived to be an inappropriate period of time. One barrister argued that cases ran over because judges were trying to be too interventionist and were trying to develop the case themselves instead of listening to the parties. Adjourning a matter part heard was seen to lead to delays and duplication of effort. One problem raised by practitioners was that when cases were continued or adjourned to a time that suited the judge, it could be necessary to brief new counsel, which could add cost.

Cases Settling

The prospect of cases settling, leaving the court with 'idle' judges, is one that is addressed in master calendar systems by over-listing. Theoretically, the same prospect could be viewed and addressed in the same way in the Individual Docket System, although this would undoubtedly be more difficult in practice. In fact, only one judge claimed to have over-listed. All the others said they used time that became available because of last minute settlements to do other work. Most often this was catching up on judgment writing. Some mentioned that they would try to move forward work in their dockets, but they noted that this could only be done rarely. A few felt that judges in this position should make themselves available to take on other work in the Court. However, it appeared that when they themselves had done so, no work was available.[105]

> *I think it's the great flaw with the docket system. Because there is hardly ever any work but sometimes it's interstate work but it's possible in some circumstances to have idle judicial time because there is no pool of cases. Everything is in a state of management so that cases are never free unless your free time happens to coincide with another judge's jamming. (judge)*

105 Difficulties surrounding the processes for redistributing cases in the Individual Docket System are discussed in Chapter 4.

Urgent Interlocutory Applications

Nearly all of the judges had experience of having to deal with urgent interlocutory applications in cases in their dockets (the way urgent originating applications are dealt with is discussed in Chapter 4). Most commonly, judges said that they simply made the time available by sitting outside normal court hours. Some judges said they kept fixed times available within their diary, to hear urgent matters if they arose.

> *I do not believe in just having a system and just sticking to it, so if an urgent interlocutory injunction has to be dealt with, I set aside whatever I was going to do and do it because it's more important. (judge)*

It should be noted, however, that several judges said that they applied stringent criteria to determine if interlocutory applications were in fact urgent. Some indicated that truly urgent applications are in fact extremely rare.

Many practitioners had experienced judges sitting outside normal court hours in order to accommodate urgent hearings. Some stated that docket judges would contact other judges directly if they could not hear the matter.

> *Well, again a variety of things, one, a couple of times judges have found someone else who is prepared to do just that aspect of it, or they've sat at odd hours or double booked themselves or sometimes you just have to wait, which is sometimes unsatisfactory. If something's really crucial it needs to be heard. (barrister)*

A number of practitioners had experienced difficulties in getting urgent interlocutory applications heard because their judge's docket was overbooked.

> *Well, beforehand you could always get a judge because we didn't have to go and find the particular judge whose case it was. In the past there weren't any instances where you were delayed, I suppose, in an urgent matter by*

trying to find a judge. Nowadays, we have to rush around and find which state the judge is in and when he can fit it in and so forth. (barrister)

Scheduling Hearing Dates

A majority of the practitioners had not experienced difficulties in getting hearing dates. In fact, many commented that it was easier and more efficient to organise hearings under the docket system because they were able to deal directly with chambers.

I think it's fair to say that I've had pretty good experience on that score. I think it might be said that docket judges take some degree of pride in their docket. They don't like people to be able to say that this docket judge didn't look after some of the cases in his list. (barrister)

At the same time, an appreciable number of practitioners had experienced significant delay in getting hearing dates due to their docket judge being booked up well into the future. A number of practitioners felt this was particularly problematic when they were unable to get dates for fairly uncomplicated short cases, because judges were caught up in large complex trials or were away from their docket for other commitments. Again, it was reported that some judges sat outside court hours to accommodate such cases.

I think if anything delay has been exacerbated. My view is that all of the judges that I've been before seem to have dockets that go into next year and as a result, you're stuck. So, if anything I think the docket system has exacerbated these delay problems. (solicitor)

Many practitioners argued that it was extremely difficult to get cases transferred between judges, and were unaware of any processes in place to accommodate this situation.[106] Others saw the need to transfer cases because judges were overloaded, as undermining the central point of having an Individual Docket System. In contrast, in South Australia where

106 See Chapter 4.

it appeared that judges found someone else to hear their matter if they were over-booked, practitioners made positive comments about this system.

Judgment writing

Many of the judges commented on the difficulties they experienced finding time to write judgments. Apart from using time that becomes available when cases settle, the only clear strategy, used by some judges, was to schedule judgment-writing time at the conclusion of trials. It appeared that this time was often taken up by cases running over, or by other cases that needed attention. The judges themselves appear often to regard writing judgments as something that had to be fitted in between hearings, rather than seeing it as an integral part of the progress of the case. A number of judges commented on the fact that scheduling their time had been made easier under the Individual Docket System. Even so, many of these judges found that this time was often taken up by other demands for their attention.

> *One good thing about the docket system is that you can organise your own judgment writing time and rather than having a big slab of judgment writing time once every three weeks or whatever it is, you can program your cases so you might leave a day or so at the end of a trial for judgment writing which is a much more efficient way of doing it. (judge)*

> *I think unfortunately in this Court we don't always leave enough time and the docket system needs to be adjusted to take enough time for judgment writing closer to the judgments. People run around trying to do the best thing for the parties, organising a hearing because it's urgent — 'in two weeks time is there a day clear?'— and this sort of thing. What is being sacrificed all the time are days that were originally being set aside for writing judgments and it doesn't make sense. (judge)*

Not surprisingly, the perspective of practitioners tended to focus on the delays in writing judgments. Whilst some judges were seen to be extremely efficient, others were said on occasions at least, to take an

unreasonable amount of time. Practitioners generally acknowledged that judges had a limited amount of time available to set aside for judgment writing and felt that the added pressure of managing cases had put an extra burden on judges.

> *I just think that that [not having time for judgment writing] is wrong. It's like being at the Bar and having every single week of your diary filled up for the next nine months. There's nothing more draining than that. You can't see the end of it. And I would imagine for a judge it must be appalling, the prospect that you've got all these reserve judgments to get through. I just can't imagine a system more destined to collapse than that. (barrister)*

At the same time, there was a view that some judges were too 'precise and academic' when writing their judgments. It was also felt that judges were under pressure to produce 'textbook' quality works, and this was not necessarily a skill they all had as former advocates. A few felt that the skills of judges would be better used by encouraging more *ex tempore* judgments.

> *And the court at the end of the day can give judgment orally without reserving it, which is a practice which I think should be encouraged, there's too much reserved judgments in the Federal Court. ...It's a skill that's been lost and I think it's a great shame. I don't know why, but there are very many cases when an oral judgment could be given, either that day or the following morning and the case is disposed of, it's out of the way. (barrister)*

Other Commitments and Appointments

Judges were not asked specifically about other commitments and these were not raised, at least explicitly, as a time management issue. However a number commented on other involvements, including court committee work, appointments to other courts, tribunals and commissions, university teaching, professional education, and public and community activities. In some cases these activities attracted concessions in individual docket

workloads and in other cases they did not. Although no judges complained, a number of other court staff commented on the inadequate provision made for judges who were involved in other official duties.

> *It is a matter for the Chief Justice whether he is prepared to give those judges that are doing extra work on tribunals credit for it. At the moment they are just doing extra work. Justice X - so far this year I think he has sat 36 days in his Tribunal that hasn't been taken into account for his work. So he has done 36 days more than any other judge without a Tribunal. So it is a bit hard on those tribunal judges. (registry)*

A number of practitioners felt that some of their scheduling difficulties were caused by other commitments of judges, making them unavailable to hear urgent hearings and causing delays in the listing of trials.

Effect of Individual Dockets on workload

Opinion about the effect of the Individual Docket System on individual workloads was significantly divided amongst judges, with nearly equal numbers saying workload had increased or stayed the same, and only a few seeming to indicate that workload had decreased. Not surprisingly, the number who said it had not changed included all of the judges in Western Australia, South Australia and the ACT, where the introduction of the docket system involved the least change.

The judges who thought their workload had increased typically cited the additional management or administrative load as the cause. Some, who clearly felt very overloaded, attributed this to the 'luck of the draw' in the case allocation system. A number spoke more generally about the burdens of the system and of the lack of central co-ordination to deal with any problems that did arise.

> *Well, I think that, because of the responsibility and the unwillingness to admit that there's a problem, and the feeling that there is no central person with whom the problem can be left to solve, I think it probably has meant*

> *that I am working harder. I think it gives the litigator better treatment but I think it is a heavier load for the judge. (judge)*

In contrast, a few judges felt that managing their own cases made their work easier, under the Individual Docket System.

> *It may be illusory. I think it is more manageable. I think I've been in court less than I used to be. I don't have to be as accommodating under the docket system. (judge)*

Many judges, including some who felt their workload had increased, said they had more control over it. Some of the judges indicated that control and autonomy over their workloads more than compensated for any workload increase.

> *From my point of view it assists me because I like knowing what I'm doing and being in control. ... It is a heavy workload at all stages so whether I was doing it this way or doing it some other way, I don't think would matter very much but I personally like the certainty of the docket system. (judge)*

Many judges also commented that managing their cases from start to finish made their work more interesting, made them more enthusiastic about understanding particular cases in their dockets and gave them greater job satisfaction.

Many practitioners felt that the judges' workload had increased, in terms of both caseload and management responsibility. The increase was said by a number to have a detrimental effect on practice in the court, for example exacerbating the scheduling problems discussed above. However, other practitioners felt that cases were far more effectively managed under the docket system.

Many practitioners commented that they did not think there was an equal distribution of the court's workload across the judges. In particular, the majority of practitioners in Queensland felt that their judges were unreasonably overloaded.

Summary

- Most judges felt that the Individual Docket System had increased their sense of control and autonomy, and that they were able to control their own workload more effectively.
- Judges reported that they were able to accommodate cases that run over time and that require urgent interlocutory hearings. Practitioners generally felt that judges were able to accommodate cases that over-run, although many reported problems getting urgent matters heard because many judges were overbooked.
- One of the main techniques for dealing with such cases is to use the time notionally allocated to write judgments. Judges appear to see judgment writing as a task to be fitted in between hearings, rather than being integral to the hearing of a case. Likewise, practitioners also appear to consider this time as being available for hearing additional cases. Not surprisingly, many judges reported having trouble finding time to write judgments. Extra time made available when scheduled cases settle was used for other tasks, especially judgment writing.
- While most practitioners felt that the Individual Docket System had made the organisation of hearings easier and more effective, some reported experiencing delay as judges are overbooked. In particular, practitioners reported problems in getting short, uncomplicated matters heard.
- Almost all judges felt that their workload under the Individual Docket System had either increased or remained the same as previously. Very few felt that their workload had decreased. This was attributed to both their increased managerial and administrative duties, and to the demanding nature of some of the cases allocated to their dockets. Some judges were clearly overloaded.

7

ADR and Settlement

At its inception, it was envisaged that the Individual Docket System would both facilitate the use of 'Alternative Dispute Resolution' (ADR) and encourage settlement. The new system was expected by its proponents to increase settlement, for a number of reasons. As the judges would have responsibility for cases from start to finish, it was thought that their greater familiarity would make them more astute to the opportunities to encourage settlement and that they would have greater incentive to do so.[107] Similarly, it was believed that judges would be able to identify cases that were appropriate for mediation or other forms of ADR, and would be more active in referring cases. At the same time as the docket system was being developed, section 53A of the *Federal Court of Australia Act* was amended to allow judges to order parties to participate in ADR.

This chapter summarises the views of judges and practitioners on the role of the court in encouraging settlement and facilitating the use of ADR, and examines the effects these perceptions have on practices within the Federal Court.

The Role of Judges in Encouraging Settlement

There is a strong belief within the court that if all cases filed went to a full hearing, there would not be the resources to cope, and that settlement is simply a necessity. This belief arguably lies behind the emphasis on judicial involvement in encouraging both settlement and alternative forms of dispute resolution, and many of our interviewees reflected these sentiments.

107 This idea was expressed by a number of judges who commented on the importance of timing their settlement interventions: 'Timing in settlement is so important. You normally get one real prospect of settling litigation' (judge).

> *We run on settlements. And we have a few gifts. If it involves the Government, settlement rate is about 20%. When you get into commercial litigation, if it's a claim for damages, we know that settlement rate is about 80%. If it's a claim for an injunction, it's more difficult. Probably only about 40%. (judge)*

While most of the judges believed that settlement should be encouraged, there were differing views about the role judges should actually play in that process. Some judges held the view that judicial involvement or intervention in the settlement process was completely inappropriate. Other judges felt that their involvement or encouragement was only appropriate in particular situations and in certain ways. There was concern expressed by a majority of judges that great care had to be taken to avoid seeming to have a predetermined view about a case or appearing to be motivated by 'laziness' or a desire to avoid the burden of adjudicating.

> *I don't do it because it gives the wrong signals to the parties and I want to avoid that. I know this from my days at the Bar, some judges' reputations – it may have been unjust – would have been that they were lazy. A difficult case they just didn't want to hear—go away. Now we can't have that in a court of law. And secondly, I have a duty to adjudicate. (judge)*

> *I think judges have got to be a little bit careful. Sometimes by pushing settlement too hard they give parties a bad taste in their mouth, a feeling that the court doesn't want to hear it or the court is bulldozing them. There is that worry, so you've got to be very careful. It is possible to make fairly neutral comments (judge)*

It was clear that views of individual judges on the court's role in encouraging settlement directly affected their practices. Those who felt it was the role of the court purely to adjudicate, were generally fairly negative about actively encouraging settlement, while others felt that encouraging settlement was part of their role.

