CASE MANAGEMENT
ROLLING LISTS IN THE FAMILY COURT: SYDNEY REGISTRY

Tania Matruglio

December 1996

JUSTICE RESEARCH CENTRE

ISBN 0 909136 610

December 1996

Published by the Law Foundation of New South Wales on behalf of the Justice Research Centre.

Participants

Director
Prof Ted Wright

Principal researcher
Tania Matruglio

Consultants
The Hon. Justice Rowlands A.0.
The Hon. Justice O'Ryan
Jenny Rimmer, Deputy Pricipal Registrar, Family Court of Australia
Jackie Klakowski, Regional Manager, Family Court of Australia
Keys Young (John Schwartzkoff)

The JRC thanks the judiciary, Court staff and the practitioners who agreed to take part in the interviews.

Contents

1

Background

1 In October 1995 the Sydney Registry of the Family Court of Australia introduced a new listing procedure for cases going to a defended hearing. The New South Wales registries of the Family Court had, for some time, operated a system of "fixed lists" whereby cases were allocated a specific hearing date. The Sydney Registry replaced this procedure with a system of "rolling lists" which removed from the litigation process the certainty of hearing date. The main reason for this change was concern about the efficient use of judicial resources.

2 About 19% of all Forms 7[1] filed with the Family Court reach the stage of being listed to appear before a judge at a defended hearing. Most of these cases, however, settle after they are listed (most before the day of hearing), leaving only 5% of cases which ultimately require judicial determination.[2] Listing cases for hearing requires the allocation of judicial time and with almost three-quarters of listed cases settling without requiring judicial determination, gaps were occurring in judges' calendars.

3 The rolling lists procedure was not new to the Family Court, as it operates in other states and was based on the Case Management Guidelines set out in the *Family Court Handbook*. Nevertheless, the Family Law Committee of the Law Society of New South Wales was concerned about the impact a rolling lists system would have. It was the Committee's belief that certainty of a hearing date is an essential

---

1 Form 7 is the main form used to initiate proceedings for orders other than divorce or nullity, for example, property and custody applications.

2 Family Court of Australia, *Annual Report 1992–93*. Note that for the June 1995 to July 1995 period, unpublished statistics from the Sydney Registry indicate that the Sydney Registry statistics reflect the national figures, with 20% of all Forms 7 filed being listed for hearing, and only 6% of these continuing through to a completed hearing.

feature of case listing, and this would be reduced under a rolling lists system. In particular, concern was raised about the effect rolling lists would have on clients' legal costs, continuity of representation, the availability of expert witnesses, and settlement rates.

4 This report provides the results of preliminary research only — conducted one month after the rolling lists system was introduced. Its original aim was to document the concerns of practitioners and to provide an account of the Court's perspective on the operation of the rolling lists system and on practitioner concerns. It was contemplated that this study would identify the full range of issues relevant to an evaluation of rolling lists, and in doing so, would provide the basis of further research. Given the short time the system was in operation this study was not intended to evaluate the effectiveness of the Sydney Registry's rolling lists system, nor to evaluate the relative effectiveness of rolling and fixed list procedures generally.

5 When this report was still in draft, the Court announced that it was abandoning the rolling lists system and would be replacing it with a new system of listing. The new system came into effect in June 1996 — only eight months after rolling lists were introduced.

6 In effect then, this study documents the early stages of an abandoned trial of a listing procedure — and it may be argued that its original aims now have little general relevance. On the contrary, we believe that the catalogue of practitioners and (to the extent these are accurately reflected by practitioners) client concerns documented by this study will be of relevance to any court contemplating changes in caseflow management procedure.

7 More important, this study provides some insight into the problems that led to the decision to abandon the system. Thus, although not its original aim, this account has value as a "case study" of a process of reform which is by no means atypical, and from which some important lessons can be learnt. These lessons are considered in the conclusion.

2

Research approach and research limitations

Research approach

8 The issues of concern to practitioners were ascertained through a series of interviews. The names of practitioners who frequently appeared in the Family Court were requested from the Sydney Registry and the Family Law Committees of the Law Society and the Bar Association. From these lists eight solicitors and four barristers were randomly selected.

9 Letters requesting these practitioners' participation were sent late in November 1995. The letters were followed up by telephone calls until contact was made and a date for an interview scheduled. One solicitor was not available during the period allocated for the interviews, and one did not respond to the request. Ten face-to-face interviews, of between 30 and 60 minutes duration, were conducted with practitioners. At the request of the Law Society's Family Law Committee and the Family Court, a representative from the Legal Aid Commission was also included in the series of interviews. This interview was conducted by telephone. A copy of the interview schedule, used a guide during the interviews, was sent to practitioners in advance. The schedule is set out in the Appendix.