At the same time, many of the judges who said that they did actively encourage settlement often referred to the need to express themselves in

neutral terms, avoiding both the facts of the case or the strengths and weaknesses of each party's arguments.

> *I take a very up front role in that sense, aggressively urging parties to settle but I don't get into the facts of the case. I don't talk about the facts...I don't attempt to forecast a result...as you haven't heard all of the evidence. (judge)*

A substantial number of other judges did, however, feel there was merit in expressing some views from the bench, albeit in particular situations and in limited ways. It was said that even if this did not lead to a settlement, it often tended to narrow issues. Some judges said that they would indicate a preliminary view if they thought one side's case was 'pretty hopeless', or they wanted to draw people's attention to the weaknesses of their cases.

> *There are occasions when at the beginning of a case you can say something. I had one case [where] quite plainly the applicant had to win simply as a matter of law on the respondent's own case...I said to counsel for the respondent, 'Look even on your evidence, on the evidence as it is before we get to the other, doesn't the applicant have to win here?' and I said 'I don't want you to answer that but it seems to me there is that point.' And to the applicant's counsel I said 'The problem is bad for you getting into this sort of area'. (judge)*

> *I do sometimes indicate a preliminary view about something where I think something is pretty hopeless. I wouldn't say it in a way that makes the case unsettleable- that's sometimes a danger that if you express too firm a view, then the person who's on the winning side thinks, 'I don't have to worry at all'- but sometimes it's helpful just to indicate that there are problems for one party who you perceive doesn't think he's got problem. (judge)*

Practitioners were even more divided in their views on whether the court should play an active role in encouraging parties to settle, with some expressing extremely strong views. Some saw it as a central part of the court's role, whereas others saw it as completely inappropriate, undermining the court's adjudicative function. Another group had varying views depending on the circumstances of a case.

Practitioners who felt the court should play a role in encouraging settlement generally thought that protocols that preserved the appearance of neutrality still needed to apply. They argued that judges could suggest that settlement was generally a good option without referring to the particulars of the case, could encourage or order mediation, or order practitioners to tell clients how much a case is likely to cost.

> *Yes, within very strictly defined protocols that necessitate the judge, at an early stage in proceedings, making mention of it and the benefits of it and ascertaining whether or not it's been considered, but from that point on, no, because I think it becomes problematic after that. (solicitor)*

Many of these practitioners argued that judges should never express preliminary views about a case. At the same time, some felt that it was possible for the judge to play a fairly interactive role without expressing views, including clarifying for parties points which are troubling them, what they think of the credibility of certain witnesses, and which points they think raise no substantial issues.

> *It's difficult for the judge when he's going to hear the matter to take too active a role in that because there are real risks if the judge who is hearing the matter starts to express views, no matter how tentative they may be, about a case before all of the evidence has been heard. I think the scope for parties to form views about apprehended bias are tremendous if the judge is to act in that respect. Having said that, though, it's always good when you are running cases, I've found, if a judge interacts with you when the case is going on. So if there are particular points that are troubling a judge, you get feedback from the judge, so I've found that really quite productive. Even in cases where things are going badly it's good to know that at the point in time, rather than spending a lot of time on issues that either the judge is not particularly troubled by or that you feel you have to put a bit more effort in, to try and explain. (barrister)*

Some practitioners did, however, feel that it was useful for judges to express preliminary views, which they thought could serve to reduce time and cost. A few practitioners stated that they had experienced judges

giving a pre-trial opinion on a matter, and at least one volunteered that this had made a matter easier to settle.

Notably, many practitioners distinguished between the role of the court generally, and the role of judges. Whilst some of these practitioners felt that the court should establish mechanisms to encourage settlement, such as court based mediation programs, many thought that the role of judges was purely to channel cases into these mechanisms.

An appreciable number of practitioners felt that it was not appropriate for a judge to get involved in a dispute, by encouraging settlement. Some felt that a judge's involvement placed undue pressure on parties, or may lead parties to feel that a judge had pre-judged the merits of the case and hence was biased. Expressing preliminary views on a case was seen as particularly inappropriate under the Individual Docket System.

> *That can cause difficulties within the docket system I think, because then you can have a judge who becomes very involved in the settlement process, then being the judge who hears the trial and he may get a perception that a particular litigant was very obtuse during settlement negotiations and there is a danger, I think, at least if the judge who's looking after the settlement process is also the judge who is going to be the trial judge. (barrister)*

> *I, personally, have difficulties with the judges involved in that because of the obvious difficulties in relation to the rules of natural justice, and, in particular, bias that arise. (solicitor)*

A few practitioners argued that judicial intervention could actually act to reduce the chance of settlement by making one side feel more confident about their case. A few others stated that it was a waste of time when they were under strict instructions not to settle and their clients were locked into their positions. Further, a number of barristers argued that it was often pointless for judges to spend time pushing them to negotiate when it was really the solicitors who were in charge of the settlement process.

> *If a judge makes a comment which tries to encourage settlement and can't possibly be fully informed at that point because a judge hasn't heard the*

> *evidence, sometimes I think there's a real risk that that can interfere with a delicately balanced settlement discussion. One party might take it as being words of encouragement and then call off all bets, or the other might happen. (barrister)*

> *I know that this is going to sound very self-serving, but I just don't think the problem in those cases is the barrister...It's the solicitor who tends to misbehave, and if you go back and say, 'Well, the judge is not very happy', they're going to say, 'Oh, well, it's the barrister saying that, I pay him not the other way round'. So I think that sometimes there is an unrealistic view of who runs these cases. Barristers are often just kept in the dark. There are whole angles going on behind scenes we never know about and very rarely can we take our big whip and whip people with it, it's really the other way around. So, I don't know that [judges encouraging settlement] ever achieves a lot of good. (barrister)*

Many of the practitioners argued that judicial encouragement of settlement made clients feel that a judge was not interested in hearing their case. Some argued that clients might feel that having settlement forced on them is unjust. Practitioners also felt that clients often would not settle because their case was 'ideologically' driven or they just wanted someone else to make a decision. The underlying theme of such arguments was that ultimately it was the parties' right to litigate, and that it was the Court's role to adjudicate.

Another argument put forward by practitioners was that settlement was already a strongly established part of legal practice, as evidenced by the small percentage of cases that get to court. Many practitioners felt that it was an advocate's role to encourage and push parties to settle. Some felt that judicial intervention could undermine this role and could make it appear to clients that their lawyers had not given them proper advice.

> *I think it's more often counterproductive than anything else. I mean settlement is very much a culture in the legal profession, in my experience. Judges only see the cases that don't settle and I think they tend to form a view that lawyers are very unreasonable and all these cases should be settling but they don't see a lot of the cases that do settle because of the*

> *nature of the involvement in the process and I think very often ... I mean judges can be helpful by just saying very quickly at the beginning of a case that settlement is a good idea, but judges who prolong hearings or extend timetables because they want to eke out every last possibility of settlement are very often just assisting a party that's trying to frustrate the proceedings or just adding to the expense. (barrister)*

There was fairly widespread agreement amongst judges and practitioners that certain types of cases were more open to settlement than others, and hence there were some situations in which they were more or less inclined to encourage settlement. These differences between case types are discussed below.

Policies on ADR

Nearly all judges felt that the most appropriate way to encourage settlement was to refer a case to mediation or to other ADR processes. As stated above, many of the practitioners also felt that this was the most appropriate way for judges to promote settlement. Again, judges appeared to differ in how actively they encouraged ADR according, broadly, to their views on encouraging settlement generally.

A number of judges said that they referred cases to mediation in all or nearly all cases, even in test cases or where there was apparently little prospect of settlement. A minority said that they rarely encouraged mediation or did not push it as a formal process, believing it to be a matter better left to the legal profession. A few judges, while positive about ADR, expressed reservations about the competency of registry mediators.

Generally judges said that their assessment of whether a case should be referred to ADR was simply a 'matter of judgement'. However, cases seen as unlikely to settle were seen as less appropriate for mediation. Cases that were seen as unlikely to settle included—

- administrative law cases, in particular migration cases
- other cases involving the government
- test cases on particular points of law or involving statutory interpretation
- cases that involve issues of public interest.

In these cases, ordering mediation was just seen to add cost for no great advantage. In contrast, certain indicia were said to make other case types or individual cases suitable for mediation. Those identified by different judges included—

- the prospect of ongoing relationship between the parties after the case
- the prospects that the trial will be lengthy and expensive, that the result is likely to go either way or the claim is not worth the costs of the litigation
- a commercial resolution is obviously required (money involved)
- the parties likely to destroy each other before the hearing.

The other factor mentioned by a number of judges was the experience and competence of the lawyers involved—they said that they were less likely to intervene where they had confidence in the ability of the practitioners.

A number of judges expressed concern about possible power imbalances in mediations involving unrepresented litigants, and for this reason said they rarely referred these cases to mediation. In contrast, other judges saw mediation as more appropriate for self-represented litigants than the formal procedures of litigation.

The time at which mediation was raised also varied and in many instances was said to depend on the individual case. Two judges said that they raised mediation earlier if the practitioners were perceived to be inexperienced. Some judges preferred to raise the possibility of mediation toward the end of the pre-trial preparation, when all the issues were known and appreciated by the parties. Other judges noted the importance of pushing

cases to settle early, at a stage when parties had yet to invest time and resources, and hence were not entrenched in their positions.

> *If there was time, I would bring the parties in on an earlier occasion than the hearing because so much of the costs has already been incurred by the time the hearing starts that somebody is likely to respond by saying well, I'm in this deep, I might as well go the whole way. (judge)*

Whilst most of the practitioners stated that they had a positive view of ADR, these views generally seemed to be purely theoretical. Few practitioners said that they actively encourage or pursue ADR, and an appreciable number had never used or experienced it.[108] Almost none of the practitioners interviewed reported to have experienced ADR in the Federal Court, despite the fact that the judges said that they actively promoted it.

> *Well, I think that alternative dispute resolution is something which has become all very fashionable, it's almost like opposing motherhood to oppose ADR, [but] I've seen cases which have cost vastly more to resolve through mediation than would have been the case with a hearing. (barrister)*

Practitioners also felt that ADR was only appropriate in certain situations, and many argued that mediation was only appropriate at certain stages in a case. Opinion was divided on this point. On the one hand, some practitioners felt that mediation should occur very early in the process, when large amounts of money had not been spent, and parties were not entrenched in their positions. In contrast, other practitioners argued that mediation was only useful once people were clear about the case against them and they had a hearing date pending.

108 While this finding was consistent among all the practitioners interviewed, it is important to note that almost half of those practitioners acted in administrative law cases in which mediation is often not appropriate due to the narrow issue of law in question and there is no real room for compromise or negotiation.

A few practitioners felt that cost was rarely considered in the debate about ADR, and that in many cases ADR was an added procedural burden that merely served to increase costs and delay.

> *I think an active interventionist judge can achieve everything that alternative dispute resolution can achieve. And I think alternative dispute resolution just runs the risk of setting up an alternative judiciary.....and it can act to disadvantage people without the resources to withstand a long process, so a speedy hearing without mediation is better. (solicitor)*

A number of practitioners were extremely negative about ADR, seeing it as an inappropriate and ineffective form of adjudication within the adversarial system.

> *There are three drawbacks I see with it. One is that it encourages spurious claims, people just think, 'Oh we'll go to mediation and they will offer us some money to go away'. The second is that it stifles innovative claims which really need to go to court for a judge to make a decision to develop the law. And the third is that it is very, very rough justice. (barrister)*

Practitioners who stated that they were positive about ADR still expressed differing views on the court encouraging and facilitating ADR. Many practitioners felt that the court as an institution should facilitate the use of ADR, but the judges themselves should not. These practitioners generally thought that ADR should be part of court processes, as an alternative to litigation. At the same time, some questioned the experience and authority of court-based mediators.

In contrast, some practitioners felt that ADR should be separated from the court system altogether, as an alternative system. These practitioners felt that it was inappropriate for the court to push other forms of adjudication by housing ADR processes.

> *I think it's a good and necessary adjunct to the existing adversarial system and it helps moderate some of the harshness of the system, but the court shouldn't actively encourage it (barrister)*

More than half the judges supported ordering compulsory mediation, and a number stated that they had done so for various reasons. Some argued that parties often failed to raise mediation themselves through fear of appearing 'weak', and for this reason they supported compelling parties to mediate. One judge advocated compelling mediation, even if the prospects of success were unlikely, as a strategy of making 'parties' expectations more realistic'.

Many judges said that they preferred to use persuasion to direct their cases to mediation. These methods included—

- requiring parties to explain why mediation should not be attempted
- requiring solicitors to disclose to their clients the costs of the litigation if they win or lose
- directing solicitors to get explicit instructions from their client on whether mediation is desirable.

Another view expressed by judges was that there was no need to do more than recommend mediation, as parties did not want to appear obdurate or recalcitrant in front of the judge who was to hear their case. One judge had on occasion simply instructed registry to mix informal ADR with the case management conference held prior to hearing as a matter of course.

In contrast, a substantial minority of judges argued that they would not compel mediation against parties' wishes, believing that it would be a waste of time and resources. It was also said that the process of mediation depended on good faith and a willingness to discuss issues. A number of judges argued that pressuring parties to mediate was inappropriate as it undermined the right a party had to have their case heard.

> *It could be that the party before a heavy handed judge, if we use that expression, might resent it if they think they've got a strong case and they're being pushed into giving up what they perceive to be their rights. They would feel that's an injustice. (judge)*

Only a small number of practitioners were in favour of compulsory mediation, with some arguing that mediation should be compulsory in all cases. However, most practitioners were against this development.

> *As a matter of general theory, you can't compel mediation. If the parties are not willing to do it, you could order them to explore it, but I think that would be fatal too, because if you're compelling somebody to try and explore the possibility of resolving something, they are going to feel bad about not resolving it, and feel that the judge may punish them for not resolving it. (solicitor)*

Over half the judges interviewed stated that the Individual Docket System has increased their use of ADR as a mechanism to assist settlement. This was seen to have occurred because of the incentives to finalise cases and because they were able to make better judgements about the opportunities for settlement. Many judges also remarked on the active promotion of ADR within the court, which has led to a higher level of awareness and a change of culture respecting its use.

> *By having a docket system where you are managing cases, not only do you think in your own mind – pleadings, discovery, particulars, statement, you think mediation. In other words it is now a specific stage I address in each case. (judge)*

Perceived Differences between Chambers

We asked interviewees if they thought that judges differed in relation to their policies on settlement and ADR. Thirty-four of the 38 judges who responded to this question thought judges had differing policies, with some believed to be more willing to compel or vigorously promote settlement than others. Although many of the practitioners felt that judges were generally in favour of settlement, they felt that judges differed in their attitudes towards their own roles in both encouraging settlement and the use of ADR, which in turn affected their practices.

There was some suggestion from our data that attitudes towards encouraging settlement may be 'generational'— all the judges who expressed pro-active views had been appointed within the last six years. This suggestion was supported by comments from a number of practitioners who felt that judges differed in their attitudes and practices according to how long they had been on the bench.

> *I think the younger judges are far more proactive in that area. The older judges are less so, that's just a generation thing. (barrister)*

Many of the judges held the view that differences in judges' policies had a practical effect on settlement rates. Of these judges, about half did not think that this posed any problems for the court. An appreciable minority, however, believed that problems could arise from the differences. However, while seeing consistency as a positive aim, many conceded that they were unsure of how differences between practices could be resolved.

> *I think probably in a general sense it's not a good thing if practices within the court are seen to be widely divergent and I suppose we really haven't grappled with that seriously yet. The trouble is of course everybody says, yes it's better to be consistent, everybody also says, oh yes but judges are independent and the judge must be able to run a case the way that the judge thinks appropriate. (judge)*

More importantly, some of these judges felt that pressure on judges to dispose of cases could result in inappropriate pressure being placed on parties to settle. A number of practitioners felt that some judges tended to apply inappropriate amounts of pressure on parties to settle.

Practitioners also stated that some judges were more likely than others to put pressure on parties to settle, and to make direct comments from the bench about the merits of a case. The way practitioners viewed such differences clearly depended on their own view of the role the court should play in such processes. For example, as discussed above, practitioners often had quite strong opinions about both ADR and the role of the court in encouraging settlement, and these tended to affect their views of judges' practices.

Some judges will do everything in their power to avoid having to make a decision in a case, and resort to beating parties over the head, going to extraordinary lengths to try and get parties to settle, which I think is a bad thing. (solicitor)

Some judges are very open and blatant about trying to resolve the case, so there is a variation between judges and what they say and do. ... Some of them raise mediation on a regular basis, they order mediation and they make various comments from the bench, they indicate that they think that it's a really good idea that parties look carefully at their position. Others simply say it's there, is it worth ordering. (barrister)

Summary

- Some judges felt that judicial involvement in the settlement process was inappropriate, while others thought it was appropriate but only in certain circumstances. All the judges stated that there was a strong need to maintain the appearance of neutrality if views about the desirability of settling were to be expressed. While many judges indicated that they frequently encouraged the parties to consider settling in general terms, only a very few said there were circumstances in which they would comment on the merits of the case or a party's position.
- The overwhelming majority of practitioners thought it was inappropriate for judges to comment on the particular merits of cases. A number of practitioners thought that some judges tended to apply excessive pressure on parties to settle.
- Interviewees believed that different judges had different policies towards the active promotion of settlement. Some suggested that there was a generational difference in attitudes towards settlement, with more pro-active views expressed by judges appointed within the last six years.
- Practitioners were strongly divided about the role of judges in promoting settlement, with some stating that this should be the

central role of a judge, while others saw this as being completely inappropriate. Those who supported judicial involvement also stressed the need to appear neutral.

- Judges generally considered it appropriate to refer suitable cases to ADR and mediation. Some identified types of cases that they would not consider appropriate, while a few considered all cases potentially appropriate. Judges claimed that the Individual Docket System had increased the use of ADR as a mechanism to promote settlement.
- There appears to be a high level of resistance among practitioners to the use of ADR in the Court. Despite judges' apparent support for ADR, very few practitioners appear to actively pursue ADR or to have had actual experience of its use. Practitioners reported little change in the use of ADR under the Individual Docket System.
- Some judges stated that they supported compulsory mediation, while others said they attempt to persuade parties to attend. A few judges said they would not compel mediation against the wishes of parties, as they believed that successful mediation requires a willingness to participate. Practitioners generally did not favour compulsory mediation.

8

Administration and Information Management

Successful introduction of any new system into an established organisation will necessarily entail changes in infrastructure.[109] While a general organisational review of the Federal Court is plainly beyond the scope of this study, there are some aspects that immediately affect the operation of the Individual Docket System.

The Individual Docket System was introduced with minimal alterations to the existing information technology system; however a number of more localised systems have developed to cater for the new system. This has had significant implications for information flow through the court.

Further, the Individual Docket System was intended to, and did, alter the roles of the principal actors in the court system. Prior to the Individual Docket System, case listing, file maintenance and information management were the sole province of the registry. Under the Individual Docket System, case listing was decentralised to chambers, with the consequences that responsibility for both file maintenance and information management was split between chambers and registry. These aspects of the court's organisational systems and structure are discussed in this chapter.

109 H Scarbrough and J Corbett 'The meaning of technology in organisations' in *Technology and organisation: Power, meaning and design* (1992) Routledge: London; M Ryan 'Human resource management and the politics of knowledge: linking the essential knowledge base of the organisation to strategic decision making' (1995) 16(5) *Leadership and Organisational Development Journal* 3.

Organisational Systems— Technology and Information Management

The Federal Court was one of the first Australian courts to computerise its records system. This system — FEDCAMS — is a mainframe system that records basic information about all cases.[110] When the Individual Docket System was introduced, FEDCAMS was modified to provide some additional support functions.[111] FEDCAMS now allows users to view details of cases, judge or registrar commitments, daily listings, hearings lists and reports of listing forms. Details of cases include the docket, and panel if appropriate, to which the case is allocated, details of parties, and a brief summary of previous and future hearings in the matter. There is also an option to view all the judgments handed down for each matter in the court.

In addition to these case management functions, FEDCAMS can be used to produce statistical reports about the workload and performance of the judges.[112] Examples of some of the reports that can be produced within this function include court commitments and commitment schedules for judges, individual docket reports (for example, current cases not on a docket, estimated hearings not listed and reserved judgments).

It is apparent from interviews with court staff, that FEDCAMS was not seen as particularly useful, reliable or accessible. The system was described as too slow, cumbersome, confusing and difficult to use. The information stored on FEDCAMS was also seen to be inadequate, providing little more than basic information that is not always up to date. A

110 FEDCAMS contains a number of menus for use by court staff, including enquiry functions, reports, daily listing, and maintenance.

111 Changes made to FEDCAMS to introduce the docket system into the court included new fields of docket judge(s), panel group, weighting value with new codes. FEDCAMS was also adapted to be able to produce new reports including current cases not allocated, current statistics by judge, current statistics by panel, time-span docket report by state, time-span docket report by judge. Federal Court Memo: pilot for the Individual Docket System (B. Van Os), 10 December 1996 and Federal Court Memo: work done on the Individual Docket System in FEDCAMS (B. Van Os), 5 March 1997.

112 Federal Court Memo: Introduction of Docket System guidelines (Melbourne) (F. McRae), 19 November 1996.

significant number of court staff, particularly chamber staff, stated that they were unable to use the system.

> *It's a shocking system. It breaks down. It freezes. It's slow. It's not logical to use. It's not user friendly at all, basically. (associate)*

> *It is fairly slow. You'd have to know what you want and how to get it. It doesn't follow the prompts sort of thing, you have to know how to use it. When I try to run reports from it the information that gets spewed out is... well you can't rely on its accuracy because lots of people take short cuts, because they don't really input the data and the layout of it is not very readable. (registry)*

Very few of the associates or personal assistants used FEDCAMS in the everyday management of their judge's docket. If they used it at all, most associates only used FEDCAMS to cross check their own case record systems. Because of their overall monitoring and administrative role, registry staff were much more likely to use FEDCAMS on a day-to-day basis, however they too were critical of the system.

Some members of registry felt that the reliability of FEDCAMS has deteriorated as a consequence of the splitting of functions between registry and chambers. The registry is now dependent on associates and has experienced difficulty in getting the prompt and accurate reports needed for the centralised database. It was said that some associates did not understand their reporting obligations and that this was exacerbated by their rapid turnover as employees of the Court. Further, it was suggested that chambers did not appreciate the importance of the task, as they saw it as having little relevance to their daily work.

The statistical reporting functions of FEDCAMS were used by the Chief Justice's chambers, the Principal and District Registrars, and to a lesser extent, listing managers and list judges, to monitor workloads, listing and performance. We were told, however, that the Principal Registry also maintains its own statistical databases in order to produce national performance reports.

At the time of our research, most judges were receiving fairly regular reports about various aspects of their dockets, such as the number of new cases allocated to their docket, the number finalised, and the number pending, usually by case type.[113] In addition, some registries supplied judges with information about reserve judgments, inactive cases, cases older than 18 months, and cases with no future hearing dates listed. In a few registries, judges receive a limited amount of similar information about other dockets. A number of judges stated that they often request this information in order to assess the state of their docket as compared with other judges in the court.

> *I also receive a comparative study because I see...the docket as an equity system so I want to see who is given what proportion of work...so they give me a monthly print out of the work that has come in, who has received it and what panels and how it all works. I don't think all the judges get that but I ask for it and they send it to me. (judge)*

A significant number of judges said they used these weekly or monthly reports in the management of their dockets, at least in the sense that they would react if they noticed a problem in their cases. In contrast, some judges felt that the reports had limited utility, with a number saying they have no use at all. A few judges even commented on the possibly detrimental effects of the comparative - or 'competitive' - nature of the reports. Essentially, these opinions were based on reservations about using simple aggregate statistics as measures of performance in relation to a caseload as mixed and complex as that of the Federal Court.

Virtually every person interviewed thought there was a pressing need for an improved centralised information technology system, which would avoid duplication of effort and radically improve information flow throughout the court.[114]

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113 There are appreciable state to state variations in the content of these reports.

114 The Federal Court is currently examining the utility of its computer case management system.

As a result of the inadequacies of FEDCAMS, localised information management systems had developed at both the chamber and registry level. These systems had allowed staff to organise information and manage cases in a way that was more useful for them. However, the proliferation of individual systems created a number of problems, including increased workload for chamber staff, inconsistent and incompatible methods of record keeping and inaccessibility of information.

Chamber based Systems

At the time of our research most chambers had independently developed case management systems, which, not surprisingly, tended to differ from one another. The sophistication of these systems generally depended on the demands of the judges, and the computer literacy of their associates.

A small number of chambers relied almost entirely on hard copy files. One used a whiteboard. A number of others used simple computer-based systems, while another group had created complex and sophisticated systems for managing their dockets. It was also not uncommon for chambers to maintain both electronic and paper diary systems in conjunction with another information system.[115]

By far the most commonly used software to support chamber-based systems was Microsoft Word, which was used with varying degrees of sophistication. At the simple end of the spectrum, some associates just maintained brief summaries of all their cases in one Word document. In other chambers, a matter summary was linked to a number of other more detailed documents with specific functions, such as a list of the practitioner details, a record of all the previous orders in a particular case, a list of reserve judgements, a list of cases that may have settled, or an overall docket diary.

115 Many chambers in the Federal Court also used a Groupwise calendar, often located on a common drive so that it is accessible to both the judge and chamber staff.

A small number of chambers used spreadsheet programs (such as Excel and File Maker Pro), either on their own or in conjunction with a more detailed Word document summary system. A few used a relational database, Microsoft Access, which enabled them to access information separately or in relation to other elements.

It was common for chambers that had computerised systems also to maintain hard-copy files. Sometimes these seemed to be little more than printouts of the computer records, placed in a folder; however they also often contained copies of the reports of listing, any short minutes of orders, and any correspondence with the parties. A number of chambers copied parts of the entire centrally maintained registry file. In South Australia, it was established practice to maintain duplicate files for both registry and chambers.

The systems generally consisted of a brief summary of the case and other relevant details such as the date of filing and the listing history, party names and contact details, relevant legislation, and orders made including compliance history. Most associates stated that they updated their system after each directions hearing or other significant case event.

Associates reported that they used this information in a number of ways. Some gave their judge a case summary prior to each directions hearing in order to refresh their memory about the progress of a case. Associates also said that their systems were useful for answering inquiries from practitioners about the status of a case, as well as for recording notes of telephone conversations and any new event in a case. A number said that they used electronic functions such as mail merge systems to produce forms for filing in chambers, and for the judge to use on each directions day.

Whilst these different systems were seen as useful for work within each chambers, there was a general feeling that there was not enough information sharing either between chambers or between chambers and registry. There was a fairly widespread consensus amongst interviewees that a more standardised system would greatly assist the flow of

information across the court. To some extent localised registry based systems appeared to have developed in response to these problems.