10 As the study was preliminary only, the number of people interviewed was considered to be sufficient to highlight areas of concern. In fact, during the interviews, it was found that saturation was reached: that is, responses from those interviewed consistently repeated information already obtained from others.

11 The period of interest during the interviews was from 3 October 1995 (the commencement of the rolling lists system) to 17 November 1995 (the commencement of the consolidated lists — discussed below). The main issues covered during the interviews were —

- the practitioners' experience with, and general reaction to, rolling lists
- problems anticipated or experienced
- the effect of rolling lists on clients, in both personal and monetary costs
- the effect of rolling lists on case outcome and settlement rates
- how rolling lists had operated to date, and the effect of the lists on the practitioner's work and work practices
- the requirements practitioners believed were necessary to enable a system of rolling lists to work effectively.

12 Before conducting the interviews informal discussions were held with judicial officers and administrative staff of the Family Court. These discussions provided background information about the introduction of the rolling lists system and its operation. After the interviews were conducted, further discussions were held with representatives of the Family Court to allow the Court to respond to the material provided by the practitioners, and to clarify details about the operation of the rolling lists system.

13 Given that a system of rolling lists has been in operation in the Melbourne Registry for a number of years, informal discussions were also held with a registrar from the Melbourne Registry of the Family Court.

14 Also included in the report is a general description of the operation of the Sydney Registry before and after the introduction of the rolling lists system. This information is based on unpublished case processing statistics provided to the Justice Research Centre by the Court.

Research limitations

15 There are three main limitations of this research. The first relates to the short period the rolling lists procedure had been in operation at the time the interviews were conducted. This report provides preliminary information about practitioners' perceptions of rolling lists, not an analysis of the impact of the procedure on the practitioners, their clients or the Court. Therefore, the information cannot be used to draw definitive conclusions about rolling lists.

16 In the same vein, the practitioners had not, at that time, dealt with many cases under the new listing system. Thus, the reported perceptions of the legal practitioners are very likely based as much, or possibly more, on anticipated effects of rolling lists as they are on experience with them.

17 The third consideration is that while the interviews were being conducted a second procedure was introduced into the Sydney Registry. For four weeks, commencing 20 November, the Sydney Registry ran a "consolidated lists" program in parallel with the rolling lists. The consolidated lists were designed to reduce the backlog of cases in the Sydney Registry. This was achieved through over-listing cases at a much higher rate than was usual. The quantity of cases dealt with during this period required that judges be brought in from other registries.

18 The higher than usual over-listing ratio would have caused specific problems for practitioners, and these may have affected practitioners' perceptions of the rolling lists. While considerable effort was made during the interviews to focus the practitioners on the period before the consolidated lists program, there can be no guarantee that the issues raised by them relate solely to the operation of the rolling lists.

3

The listing procedures

19 This section provides a description of the fixed and rolling lists procedures, an account of the reasons for the introduction of the rolling lists procedure in the Sydney Registry, and how the procedure operated.

Fixed and rolling lists systems in the Sydney Registry

20 Until October 1995 the Sydney Registry operated a fixed lists system. Under this system cases were listed for hearing on a particular day. Against the possibility that a case might settle, the Court "over-listed", that is, it listed more than one case for an available hearing time. If none settled, the consequence was that some cases would not be reached.[3] When cases under the fixed lists system required more hearing days than anticipated, they were adjourned "part-heard" to another fixed hearing date. This was done in order to keep scheduled appointments with other cases in the list, and secondarily, as a disincentive to under-estimating hearing lengths.[4] The fixed lists system was also what is described as a "master calendar" system, that is, cases went into a pool and were assigned to a particular judge as action was needed.

---

3 Given that some cases settle on the day of, or during, hearing a common court practice is to "over-list" cases. The aim of this is to avoid gaps occurring in judges' lists when listed cases settle, thereby maintaining a constant flow of cases before them.

4 The Sydney Registry operated three lists — long matters, general matters and short matters, and the waiting time for a hearing related to the list a case was in.

21 Fixed lists were considered to have two main disadvantages. The first was that despite the practice of over-listing in the Sydney Registry,[5] gaps were occurring in judges' calendars when cases listed for hearing settled. This was viewed by the Court as a waste of judicial resources. The second disadvantage was that a significant number of cases were being adjourned "part-heard", and it could take up to six months before hearings recommenced. This break in continuity was generally believed to affect the quality of hearing. In short, the fixed lists system was seen as an inefficient way to get cases before judges.