Registry Based Systems

At the time of our research, the Brisbane registry had developed a centralised computerised case management system that included a summary of all cases in the judges' dockets. The system used a basic word processing interface, which was more user-friendly and accessible than FEDCAMS and allowed staff to record more details and relevant information for everyday use.

In this system, both registry and chambers staff had responsibility for maintaining and updating the information on the system. The registry, rather than chambers, held primary responsibility for monitoring matters within the court. In this respect the system resembled the arrangement of responsibilities prior to the Individual Docket System. Registry maintained a case summary, which was updated after each directions hearing from the report of listing forms sent by chambers. The summaries contained information about all significant events in the matter and highlighted whether matters were ready for trial, had been listed, should be held in abeyance or were in mediation. Although the information system was not fully integrated with the national system, it had at least the virtue of being common to all judges and court staff in the registry.

The Perth registry maintained a summary of every matter on each judge's docket to note progression of the matter. This document contained details of the judge, case name and number, last hearing date, future hearing dates and significant events, and was usually generated on a monthly basis. Although this had similar features to the Queensland system it was not as fully integrated into day-to-day management practices.

Besides maintaining FEDCAMS, the staff in the Melbourne Registry used a Microsoft Access database to monitor the numbers of cases ready for hearing at any given time. Registry staff also maintained a spreadsheet at

the main filing counter for each of the judges, so that an accurate record could be kept of all new matters being allocated to judges in the court.

In Canberra, the registry used a manual diary and a Microsoft Excel spreadsheet, in conjunction with FEDCAMS, which was updated daily. In the South Australian Registry, as noted above, duplicated files were maintained in registry and chambers. Practitioners were required to file two copies of anything they send to the court. Registry staff had responsibility for making sure that chamber and registry diaries matched, and that the FEDCAMS database was kept up to date after each event through the reports of listing.

Organisational Structure— Role of Court Personnel

The Individual Docket System has necessarily affected the roles of some staff in both registry and chambers. In the first place, some registry functions have been transferred to chambers. Secondly, the implementation of the system involved the creation of new functions or roles. Further, it was originally envisaged that registry would have an active role in the management of judges' dockets, with a member of the registry assigned to assist individual judges or teams of judges. This function, however, does not appear to have been either specifically defined or widely implemented. This in turn has resulted in the role being taken up by associates, which has had its own set of implications.

Registry Roles

Under the Individual Docket System, registry performs a range of functions relating to the management of case information, many of which are a simple continuation of registry functions under the old system, such as the filing of cases, listing, and the maintenance of FEDCAMS and other information systems. Registrars and Deputy Registrars also perform judge delegated duties such as conducting interlocutory proceedings or case conferences, as well as providing a mediation service.

A number of new registry functions have also developed under the Individual Docket System. For example, the role of the listing manager in the Victorian Registry was set up to work closely with the list judge to make sure that allocations to judges are appropriate. In addition to this, some members of registry were delegated the responsibility of coordinating listings for specific case types, such as native title and migration cases, as well as the Full Court list.

There appeared to be fairly marked differences in the role and function of registries across the different states. As noted above, the contemplated role of registry staff in assisting judges with the management of their dockets was not taken up as a court wide initiative. However, some registry staff and judges have attempted to establish this type of working relationship on a local level.

In Queensland, the judges themselves requested that the registry take on a larger role in case management. This resulted in a newly created position of Deputy Registrar. At the time of our research the Deputy Registrar conducted some directions hearings, as well as directing a docket team which had principal responsibility for monitoring compliance.

In South Australia and Western Australia, registry staff also appeared to have quite an involved role in the hands-on management of the court's caseload, individual dockets and individual cases.

> *There are five people in the registry who look after a judge's docket on a rotating basis. That is, at the moment we each look after one judge for a month at a time. (registry)*

In Melbourne and Sydney, a number of individual judges had taken initiatives to work actively with a Deputy Registrar, to whom they delegated a role in the management of their cases.

> *I work in conjunction with one of the registrars. The registrar deals with purely mechanical things like what goes in the appeal book, what goes in the court book, simple things like interlocutories and discovery and then he comes and reports to me on the progress of each case. (judge)*

However, the majority of judges across the country indicated that registry played no role in the management of their docket (that they were aware of).

> *What I think is a problem, is that I don't think the registry is quite focused on its role, or what I think its role is. ... The registry thinks that it has a reason for existence of its own; whereas in my view a court registry exists only to support the judges and the use of their time. And I don't think that in this Court they see that quite as clearly as they should sometimes and they think that maintaining their files and filling in their forms is an end in itself. (judge)*

At the same time, most of these judges appeared to have a fairly negative attitude towards the involvement of registry in docket management, and hence were satisfied that their role was limited. In contrast, there were judges who stated that they would like registry to be more involved in their dockets. This was largely because it would allow the administrative burden to be removed from the associates, so they could spend their time performing more functions to support the judge.

> *I think one of the things we've got to be careful of is not to see the docket system as a vehicle for turning associates into quasi-registry officials who are taking the workload off registries. (judge)*

There appeared to be a number of reasons why the involvement of registry in docket management has remained limited. In many cases, judges appeared to be unaware of the availability of registry staff or their possible functions in case management. A number of other judges acknowledged that they had been continuously encouraged to make more use of registry staff but they had not done so – yet.

> *In my case—I think, probably less than other judges—I don't use the registrars terribly often. They are always complaining about the fact that I don't make sufficient use of them and I think that with time I will make greater use of them. (judge)*

We had the impression that the limited use of registry staff emanated in some cases from the fact that some judges themselves were not active

managers. It was possible that some judges did not necessarily have a clear conception of case management and were uncertain about what functions they could delegate. In response to comments about their limited involvement in case management, some registry staff members argued that the initiative had to come from the judges in the form of defining the nature and level of assistance and resources they required.

> *In other registries, there has been far greater need or wish for assistance from registry than has happened here. We have certainly made staff available to judges if they've wanted to use them. (registry)*

Practitioners had fairly divided opinions about registry involvement in case management. Some practitioners argued that registrars should take on more responsibility for interlocutory matters, in order to take more administrative pressure off the judges. The use of registrars in pre-trial steps and mediations was also seen to prevent any accusations of a judge overstepping their judicial role as arbiter of disputes. In contrast, other practitioners argued that the process of registrars reporting back to a judge in fact only increased the chance of prejudice as it added 'another interpretation to the equation'. As mentioned in Chapter 5, some practitioners also felt that registry staff often did not have enough experience or authority to run directions hearings effectively. Further, the practice was seen to remove some of the proclaimed advantages of having a judge involved in the process from the beginning.

Roles of Associates

Under the Individual Docket System most associates have a central role in case management. All associates interviewed stated that case management comprised a substantial part of their daily duties.[116] The extent to which this was so often depended on the management style of their judge. A large

116 They found it difficult to estimate the percentage of their time taken up with case management, and gave figures ranging from 10% to 70%. Some of the difference between estimates appears to be due to differences in what individual associates regarded as case management as opposed to other chambers duties. For example it was clear that some did not include time spent ringing solicitors in their estimates, while others did.

number of associates produced various forms of case summaries and updates for their judges. Some also monitored the progress of individual cases and compliance with the judge's orders.

The transfer of case management functions to chambers had resulted in other practical functions apparently shifting to chambers, with a number of associates stating that they were responsible for arranging requirements such as courtrooms and court staff availability, interpreters or other aids for litigants, and making arrangements for litigants to be brought to the court from detention. They were also expected to continue to fulfil their conventional duties, such as keeping exhibits lists or subpoena materials on hand, ensuring that documents and relevant legislation are in court, and drafting, editing and proof-reading judgments. Despite this additional work, the majority of associates believed that case management was good experience and an appropriate part of their role.

At the same time, both judges and associates suggested that case management responsibilities were taking associates away from their more traditional duties of assisting judges with legal research and judgment writing. A number of judges and court staff argued that associate involvement in case management was unsatisfactory because they were not properly equipped to perform the required administrative and managerial functions and that they had been employed for their legal and academic skills. This was seen by registry staff as particularly problematic due to the vital role associates had to play in relaying information to registry about the progress and status of a case.

> *Perhaps our biggest problem... is the timeliness and quality of information that gets to us. For example, if a judge wants to bring a matter on at fairly short notice, a good associate will consider us very early in the piece and let us know promptly and give us all the details we need to do such things as getting it onto the system and getting onto the law lists ...A less cooperative associate would put us further down on the list of those people and that manifests itself in law lists having to be changed at the last minute, which causes problems and gets people's noses out of joint. (registry)*

Whilst the associates agreed that they did not necessarily have the skills to take on the procedural or administrative aspects, they felt these skills could be easily acquired on the job. Those associates who had previously practised as a solicitor, or had paralegal experience, felt better equipped for the job than others.

Most associates did, however, feel that they were not adequately trained, with a number stating that they had received no training at all. Some relied on past experience or previous exposure to the concept of case management to make sense of the system, others attended a short induction run by registry, and a few received a briefing from the previous associate before they left. In some registries, an associates' handbook and protocol documents were available and those associates who had actually seen them thought they were useful.

Many of the associates argued that the significant reliance on 'on-the-job' training meant that it took a long time to feel comfortable in the position. Many felt their position would be improved if the usual tenure period of one year was extended, largely because it would increase the continuity of the assistance available for judges. At the same time, a considerable number of associates, including some of those who believed the current tenure caused problems for their judges, believed that the career value of the position was often exhausted after twelve months.

A number of judges and court staff suggested changes to both the job description and the period of tenure of associates.

> *I have encouraged other judges to say, 'Well look there may be a role in a docket system for a professional associate. There are actually lawyers now who might want to spend two or three years doing this, especially if there is management associated with it...' I think if you are going to have this kind of approach, you've got to have a different vision of what you want. They're not just clever little researchers. (judge)*

Amongst the judges, there was a general perception that the workload of their associates had increased, and had become much more administrative and less research oriented.

> *Yes, it has involved a major departure in the role of the associate that means that different skills are required than once would have been the case. He or she has to be able to liaise with solicitors, record keep carefully, anticipate problems, exercise a bit of ingenuity in sorting things out, and use judgment in how issues are addressed. I mean, it is in fact quite a terribly important and quite difficult set of responsibilities actually. (judge)*

Most judges were not happy with the extended involvement of their associates in case management. A few judges attempted to minimise this involvement and compensate for the loss of time by engaging additional research assistance, in some cases paid for by reducing hours worked by other chambers staff.[117] Some other judges addressed the problem by allocating a significant proportion of case management administration to their personal assistants, or by engaging registry staff in this role, which was seen as a more practical alternative.

> *Here I have this person who has worked in registry who really is dying to do something more interesting, who is quite capable of doing it, who sits in chambers when we are in court anyway and who can chase up the legal practitioners all day...rather than giving it to an associate who may or may not be suited to it, who may or may not have experience in the area of litigation anyway who is going to go after a year or 18 months. (judge)*

Relationships and Communication

As already noted, the success of organisational changes, such as those envisaged under the Individual Docket System, depends to a large extent on changes in organisational culture and the cooperation of those involved. Effective communication, good working relationships and shared knowledge within an organisation can facilitate change, as well as having

117 In Victoria, registry have set up a special research unit consisting of 3 associates designed purely to help the judges.

a generally positive effect on corporate ethos. We therefore asked all interviewees about their relationships and communication with the other actors under the new system. We were also interested to see whether the Individual Docket System had affected how much was known about the work in different areas of the court, and whether interviewees were generally aware of what their colleagues or other key players were doing.

Inter-Chamber Relations

The great majority of judges stated that communication with their colleagues was limited and that they knew relatively little or nothing about either the work of most other judges, or how they managed their cases and workload. This view was supported by the associates who also stated that they had little or no knowledge of what work other chambers were doing or how they managed their cases.

Insofar as judges purported to have some knowledge about what other judges did, this was only very broad, or confined to a few close colleagues. Several judges, when asked how they knew about what their colleagues were doing, mentioned reading judgments published on the Internet, hearing appeals from other judges and, more sporadically, television and newspaper reports. One judge also mentioned occasionally reading the published Law Lists.

There appeared to be few formal structures in place to encourage the sharing of information among judges, particularly about case management practices within the court. Committees, such as the Practice and Procedure Committee, circulated some information about matters of particular interest. Further, all Federal Court judges met twice yearly, and for a number of judges this appeared to be their main or sole source of information about their colleagues and their work practices. On a less formal level, many of the judges across the various registries said they met regularly for lunch.

> *It started off a couple of years ago really to encourage social interaction.... We often barely get through the agenda in the whole lunch. But it's very pleasant to chat in an informal sort of way. ...It's sort of semi social, semi work – or three quarters work and one quarter social. (judge)*

In South Australia, the judges generally tried to meet informally for lunch every week. In other Registries these meetings appeared to occur at longer intervals or on a more ad hoc basis.

In addition to these mechanisms, some judges obtained some information about happenings around the court through different reports and statistics provided by the different registries. A few judges, via their associates, acquired information from FEDCAMS. These judges observed that the advent of the Individual Docket System meant they could access more information—at least, of an elementary nature—about their colleagues' workloads.

> *It's affected my knowledge because I get to see their docket. ...You've got a much better idea of the size of people's dockets... you know from a statistical point of view, I know much more about what my colleagues are doing. (judge)*

In contrast, some judges suggested that the statistical reports that are available provide little substantive information about what different judges were doing, and others stated that they had not seen these reports or were not aware that such reports or statistics were generally circulated.

> *The only thing that does come around twice a year is when we have the formal judges meeting, they publish a list of outstanding judgments...That's the only statistic I ever see about what the state of other judges' work is. (judge)*

Otherwise, it appeared that most of the information that judges gather about the work of colleagues, and particularly about how they were managing their dockets, comes through informal interactions. A number of the judges stated that they were aware of other work in the court because

of their personal friendships with other judges. Others saw Full Court sittings as an opportunity to exchange information.

> *When we are on Full Courts ... the three of us meet before every case and [during] adjournments and after court each day and that's how you pick up what your colleagues are doing. Some judges talk much more or some of them are friends from way back and they sort of drop into each other's chambers. (judge)*

Many judges believed that there was not enough communication, which could be both isolating for judges and detrimental to the effective running of the court. These judges suggested that both formal mechanisms and time were needed to encourage more information sharing and exchange amongst the judges.

> *I mean we all work in our little boxes and compartments. It's a lonely life.... the danger of judicial life is that you can get the worst of several worlds. You can get lonely, [and have] a lot of hard work and there is no substitute for lonely hard work to produce judgments. (judge)*

A substantial number of the judges felt that the Individual Docket System has adversely affected communication and relations among judges, mainly due to the emphasis on individual activity and responsibility and its isolating effect on chambers.

> *Yes. I think ... under the old system... each judge ordinarily developed a sort of nodding acquaintance with a much larger range of cases because of the exposure to them in the general directions day or motions day or whatever. So quite frequently, although another judge would be allocated the trial, you'd be aware in a general way when you saw the name of that case what it was about. But under the docket system, unless it's a case that has attracted some notoriety or it's a case that the particular judge has discussed with you, the name doesn't mean anything—it's just another case. In that sense I suspect it's true to say that each judge knows less about other judges' cases than he or she would have under the old system. (judge)*

It was also felt that perceptions of inequity in workloads and a lack of effective redistribution mechanisms had had negative impacts on collegiality within the court. A few judges appeared somewhat resentful that others had been apparently given additional staff or had had their workloads reduced, and felt that such processes were not transparent.

It appears that there is a possible cultural barrier to sharing information based on a particular interpretation of the concept of 'judicial independence', which seemed to us to extend beyond the proper sphere of this principle. There was a wide-spread belief that it was inappropriate to observe other colleagues' work practices, or even ask them details about their work or a particular case.

> *It is regarded as extremely rude for a judge to go into the hearing room of another judge. I'd be perfectly happy occasionally to go and sit and watch my colleagues work, to learn, but great offence would be taken. (judge)*

> *I don't know. I think it's a cardinal rule not to attempt to interfere. (judge)*

Chamber-Registry Relations

Most judges and court staff said that the relations between registry and chambers were good. Many of these generally positive assessments were however, when elaborated, qualified in some way. Further, many judges who were positive, had minimal involvement with registry and were not seeking any greater involvement.

> *My relations are excellent. I mean, the registry does everything I ask them to do and they do it promptly and well and I have a good relationship with the registrars and to the extent to which I call on them they service me excellently. (judge)*

Problems in the internal relationships within the court were attributed to unclear role definitions and divisions of work (specifically the extent of registry staff involvement in docket management), difficulties with flow of information, and the capabilities of some staff with particular responsibilities. The physical separation within the court building between

registry and chambers in some registries was also blamed. There were some judges and court staff who believed that these were quite significant problems and that they had a tendency to impinge on the effectiveness of the court.

> *Inadequate and not helped by the structure that we follow in this building. It was one of the great mistakes I think in this building, putting registry many floors below. ... We have our chambers world and there's a registry world out there somewhere and we just see very little of each other and communicate inadequately in my view. (judge)*

Opinion appeared to be divided as to how the Individual Docket System had affected chambers-registry communications and relations. A number of interviewees believed that relations had improved through the introduction of the docket system, specifically because of the need for closer working relationships between chambers staff and registry in the smooth running of dockets.

> *I think it has improved the relationship because the judges and the staff are now working in ways they haven't worked together in the past. (registry)*

Other interviewees argued that whilst the docket had created a need for closer working relations, no effective mechanisms had been implemented to facilitate this. A number of registry staff argued that the docket system had created an individualised approach that made it harder for them to know what support judges needed, or when judges were available or if it was appropriate to ask them to take on additional cases.

> *When the listing of matters was really a registry province, we were always reasonably well aware of when judges were available or when they were going to be away. Well we are not now. We don't know, as judges are managing sort of their own listings to some extent, we don't have that degree of information. (registry)*

Court-Practitioner Relations

In general, the attitudes of the practitioners of the court towards members of both registry and chambers staff were positive. Few had experienced significant problems in dealing with either group.

Previously associates and personal assistants were not often directly involved with the parties, but at the time of our research they were the first port of call for much correspondence about cases in the court. As previously noted, associates also played a central role in organizing directions hearings, scheduling urgent interlocutory hearings, and monitoring compliance with previous orders.

A number of practitioners felt that the limited experience of some associates made them harder to deal with, and that the increased reliance on associates meant that it was important that they were adequately trained.

Although there were many variations across the court, associates often played an important liaison role between chambers and parties to a proceeding, often initiating contact with parties. It appeared to be quite common for chambers to initiate contact with parties on administrative issues relating to case management. Several associates and judges reported contacting parties if it was felt there was something not right with the file or where the judge spotted defects in the application.

> *I would in fact try and see a new file the day that it is issued and at times would even get the associate to ring up the applicant's solicitors and say have you considered whether this is the right jurisdiction or you've used the wrong form or you need to go and read an elementary primer or something, because this is a load of poppycock. Fix it up, or think about this, before you seal it or run the risk of a big order for costs. (judge)*

A number of practitioners were clearly in favour of court-initiated contact, both through the associates or registry staff, to facilitate the efficient running of cases. It also appeared to be quite common for practitioners to

initiate contact with chambers about a range of issues, generally all procedural in nature.

A number of chambers had a standard letter that they sent out to parties indicating how they expected a matter to be dealt with. One associate stated that they rang both parties before first directions to get an idea of what the case was about, in order to produce a summary for the judge.

Several chambers had developed procedures to preserve the formality and transparency of party communications. For example, if one party has communicated with chambers, associates were required to ensure that the other party was made aware of the content of that communication.

> *The standard practice is that that can be done by telephone but I don't do it on the basis that there will be communication behind the back of other parties. In other words, if they contact me about a problem they are expected to have spoken about it together first. So that the party that rings will have already told the other one what the problem is...I think it would be a mistake for judges or associates to get into the habit of dealing with one party without the other one becoming aware of it because even if nothing untoward occurred you'd have a suspicion that it was occurring. (judge)*

Direct communication with chambers was seen by many practitioners to avoid the double handling under the old system where it was necessary to go through registry.

> *It means that you no longer have to ring the registry to find out who the duty judge is, then ring the duty judge's associate. You can now just ring whoever your docket judge's associate is, who, if you've had a matter in front of that judge for a while, you generally know pretty well, and they know what the matter's about. (solicitor)*

A small number of practitioners said that they had always communicated directly with chambers; however even these practitioners found dealing with the same associate was more efficient. Further, as the associate is more actively involved in the management of their judge's docket, they were seen to be more able to answer inquiries or deal with matters relating to a case.

Summary

- Interviewees did not consider FEDCAMS to be particularly useful, reliable, or accessible and consequently it was not well utilised. The inadequacy of the information systems within the Court at the time of this research had led to the development of ad hoc localised systems, which were said to have resulted in a number of related difficulties. These included inconsistency and inaccessibility of information available throughout the Court, duplication of effort, and deterioration in the quality of centralised information.
- Both judges and registry staff were unclear about the role of registry in case and docket management. Most judges claimed that the registry staff did not and should not have a role in the management of their dockets, however some judges expressed a desire for registry to have a greater involvement in order to free up their associates from administrative tasks.
- Most associates had a central role in the management of cases, although the extent of their involvement depended on individual judges' practices. This new role appeared to be generally welcomed by associates, although some felt that the skills that had led to their selection were not particularly relevant to this function. The change has also meant that associates are less involved in their traditional duties of assisting judges with legal research and judgment writing. As a result of this, many judges were not supportive of the increased involvement of associates in case management.
- It appears that there were few formal structures to facilitate sharing of information between judges, and consequently most communication between judges occurred only on an informal basis. Most judges felt that communication with their colleagues was limited, and most said they knew very little about what other judges were doing. Some judges reported feeling isolated.

- Most interviewees expressed a positive attitude towards the relationship between registry and chambers, although their comments tended to be qualified. Concerns were raised about unclear role definitions and divisions of work, limited flow of information, and problems arising from physical separation of chambers and registry within the court building.

9

Conclusion

The main findings emerging from the data presented in the preceding pages have been summarised at the end of each chapter. Here we would like to recapitulate some important points about the scope of the research, and then draw out a few central points and general observations that we hope may be of value, not only to the Federal Court, but also to other courts that may be contemplating similar reforms.

As we noted at the outset, the Federal Court's Individual Docket System is one of the most distinctive and significant models of case management to be found in an Australian superior court. The aim of the system is to promote more active and effective judicial case management, in order to streamline processing, encourage early settlement and, overall, to dispose of cases more efficiently. The aim of this study was to assess how successfully the Individual Docket System has been implemented, and is operating, in the Federal Court of Australia. This, plainly, by no means involves a comprehensive evaluation of whether the Federal Court has achieved its aims. It is, however, the essential first step in that undertaking.

The ambitious nature of the Federal Court's reform cannot be overstated. It is the product of extensive, detailed planning that addressed, among many things, aspects such as case allocation and associated workload issues, development of a recommended case management model, compliance monitoring and sanctions, organisational and administrative changes (including staffing and resources), transitional issues and related procedural reforms. Nevertheless, if the best laid plans do not often go astray, they are almost invariably transformed or modified over the course of their conception, implementation and operation. Moreover, as with all such examples of systemic change of this extent, their success depends upon altering the behaviour of the principal participants in the system.

It is, therefore of first importance that an evaluation of the Individual Docket System should assess how people responded to the new system and what actually occurred as a result of its introduction. For this reason we undertook in-depth interviews with the key participants in Federal Court litigation, including a large, randomly chosen sample of practitioners, a very significant proportion of the Court's employees and virtually all of its Judges. The use of in-depth interviews is a particularly useful method for gaining insights into people's practices and experiences, and hence in assessing organisational changes.

A complete evaluation of the Individual Docket System would explore fully whether it was achieving its aims, and additional methodologies (such as quantitative studies) could usefully be applied to answer this question. The data described in this report supply the critical foundation for undertaking that research, and understanding its results. The data also provide a number of insights into the Federal Court's experience, which we venture to suggest will prove valuable to it and to others.

It is clear that the Federal Court would benefit from the introduction of a more sophisticated, purpose-designed and centralised IT support system. The shortcomings of the, now rather dated, FEDCAMS system are well recognised by the Court and, we understand, are being addressed. As it happens one of those shortcomings is difficulty in making changes to the system. Other courts contemplating major case management reforms would appear to be well advised to address their IT support needs from the outset, if possible.

It also appears to us that some administrative support functions, and working relations between staff in the registry and in chambers, might have been improved had position descriptions, particularly of registrars and associates, been more clearly defined and generally understood. As it was, the case management support role envisaged for registrars in the early planning stages was not generally taken up, and the functions of associates were transformed in a somewhat unsatisfactory and ad hoc fashion. Given what has been noted above about the difficulties of implementing major organisational reforms of this kind, it is probably unnecessary to

emphasise that no serious criticism of the Court is intended by this observation.

There are strong indications that the effectiveness of the Individual Docket System is partly dependent on characteristics of case types and a court's overall workload. The Federal Court itself has had to adapt the system significantly in relation to cases such as migration cases (i.e. high volume, straightforward litigation) and native title cases (i.e. large, complex and lengthy litigation). This indicates that an Individual Docket System may not necessarily be readily transferable to other court settings.

A central feature of the Individual Docket System is the listing or workload allocation system. It is clear that equity in the distribution of the Court's workload is difficult to achieve, and in a number of instances overload was obviously a serious issue. Many interviewees felt that random allocation was a direct cause of inequity and overload, put plainly because the theoretically compensatory cycle of 'swings and roundabouts' of randomness simply did not work. There was also a great deal of confusion about the possibilities and processes for reallocating cases or redistributing workloads. Both clarity and transparency were raised as issues and stressed as being of paramount importance. Added to this, an appreciable number (not quite a majority) of judges felt that their workloads had increased under the Individual Docket System, and it was clear that many judges found it hard to find time to write judgments. Very possibly the latter difficulty would be a complaint in any court, regardless of the case management system in place. However, it appeared to us that the Individual Docket System imposed particular pressures on judges to give up time, notionally reserved for judgment writing, to other demands.

Overall, we found that the judges and court staff were positive about the new system. The majority of interviewees clearly felt that the system was achieving its core aims. A few further points, perhaps in qualification of this general conclusion should be noted. First, there was an evident dissenting view and this was associated with feelings of alienation from the initiative. In contrast, support for the system appears to have been strongly related to the degree of participation in the design and

implementation process, as evidenced particularly by the general enthusiasm found in the Melbourne Registry. Second, it is noteworthy that the most common reasons that judges gave for liking the system were the sense of autonomy and control over their work lives that it gave them. Many argued that these are important values to promote within a court, and they were seen by many as contributing to a more effective and efficient system. At the same time, it must be said that many of the judges who spoke positively about this aspect of the system had not had the experiences of work overload that a few of their colleagues had had.

The flexibility afforded by the autonomy allowed under the Individual Docket System was highly valued by many interviewees. The system was seen to enable judges to tailor their practices to suit the needs of different cases as well as their own work styles. However, marked differences in case management practices across different chambers resulting from the same flexibility and autonomy were also seen as problematic by both judges and practitioners. It may be noted that this was a matter of concern canvassed by the ALRC in its report.