22 The means through which the Court sought to increase its efficiency was through the introduction of rolling lists. Under the rolling lists system cases were not given fixed appointments for hearing. Instead, they were included in a list of cases which were all scheduled to be heard during a specific period, starting on a specific day. Cases could be given a "not before" date, and on the basis of their priority in a judge's list, an approximate start date. The case which was at the top of a judge's list started first and continued until it finished. In the event that the case settled or was resolved more quickly than anticipated, the next case was called on directly. As a result, all but the first case were "on-call" and had to be ready to present for hearing at any time during the list period. Under the rolling lists system, the judges could arrange "special fixtures" (ie a fixed starting date) but would only do so in the event of special case needs (for example, if interstate witnesses were required).

23 The rolling lists system was also an "individual calendar" system. Cases were allocated to a specific judge in advance of the hearing. This judge then heard all motions and conducted all pre-hearing events. The aim was for judges to take responsibility for the management of individual cases to ensure that they were ready to proceed when they came up for hearing.

5 It can be noted that we were told that the Sydney Registry maintained a low over-listing "ratio" compared to the other Family Court registries.

24 During the period under review, the judges generally received their list in July 1995 — three months in advance of the listed hearings. This provided the opportunity for them to review the cases at an early stage, and to ascertain whether all interlocutory procedures had been complied with. If non-compliance was evident the judges had the opportunity to call cases before the Court and give directions to ensure that the cases were ready to proceed when they reached hearing. Although an individual calendaring system, cases could be transferred from one judge to another if judges got ahead or behind on their list.

25 The judges generally began to plan their list four to six weeks in advance, and gave priority to cases according to need and to order of filing. Practitioners were sent information about the list "as soon as possible" after this. Rolling lists, as they operated in the Sydney Registry, were described by one judge as "judge-owned lists", because there were no formalised procedures or guidelines within which they were required to work. As a result there were differences in how actively judges managed the cases on their lists. For example, during October, some judges called-over all the cases on their list, others called-over only those considered to have potential problems, and others called no cases instead sending correspondence to the solicitors with information about a date on which they could appear before the judge if the solicitor considered it necessary.

26 The Court notified practitioners at the end of June 1995 that their cases were listed for hearing in October.[6] These practitioners were also given a "not before" date which was, in fact, the first sitting day in October for the judge before whom they were to appear.[7]

6 In August 1995 the Court also wrote to the Law Society of New South Wales about the introduction of rolling lists, and attached a description of their operation. The Law Society published a report about their introduction in the September issue of the *Law Society Journal.*

7 3 October 1995 was not the first sitting day for all of the judges during that month.

4

The Sydney Registry

27 This section provides a summary overview of case processing statistics in the Sydney Registry. The statistics for the fixed lists system during the three months before the introduction of the rolling lists system[8] are compared with the figures for October 1995, the first month of operation of rolling lists (and the period of our review). Also included are the figures for January to May 1996 which were requested after it was announced that the rolling lists system was being abandoned. As noted above, during the months of November and December 1995, the Court ran the "consolidated lists" which were essentially the rolling lists with a much higher rate of over-listing than usual — because of this we have also presented the case statistics for this period separately.

Case load

28 During the 1994–95 financial year 8,559 cases were commenced in the Sydney Registry. This represented 13.7% of the total case load for the Family Court during this period.[9] Of these, 880 (10%) were listed for a defended hearing.[10]

8 We tested for differences between the figures for this three-month period, and the year preceding and found none, indicating that these figures are representative of fixed lists as they operated in the Sydney Registry.

9 Statistics from the *Family Court Annual Report 1994–95*.

10 Unpublished Court statistics.

Case duration

29 The average time taken from commencement to listing for cases in the short matters list during the 1994–95 financial year was 9.5 months. For cases allocated to the general matters list (cases requiring up to a four-day hearing) the time was fifteen months, and for cases allocated to the long matters list (cases requiring four or more hearing days) it was seventeen months. The bulk of the cases listed for hearing in the Sydney Registry were allocated to the general matters list.