Although the profession generally expressed high regard for the Federal Court (and particularly for the high quality of the bench), their response to the Individual Docket System ranged from being less enthusiastic than the judges', almost to indifference. Most practitioners said they had not noticed any significant changes following the introduction of the Individual Docket System, apart from the fact that the same judge was responsible for a proceeding throughout. While the resulting consistency of approach in a given case was something they liked, many expressed concern about the hazards of the 'luck of the draw' and, particularly, ending up in an overloaded list.

While practitioner comments on case management at the most general level were fairly positive, they expressed a high degree of concern about judicial involvement in the litigation process. It appears that the Court and the profession may in some way be at cross-purposes about what effective case management is, and what place it has in the litigation process. It is perhaps significant that, when asked to name the most important factors

that lead to the litigation process working efficiently, practitioners most often nominated qualified, polite and competent judges, as well as competent practitioners. In comparison, there was little mention of case management.

There were also some obvious differences among judges themselves about the role they should play in the litigation process. One area that elicited sharply diverging views was the role that judges should have in the settlement process. It can be suggested that such issues of principle are in need of some common understandings or collective stance on the part of the Court and therefore require more open examination and discussion. Given the essential role that the profession has in the litigation process, their participation in such initiatives seems highly desirable.

While the Court and the profession appeared to have somewhat opposing philosophies about their respective roles in litigation, their differences were less marked at the practical level. Most of the Federal Court judges clearly took a consultative and cooperative approach to most case management issues, and if anything tended to defer to the parties' representatives. Further, the responses to questions about case management models, standard time frames and standardised procedures revealed that virtually all interviewees saw these as highly stylised features of case management that were impractical or inappropriate. These findings perhaps challenge some of the previously accepted wisdom about the fundamental features of successful case management. In that light, it would indeed be interesting to evaluate quantitatively whether the Federal Court has succeeded through the Individual Docket System in reducing case processing times, reducing litigation costs and increasing the effective use of its resources.

APPENDICES

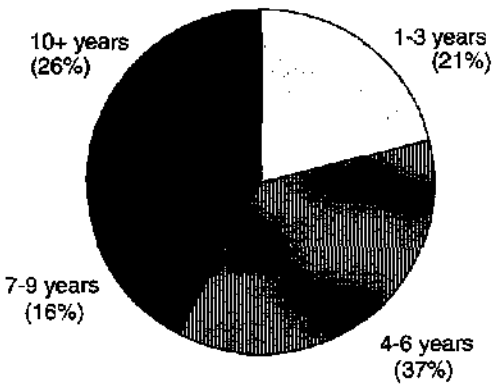
A

Profile of respondents

Judges in the Federal Court

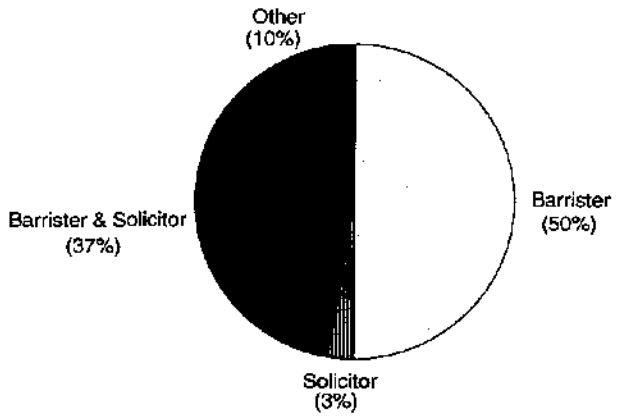
Judges in the Federal Court have been on the court for varying amounts of time, from less than a year, to the more senior judges who have been in the judicial life for up to 16 years.

Figure 1.1: Years at court



The majority of the Judges previously practiced as barristers or solicitors, or both. A small number bring experience from academia, lower courts, and legal positions within either state or federal government. Note: for 57 out of 95 this was not recorded.

Figure 1.2: Judge previous experience



37 of the Judges interviewed were men, while 3 were women.

Solicitors and Barristers in the Federal Court

Practitioners of the Court bring a wide range of practical legal experience and expertise to the process.

Amongst those practitioners we interviewed, experience in the Federal Court ranged from acting in one case to working in the Court for well over 13 years.

Figure 1.3: Years in practice at the Federal Court - barristers

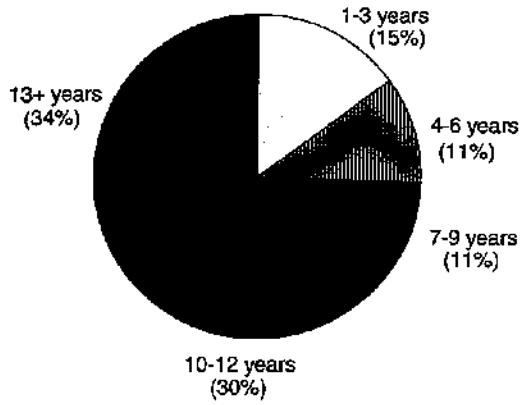
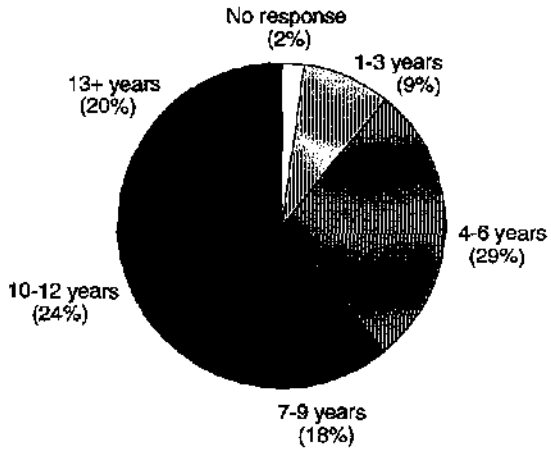


Figure 1.4: Years in practice at the Federal Court - solicitors



There was also great variation in the percentage of time that different practitioners spent dealing with federal matters, from those who spend their entire working time in the federal jurisdiction, to those who only occasionally appeared before the Federal Court.

Figure 1.5: Amount of practice in the Federal Court (%) - barristers

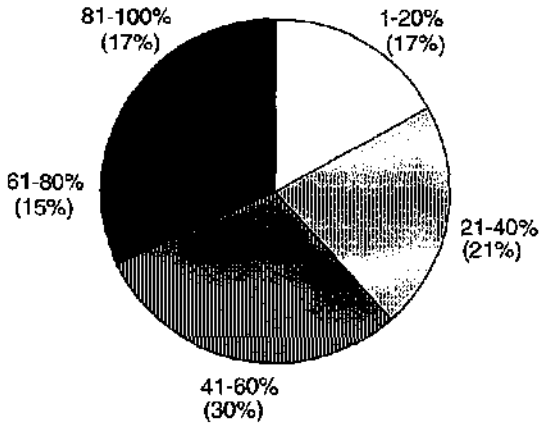
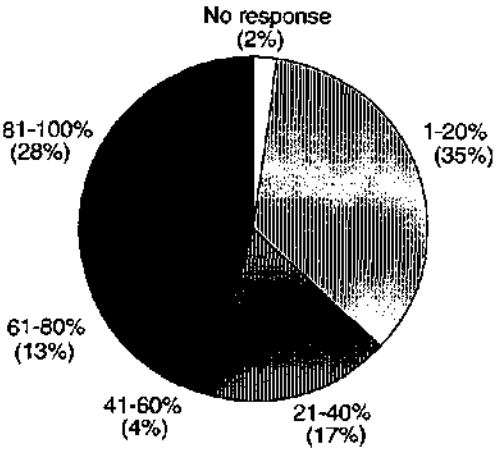


Figure 1.6: Amount of practice in the Federal Court (%) - solicitors.



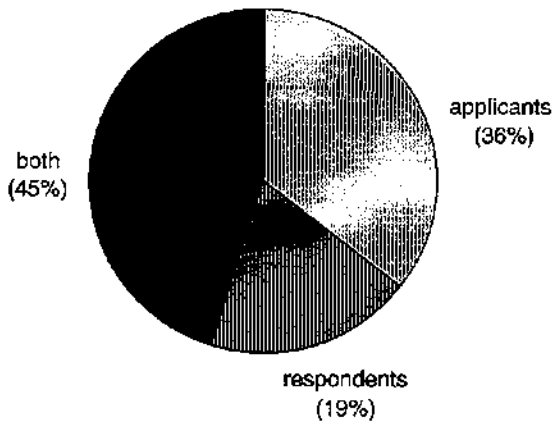
Most of the practitioners interviewed had various areas of expertise. A number of specialist areas were identified (see Table 1.1); however many practitioners worked in more than one specialist area; hence the figures below represent the number of practitioners working in each specialist area. See below. However, a number of these court users identified more than one specialisation, so these figures represent the number of people spoken to who work in each specialist jurisdiction.

Table 1.1: Practitioner specialisation.

Specialisation	Barristers	Solicitors	Total
Administrative law	13	8	21
Bankruptcy	3	4	7
Commercial	9	10	19
Employment	2	-	2
Industrial	7	10	17
Insurance	1	-	1
Intellectual property	6	10	16
Migration	7	7	14
Native Title	3	2	5
Taxation	8	-	8
Trade practices	14	10	24
Other	-	3	3

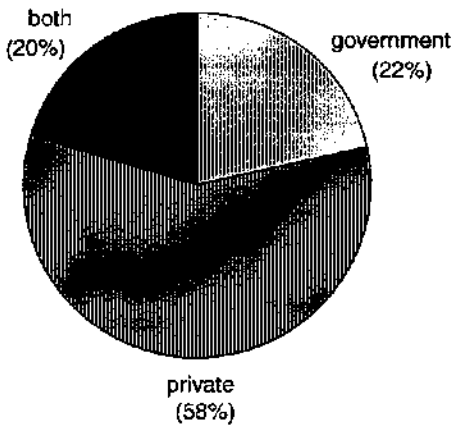
Amongst our sample, there were roughly corresponding numbers of practitioners representing applicants, respondents, or both, in the Federal Court.

Figure 1.7: Applicant/respondent work in the Federal Court - barristers and solicitors.



However, there were significantly fewer practitioners who worked for the government than those who worked primarily for private parties.

Figure 1.8: Government/private party work in the Federal Court - barristers and solicitors.



B

Interview Schedules

Interview Schedule for Judges

1. Personal Details

a. How many years have you been on the Federal Court bench?
b. Which specialist panels are you a member of?
c. Would you briefly describe what you did before your appointment to the Federal Court bench?
d. What experience did you have in Federal Court practice prior to your appointment?

2. The Individual Docket System Model

a. What do you see as the aims of the individual docket system?
b. Do you think the system is achieving these aims?
c. Would you give us a brief overview of the distinguishing features of the new system compared to the old system, in your registry?

3. General case management practices

a. What do you see as the role of the court in managing a case?
b. Thinking about a case that is destined to go all the way to a final hearing, could you describe the steps you follow in managing that case?
c. Do you work to any kind of agenda of issues to be addressed, or orders to be made, at each successive directions hearing? (Prompt: for example, are there standard orders that you consider at specific stages of a case?)

d. When the individual docket system was introduced, a case management model was suggested that consisted of a progression of four distinct hearings or conferences, culminating in a trial. How closely does this correlate with your experience of managing cases? What is your view of this sort of model of case management?

e. Do you monitor the general progress of cases on your docket? If so, how do you go about doing this?

f. Do you have any standard practices involving communicating with parties outside of directions hearings?

g. Do you monitor compliance with directions, between direction hearings? If so, how?

h. Are there any circumstances in which you dispense with the need for parties to attend a directions hearing?

i. What is your policy on: actively encouraging litigants to settle?; actively encouraging ADR?; ordering ADR? Do you think that judges differ in their policies, in relation to any of these? If so, do you think this creates any problems?

j. Has the system affected whether or when you decide to refer a case to alternative dispute resolution? If so, how?

4. Time frames

a. How is the timetable for a case decided? (Prompt: that is, as between you and the parties or their lawyers)

b. Do you work to any overall time frame?

c. Have you ever had any of the following experiences: A hearing running over time; A case scheduled for a long hearing settles at the last minute; A party to a case applies for an urgent interlocutory application? Would you briefly describe what you did, or what you would do if such a situation arose?

d. What effect has the new system had on your workload?

e. Has it resulted in any difficulties in managing your full range of judicial duties? (Prompt: e.g. accommodating judgment writing time and Full Court rosters into your schedule)

f. Has the new system changed the way that you organise your time in relation to your judicial duties? If so, how and why?

5. Case Allocation

a. How well do you think that the method of allocating cases to judges is working? (Prompt: in terms of equitable distribution of cases and diversity of case load)

b. Do you see any problems with this system?

c. What would you do if your docket became extremely overloaded? (Prompt: is there a process for redistributing work if necessary?)

6. Court Relations

a. Are you aware of how other judges go about managing their dockets?

b. Do you think there are any significant differences between chambers? If so, can you comment on the following: Do you think this would affect users of the court in any way? (Prompt: for example, would regular users of the court notice the differences between chambers?). Thinking of some of the differences you are aware of, are some ways of doing things better than others? If so, can you give examples? [Can you tell us why you prefer your style or way of doing things?]

c. How much do you know generally about what your colleagues are doing? Do you think that the new system has affected the degree of knowledge you have about what your colleagues are doing?

d. What role does registry play in the management of your docket?

e. Can you comment on the communication between and the relationship between chambers and registry? Has the new system had any effect on this? If so, how?

f. Have there been changes in the duties of your staff, following the introduction of individual dockets?

7. Technological Support and monitoring of Court's performance

a. What information do you, or your staff, maintain in relation to matters on your docket, and how do you maintain this information? (Prompt: that is, do you have any other administrative system besides the court file kept in registry and FEDCAMS?)

b. Do you, or your staff, use any type of information technology system in your chambers to help you manage cases?

c. Do you receive or prepare any statistical summaries, or other reports relating to the general state of your docket (as distinct from a particular case)? If so, do you use these reports? How?

8. The Legal Profession

a. How do you think that legal practitioners have generally responded to the new system?

b. Do you think that the new system has any effect on the way practitioners approach the litigation process?

9. General Issues/Attitudes

a. Has the individual docket system changed the nature of, or your attitude to, your work in any way?

b. Does the fact that you will have a case from start to finish affect your approach or attitude to the cases in your docket in any way?

c. Has the new system had any benefits for you as a judge?

d. Has the new system had any disadvantages for you as a judge?

e. Has the new system had any advantages for the courts?

f. Has the new system had any disadvantages for the courts?

g. Has the new system had any disadvantages for litigants?

h. Has the new system had any advantages for litigants?

i. Are there any improvements you would like to see implemented?

Interview Schedule for Associates

1. The Individual Docket System Model

a. Can you explain briefly the process that a case goes through, once the listing manager places it on your judge's docket? Please describe how your chambers manages a case.

b. Is there a standard agenda for each directions hearing? What issues are typically addressed at each directions hearing?

c. How many directions hearings would your chambers generally hold for each case?

d. Does your chambers attempt to follow any time frames or set schedule?

e. Do you require any progress reporting from the parties, or do you monitor the progress of a case in any other way?

f. Do you communicate with the parties to a case? Under what sort of circumstances? For what purpose? Who usually initiates such communication?

g. Were you given training or information about the aims and structure of the new system and your role in it? If so, what sort of training?

h. Are you aware that when the individual docket system was first adopted, the court developed a standard model setting out a sequence of case management processes, with model timelines? Have you seen a layout or description of the model?

i. The different names of successive hearings in the model, indicate an intention that the sequence is progressive and involves distinct activities. How closely does this correlate with your experience? Would you say that your chambers follows any such progressive structure?

j. Does your chambers try ADR in many cases? Is there any general policy or indicia about which cases to send to ADR? Are you aware of any general policy about ADR?

2. Technological Support and monitoring of Courts performance

a. Do you use FEDCAMS to help you with your daily work? How accessible or useful do you find it?

b. Do you use any other type of administrative system, tracking system or information technology system in your chambers to help you manage cases?

c. Do you use any statistical reports or summaries to help you to monitor the status of your list?

3. Work load and Time Management

a. What specialist panels does your judge belong to? Do you have any general comments about this system of case assignment?

b. Do you feel that the system produces an equitable distribution between judges and different chambers? Are you aware of any mechanisms for reallocating cases between chambers where this needs to be done?

c. How do you manage the scheduling of hearings around typical problems, such as: a case running over time; settling before trial; or the hearing of urgent matters?

d. What sort of communication is there between chambers about the system?

e. What benefits arise out of judges retaining a case from start to finish?

f. What are the disadvantages of this system?

g. How consistent do you think the system is across different chambers? For example, is there some sort of uniform approach to the model?

h. How does your judge manage their time in relation to the full range of judicial duties, such as judgement writing and sitting in court?

i. Can you comment on how the system has effected your judge's attitude and approach to their cases?

4. Division of Responsibility between members of the Court

a. Can you describe, in general terms how the responsibilities for case management are divided/allocated between chambers and registry?

b. Reflecting on this allocation of responsibilities, can you comment on the flow of information between chambers and registry?

c. How are the duties in regard to case management divided between the secretary and you?

d. Can you briefly describe your range of duties?

e. How closely does this correspond to what you expected to be doing as an associate?

f. How closely does this correlate with what you would like to be doing?

g. How much of your time is taken up with case management?

h. How well equipped do you think you are, or were, for the job required of you?

i. Do you think that the period tenure of associates presents any particular problems?

5. Response of the profession

a. How has the legal profession generally responded to the new system?

6. General Observations

a. What do you see as the aims of the new docket system?

b. Do you think the system is achieving these aims?

c. Are there any improvements you can suggest or would like to see implemented?

Interview Schedule for Registry staff

1. Personal Details

a. How many years have you worked at the Federal Court?

b. What did you do before coming to work at the Federal Court?

c. What is your position in the Federal Court Registry?

2. The Individual Docket System Model

a. What do you see as the aims of the individual docket system?

b. Do you think the system is achieving these aims?

c. Would you give us a brief overview of the distinguishing features of the new system compared to the old system in your registry?

3. General case management practices

a. What do you see as the role of the court in managing a case?

b. Would you briefly describe your range of duties?

c. Does registry actively monitor judges' dockets? If so, how?

d. Does registry monitor the progress of individual cases? If so, how?

e. Does registry communicate directly with parties? If so, under what circumstances and for what purpose? Who usually initiates such communication?

4. Case Allocation

a. How well do you think that the method of allocating cases to judges is working? (Prompt: in terms of equitable distribution of cases and diversity of case load)

b. Do you see any problems with this system?

c. Is there any method of redistribution of cases between judges if this becomes necessary? (Prompt: for example, if a judge's docket becomes overloaded)

5. Court Relations

a. Are you aware of how judges go about managing their dockets?

b. Do you think there are any significant differences between chambers? If so, can you comment on the following: Do you think this would affect users of the court in any way? (Prompt: for example, would regular users of the court notice the differences between chambers?) Thinking of some of the differences you are aware of, are some ways of doing things better than others? If so, why?

c. How much do you generally know about what the judges are doing? (Prompt: that is, what sort of work the judges are engaged in) Do you think the new system has affected the degree of knowledge you have?

d. Can you comment on the communication between and the relationship between the registry and chambers? Has the new system had any effect on this? If so, how?

e. Have there been changes in the duties of registry staff generally, following the introduction of individual dockets?

6. Technological Support and monitoring of Court's performance

a. Do you use any type of administrative system, tracking system or information technology system in your daily duties? If so, for what purpose? [Do you use FEDCAMS in your daily work? How useful and accessible do you find it?]

b. Do you receive or prepare any statistical or other reports relating to the management of cases in the Court? If so, do you use these reports? How?

7. The Legal Profession

a. How do you think that legal practitioners have generally responded to the new system?

b. Do you think that the new system has any effect on the way practitioners approach the litigation process?

8. General Issues/Attitudes

a. Has the individual docket system changed the nature of your work in any way?

b. Has the new system had any advantages for the Court?

c. Has the new system had any disadvantages for the Court?

d. Has the new system had any advantages for Registry staff?

e. Has the new system had any disadvantages for Registry staff?

f. Has the new system had any advantages for litigants?

g. Has the new system had any disadvantages for litigants?

h. Are there any improvements you would like to see implemented?

Interview Schedule for Personal Assistants

1. The Individual Docket System Model

a. Can you explain briefly the process that a case goes through, once it is placed on your judges docket by the listing manager? That is, describe how your chambers manages a case.

b. Does your chambers attempt to follow any time frames or set schedule?

c. Do you require any progress reporting from the parties, or do you monitor the progress of a case in any other way?

d. Under what sort of circumstances do you communicate with the parties to a case? For what purpose? Who usually initiates such communication?

e. What sort of training or information were you given about the aims and structure of the new system and your role in it?

2. Work Roles/Relations

a. Do you think that the new procedures have changed the nature of your work in any way?

b. Do you think that the new system has changed the nature of your judge's work at all?

c. Do you think that the nature of the associate's duties or job description has changed?

d. How are the duties of case management divided between yourself and the associate?

e. What sort of communication is there between chambers about the system?

f. How consistent do you think the system is across different chambers? For example, is there some sort of uniform approach to the model?

g. Can you describe, in general terms how the responsibilities for case management are divided/allocated between chambers and registry?

h. Reflecting on this allocation of responsibilities, can you comment on the flow of information between chambers and registry?

3. Technological Support and monitoring of Courts performance

a. Do you use FEDCAMS to help you with your daily work? How accessible or useful do you find it?

b. Do you use any other type of administrative system, tracking system or information technology system in your chambers to help you manage cases? Do you use any statistical reports or summaries to help you to monitor the status of your list?

4. Work load and Time Management

a. Do you have any general comments about this system of case assignment?

b. Do you feel that the system produces an equitable distribution between judges and different chambers?

c. Are you aware of any mechanisms for reallocating cases between chambers where this needs to be done?

d. How does your judge manage the scheduling of hearings around typical problems, such as a case running over time, settling before trial or the hearing of urgent matters?

5. General Observations

a. What do you see as the aims of the new docket system? Do you think the system is achieving these aims?

b. Are there any improvements you can suggest or would like to see implemented?

Interview Schedule for Solicitors

1. Background Details

a. Can you give me a brief synopsis of your legal career? (Prompt: years of experience, position)

b. How much of your practice is in the Federal Court? Over what period? Any areas of specialty? Do you generally represent applicants, respondents or both in the Federal Court? Do you generally represent government or private parties?

2. The Individual Docket System Model

a. The Federal Court has introduced a system of case management based on individual judges being responsible for the management of a case from beginning to end. [* Are you aware of the introduction of this system?] What do you think the Court is trying to achieve through introducing this system?

b. Do you think the system is achieving these aims/goals?

c. Can you identify any distinguishing features of the new system as compared to the old system? [Prompt: Have you noticed any specific changes over the past 2-3 years?]

d. Have you noticed any distinguishing features of litigation in the Federal Court as compared to other jurisdictions you have worked in?

3. General case management practices

a. What role, if any, do you believe the court should have in managing a case?

b. Thinking about a case that is destined to go all the way to a final hearing, can you describe the steps that a case would ordinarily go through? [*Can you describe the steps that the case/cases you had in the Federal Court went through?] Is there an average number of directions hearings that a case normally goes through?

c. Has the Individual Docket System affected the way you handle your cases? [* Did the system in the Federal Court affect the way you handled your case/cases] If so, how?

d. Have you encountered any judges who use standardised processes such as standard orders, protocols of communication or standard time frames? If so, do you think this is helpful? Is this a widespread or relatively limited practice?

e. How uniform are the case management practices across chambers, that is, between different judges? [Prompt: Can you identify any significant differences?] If so, does this create any problems/cause any problems for practitioners?

f. When the Individual Docket System was introduced the court published a case management model that consisted of a progression of four distinct hearings or conferences, culminating in a trial. Have you seen a diagrammatic or written explanation of this model? How closely does this correlate with your experience of litigating in the Federal Court? What is your view of this sort of model of case management?

g. Have you ever been to an out-of-court discussion with a judge? [Prompt: an informal discussion or a discussion off transcript about a case] If so, who organised or ordered it? What was discussed? (Prompt: what was the scope/or purpose of the conference?) What did you think of it, or of this sort of procedure generally?

h. Have you ever been to a hearing or conference before a registrar? [Prompt: a conference of hearing about a case listed on a judges' docket] If so, who organised or ordered it? What was discussed? (Prompt: what was the scope/or purpose of the conference?) What did you think of it, or of this sort of procedure generally?

i. When the court makes orders, is it your experience that the court monitors compliance? If so, how? Has this changed under the new system?

j. Have you encountered any system of monitoring compliance and/or progress that is done between directions hearings?

k. Have you experienced any differences in monitoring compliance and/or progress between different judges? If so can you comment on these differences?

l. Do you think that the Court should monitor compliance? If so, in what ways?

m. Has the new Practice Note on discovery affected you in any way? What is your opinion on limiting discovery? Do judges differ in their practices in relation to discovery?

n. Do you think the court should play a role in actively encouraging litigants to settle? Do you think judges differ in relation to their attitude towards encouraging settlement? If yes, in what ways? [Prompt: what is your view of judges actively encouraging settlement?]

o. What is your view of ADR? [Prompt: are there circumstances in which you would, or would not, encourage ADR?]

p. Do you think the court should play a role in: actively encouraging ADR?; ordering ADR? Do you think that judges differ in their policies, in relation to ADR? If so, how? Does this create any problems for practitioners?

q. What is your practice in relation to briefing counsel for interlocutory proceedings and directions hearings? Has this changed? If yes, is the change related to the docket system?

r. Does the fact that you are dealing with the same judge from the beginning to the end of a case affect the way that you approach the litigation process?

s. Do you think the fact that a judge has a case from start to finish affects the way they approach the litigation process? If yes, how?

t. What is your opinion of the same judge managing the pre-trial process and hearing the trial? Does this raise any particular issues?

4. Time frames

a. How is [*was] the timetable for a case decided? (Prompt: that is, as between the practitioners and the judge?) Are there differences between judges?

b. Is it your impression that judges are working to an overall timeframe or time standard? At what point do judges normally allocate a trial date? [*At what point did the judge(s) allocate a trial date?] (Prompt: Do practices differ?) Do you think a timetable for a case should be set down at the beginning of a case? If not, what do you see as an appropriate way to plan the progress of a case?

c. Have you ever had any of the following experiences, and if so what has happened in these situations—A hearing running over time?; A matter needing to be heard urgently?; Difficulty in getting a trial date or a date for an interlocutory hearing before your docket judge? Have there been any changes under the docket system, in relation to these occurrences? Have you experienced differences in these sort of scheduling issues when you have been in different judges' dockets?

5. Case Allocation

a. Are there any problems you can identify with the system of case allocation in the Federal Court? Are you aware of the actual method used by the court to allocate cases?

b. What is your opinion of allocation of cases to particular judges based on their expertise in the relevant field or fields?

c. Do you know how the 'specialist panels' work in the Sydney and Melbourne Registries of the Federal Court? If yes, what is your opinion of this system?

6. Relations with the Court

a. Do [*did] you deal mainly with registry or chambers? For what purposes do [*did] you deal with one as opposed to the other? Has this changed under the docket system? Does this raise any particular issues?

b. Do you have any comments to make about the roles of different personnel in chambers and your dealings with them?

7. General Issues/Attitudes

a. What do you regard as the most important attributes of a court?

b. What do you think are the most important factors that lead to the litigation process working efficiently?

c. Do you think the Docket system had any effect on the cost of the litigation process?

d. Thinking about the differences you may have observed between judges in their practice, is there anything that stands out as a better way of doing things than others? [Prompt: "best practice" methods or procedures]

e. Has the system had any particular benefits or disadvantages for you as a practitioner of the court [that you haven't already covered]?

f. Has the system had any particular advantages or disadvantages for litigants themselves [that you haven't already covered]?

g. Has the system had any particular advantages or disadvantages for the judges or the court [that you haven't already covered]?

h. Do you have any other comments to make about areas of Federal Court Practice and Procedure? [Prompt: such as the role of pleadings, evidence by affidavit, rule on expert evidence]

i. Are there any improvements you would like to see implemented?

Interview Schedule for Barristers

1. Background Details

a. Can you give me a brief synopsis of your legal career? (Prompt: years of experience, position)

b. How much of your practice is in the Federal Court? Over what period? Any areas of specialty? Do you generally represent applicants, respondents or both in the Federal Court? Do you generally represent government or private parties?

2. The Individual Docket System Model

a. The Federal Court has introduced a system of case management based on individual judges being responsible for the management of a case from beginning to end. [*Are you aware of the introduction of this system?] What do you think the Court is trying to achieve through introducing this system? Do you think the system is achieving these aims?

b. Can you identify any distinguishing features of the new system as compared to the old system? [Prompt: Have you noticed any specific changes over the past 2-3 years?]

c. Have you noticed any distinguishing features of litigation in the Federal Court as compared to other jurisdictions you have worked in?

3. General case management practices

a. What role, if any, do you believe the court should have in managing a case?

b. Thinking about a case that is destined to go all the way to a final hearing, can you describe the steps that a case would ordinarily go through? [* Can you describe the steps that the case/cases you had in the Federal Court went through?] Is there an average number of directions hearing that a case normally goes through?

c. Has the Individual Docket System affected the way you handle your cases? [* Did the system in the Federal Court affect the way you handled your case/cases?] If so, how?

d. Have you encountered any judges who use standardised processes such as standard orders, protocols of communication or standard time frames? If so, do you think this is helpful? Is this a widespread or relatively limited practice?

e. How uniform are the case management practices across chambers, that is, between different judges? [Prompt: Can you identify any significant differences?] If so, does this create any problems/cause any problems for practitioners?

f. When the individual docket system was introduced the Court published a case management model that consisted of a progression of four distinct hearings or conferences, culminating in a trial. Have you seen a diagrammatic or written explanation of this model? How closely does this correlate with your experience of litigating in the Federal Court? What is your view of this sort of model of case management?

g. Have you ever been to an out of Court discussion with a judge? [Prompt: an informal discussion or a discussion off transcript about a case] If so, who organised or ordered it? What was discussed? (Prompt: what was the scope/or purpose of the conference?) What did you think of it, or of this sort of procedure generally?

h. Have you ever been to a hearing or conference before a registrar? [Prompt: a conference of hearing about a case listed on a judge's docket] If so, who organised or ordered it? What was discussed? (Prompt: what was the scope/or purpose of the conference?) What did you think of it, or of this sort of procedure generally?

i. When the court makes orders, is it your experience that the court monitors compliance? If so, how? Has this changed under the new system?

j. Have you experienced any differences in monitoring compliance and/or progress between different judges? If so, can you comment on these differences?

k. Do you think that the court should monitor compliance? If so, in what ways?

l. Has the new Practice Note on discovery affected you in any way? What is your opinion on limiting discovery? Do judges differ in their practices in relation to discovery?

m. Do you think the court should play a role in actively encouraging litigants to settle? Do you think judges differ in relation to their attitude towards encouraging settlement? If yes, in what ways? [Prompt: what is your view of judges actively encouraging settlement?]

n. What is your view of ADR? [Prompt: are there circumstances in which you would, or would not, encourage ADR?]

o. Do you think the court should play a role in: actively encouraging ADR?; ordering ADR? Do you think that judges differ in their policies, in relation to ADR? If so, how? Does this create any problems for practitioners?

p. Have you observed any changes in the practice of solicitors briefing you for interlocutory proceedings and directions hearings? If yes, is the change related to the docket system?

q. Does that fact that you are dealing with the same judge from the beginning to the end of a case, affect the way that you approach the litigation process?

r. Do you think the fact that a judge has a case from start to finish affects the way they approach the litigation process? If yes, how?

s. What is your opinion of the same judge managing the pre-trial process and hearing the trial? Does this raise any particular issues?

4. Time frames

a. How is [*was] the timetable for a case decided? (Prompt: that is, as between the practitioners and the judge?) Are there differences between judges?

b. Is it your impression that judges are working to an overall timeframe or time standard? At what point do judges normally allocate a trial date? [*At what point did the judge(s) allocate a trial

date?] (Prompt: Do practices differ?) Do you think a timetable for a case should be set down at the beginning of a case? If not, what do you see as an appropriate way to plan the progress of a case?

c. Have you ever had any of the following experiences, and if so what has happened in these situations—A hearing running over time; A matter needing to be heard urgently; Difficulty in getting a trial date or a date for an interlocutory hearing before your docket judge? Have there been any changes under the docket system, in relation to these occurrences? Have you experienced differences in these sort of scheduling issues when you have been in different judges' dockets?

5. Case Allocation

a. Are there any problems you can identify with the system of case allocation in the Federal Court? Are you aware of the actual method used by the Court to allocate cases?

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e. Has the system had any particular benefits or disadvantages for you as a practitioner of the court [that you haven't already covered]?

f. Has the system had any particular advantages or disadvantages for litigants themselves [that you haven't already covered]?

g. Has the system had any particular advantages or disadvantages for the judges or the court [that you haven't already covered]?

h. Are there any improvements you would like to see implemented?

i. Do you have any other comments to make about areas of Federal Court Practice and Procedure? [Prompt: such as the role of pleadings, evidence by affidavit, rule on expert evidence]

C

Coding Tree

(1) Base Data

(1 1) Group

(1 1 1) Judge

(1 1 2) Associate

(1 1 3) Registry

(1 1 4) PA

(1 1 5) Solicitor

(1 1 6) Barrister

(1 2) State

(1 2 1) NSW

(1 2 2) WA

(1 2 3) VIC

(1 2 4) SA

(1 2 5) QLD

(1 2 6) ACT

(1 2 7) NAT

(1 3) Gender

(1 3 1) Female

(1 3 2) Male

(1 3 3) Both

(1 4) Applicant-Respondent

(1 4 1) Applicant

(1 4 2) Respondent

(1 5) government-private

(1 5 1) government

(1 5 2) private

(1 6) Practitioner specialisation

(1 6 1) Migration

(1 6 2) Native Title

(1 6 3) intellectual property

(1 6 4) tax
(1 6 5) commercial
(1 6 6) Administrative
(1 6 7) other
(1 6 8) trade practices
(1 6 9) industrial
(1 6 10) bankruptcy

(2) Judge

(2 1) Specialist panels
(2 2) Years on bench
(2 3) Prior work history
(2 4) Prior Fed Ct experience
(2 5) Other Judicial Activities
(2 6) Other Appointments-commitments

(3) Associate's Details

(4) Registry

(4 1) Federal Court position
(4 2) Years at court
(4 3) Prior work history
(4 4) Other court activities
(4 5) other appointments-commitments

(5) Practitioner

(5 1) Position-Workplace
(5 2) Prior work history
(5 3) Period of practice at Fed Ct
(5 4) amount of work at Fed Ct
(5 5) Specialty
(5 6) applicant-respondent
    (5 6 1) applicant
    (5 6 2) respondent
(5 7) government-private
    (5 7 1) government
    (5 7 2) private

(6) Federal Court System

(6 1) New vs Old System
(6 2) Factors towards efficiency
(6 3) Comparisons with other jurisdictions
(6 4) State differences
(6 5) Full Court Issues
(6 6) Most important attributes of Ct

(7) Individual Docket System

(7 1) Perceived Aims
(7 2) Perceived Problems
(7 3) Perceived Benefits
    (7 3 1) Court
    (7 3 2) Judges
    (7 3 3) Registry
    (7 3 4) legal practitioners
    (7 3 5) litigants
(7 4) Perceived Disadvantages
    (7 4 1) Court
    (7 4 2) Judges
    (7 4 3) Registry
    (7 4 4) legal practitioners
    (7 4 5) litigants
(7 5) awareness of system
(7 6) suggested improvements
(7 7) affect on efficiency
(7 8) affect on cost
(7 9) affect on attitude-approach
    (7 9 1) practitioner attitude
    (7 9 2) affect on practitioner approach
(7 10) affect on workloads
(7 11) Background about system

(8) Case Management

(8 1) Perceived Role of Court- judiciary
(8 2) Chamber Case management

(8 2 1) direction hearings
(8 2 1 1) average number
(8 2 1 2) standard agendas- orders
(8 2 1 3) Parties attendance
(8 2 2) Chamber-parties Communication
(8 2 2 1) Standard practices
(8 2 2 2) progress reporting
(8 2 2 3) Monitoring compliance
(8 2 2 3 2) Chamber differences
(8 2 3) Docket management monitoring
(8 2 4) practitioner views
(8 3) Policies on settlement
(8 3 1) Policy on ADR
(8 3 1 1) Standard indicia
(8 3 1 2) ordering ADR
(8 3 2) Differences in Policies
(8 3 3) Affect of Docket System
(8 3 4) Practitioner views
(8 4) Knowledge of [other] judges management-work
(8 4 1) differences
(8 4 2) Problems for users
(8 4 3) Affect of docket system
(8 5) Case management models
(8 5 1) relation to experience
(8 5 2) View of management models
(8 6) division of responsibilities
(8 6 1) Role of associate
(8 6 1 2) Training
(8 6 1 3) Tenure
(8 6 1 4) Attitude towards Associates role
(8 6 1 6) Change in duties
(8 6 2) Role of Registry
(8 6 2 1) practitioner attitudes towards
(8 6 2 2) Monitoring-managing Judges dockets
(8 6 2 3) Monitoring Compliance
(8 6 2 4) Registry-party communication

(8 6 2 5) Judges' satisfaction with role
(8 6 2 6) Change in duties
(8 6 3) Role of PA
(8 6 4) general party- court communication
(8 7) best practices
(8 8) Out of Court discussions
(8 8 1) with judge
(8 8 1 1) organised by
(8 8 1 2) purpose of discussion
(8 8 1 3) attitude towards
(8 8 2) With Registrar
(8 8 2 1) organised by
(8 8 2 2) purpose of discussion
(8 8 2 3) attitude towards

(9) Time Management
(9 1) Case timeframes
(9 1 4) fixing of trial
(9 3) Scheduling issues
(9 3 1) Case running over
(9 3 2) Case settling
(9 3 3) Urgent applications
(9 3 4) hearing dates
(9 4) Differences between Chambers

(10) Case allocation- listing
(10 1) view of method
(10 5) Redistribution of cases
(10 6) Opinion of specialist panels

(11) Court Relations
(11 1) Between Chambers
(11 1 1) Effect of docket system
(11 2) Chambers and Registry
(11 2 1) Effect of docket system
(11 3) practitioners and Court
(11 3 1) Effect of docket system

(12) Technology- admin

(12 1) Case data management systems
(12 2) FEDCAMS
(12 3) Reports-statistics

(13) Legal Profession

(13 1) Response to individual docket
(13 2) Effect on practice
    (13 2 1) briefing practices

(14) Specific Case Types

(14 1) Migration
(14 2) Native Title
(14 3) intellectual property
(14 4) tax
(14 5) commercial
(14 6) Administrative
(14 7) other
(14 8) trade practices
(14 9) industrial
(14 10) bankruptcy

(15) Other interesting comments

(15 1) role of pleadings
(15 2) evidence by affidavit
(15 3) settlement
(15 4) delays
(15 5) discovery
    (15 5 1) opinion on limiting
    (15 5 2) differences between judges
(15 6) expert evidence
(15 7) cross-vesting

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The Law & Justice Foundation of New South Wales

The Law and Justice Foundation seeks to improve access to justice, particularly for socially and economically disadvantaged people. The Foundation is an independent statutory body with a 34 year history of improving access to justice for the people of NSW. Its staff and Board come from a range of different backgrounds such as law, research, education and the social sciences. This enables us to consider issues of access to justice from different perspectives.

The Law and Justice Foundation believes that:

- a fair and equitable justice system is essential for a democratic, civil society
- reform should, where possible, be based on sound research
- people need accurate, understandable information to have equitable access to justice
- community support agencies and NGOs play a critical role in improving access to justice for disadvantaged people.

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- identifying legal and access to justice needs, particularly of socially and economically disadvantaged people
- conducting rigorous, independent research to inform policy development
- contributing to the availability of understandable legal information
- supporting projects and organisations that improve access to justice.

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