Dispositions

30 Table 1 compares the dispositions (including adjournments) of cases listed for hearing in the Sydney Registry during July to September 1995 (fixed lists) and the three rolling lists periods. There was surprisingly little difference between them, the consolidated lists period apart. The only change was a slight decline in the proportion of matters settled before hearing during the first month under the rolling lists system, accompanied by a roughly corresponding increase in the proportion settled during the hearing. It is particularly noteworthy that the number of cases listed each month remained consistent.[11] Given that the Court had identified under-use of judicial resources as a problem, it may appear somewhat surprising that the changeover to rolling lists did not increase the number of matters finalised each month.[12]

31 The adjournment rate also remained constant. However, as Table 2 illustrates, there was a significant change in the reasons underlying the adjournment rates.[13] The proportion of matters not reached jumped in

11 The consolidated lists period apart again (when there were additional judges), the only month which was noticeably different was September 1995, just before the changeover, when the number of cases listed was 45, compared with an average of 67.

12 Listing cases in a rolling lists inherently involves a higher level of over-listing than listing the same number cases in a fixed lists system, all other things being equal, and therefore an increase in finalisations would have been expected.

13 $\chi^2_4=11.6$, $p< .05$.

October from 3% under the fixed lists system to 29%, while the proportion of "part-heard" matters declined correspondingly, from 28% to 6%. In the latter period of the rolling lists system (January to May 1996), the proportion of not reached matters fell to 17%, but was still considerably higher than under the fixed lists system, while the proportion adjourned "part-heard" rose to 14%, but was still considerably lower than under the fixed lists system.[14]

32 The implication of these results is that the Court, while successful, to some degree, in addressing the problem of "part-heard" adjournments under the fixed lists system, did not apparently succeed in increasing the use of judicial resources.

TABLE 1. The number and outcome of cases listed for hearing

	Jul–Sep 1995		Oct 1995		Jan–May 1996		Consolidated Lists Nov–Dec 1995	
	n	%	n	%	n	%	n	%
Removed before hearing	9	5	4	5	20	5	44	11
Settled: before hearing	24	12	6	7	45	11	91	24
Settled: day of hearing	42	21	20	25	84	21	74	19
Settled: during hearing	16	8	13	16	40	10	27	7
Heard	71	35	21	26	135	33	91	24
Adjourned	39	19	17	21	81	20	56	15
Total number listed	**201**	**100**	**81**	**100**	**405**	**100**	**383**	**100**

Source: Sydney Registry, case processing statistics.

14 These figures might be explained by a casual suggestion, made to us after the rolling lists system was abandoned, to the effect that some of the judges had moved ad hoc in the latter stages to assigning fixed hearing dates to the cases in their lists.

TABLE 2. Reasons for adjournments

	Jul–Sep 1995		Oct 1995		Jan–May 1996		Consolidated Lists Nov–Dec 1995	
	n	%	n	%	n	%	n	%
Not-reached	1	3	5	29	14	17	11	20
Part-heard	11	28	1	6	11	14	2	3
Other	27	69	11	65	56	69	43	77
Total	**39**	**100**	**17**	**100**	**81**	**100**	**56**	**100**

Source: Sydney Registry, case processing statistics.

5

The interviews

33 This section provides an account of the issues raised by practitioners during the interviews, and the views of Family Court representatives.

34 Most practitioners had only limited experience with the rolling lists during the short period the system had been in operation — with some having had only one case. During the interviews they emphasised that their comments related to their initial impressions, and that they reflected the impressions of some of their colleagues. During the same period the Legal Aid Commission was said to have had 21 cases listed for hearing.

35 Considerable effort was made during the interviews to focus the discussion on issues relevant to the rolling lists system independent of the operation of the consolidated lists.[15] Most practitioners could distinguish between the two procedures, but some clearly did not see there was a distinction. In fact, many issues the practitioners raised were directly related to problems they had encountered as a result of the consolidated lists, and the depth of feeling expressed by some during the interviews seemed to relate more to the consolidated lists than the rolling lists. While an attempt was made to clarify the problems associated with each procedure at the time of interview, some of the comments made may relate to the consolidated lists.

15 See Research limitations, above.

The overall value of a system of rolling lists

36 All practitioners interviewed preferred the fixed lists system to the new rolling lists system. This was based on the belief that fixed listings best served the needs of both the practitioners and their clients.

The need for a rolling lists system

37 Most of the practitioners did not believe there were significant delays in the Sydney Registry, and said most of their cases were given a hearing within twelve months of filing (this impression contrasts with Court figures which indicate that most cases listed for hearing receive a notice of listing fifteen months or more after commencement). The few practitioners who perceived there were delays believed these could have been reduced by increasing the over-listing ratio under the fixed lists system.

38 The response of the practitioners to the Court's aim of increasing the efficient use of judicial resources was that judge "down-time" could be put to better use by applying it to other duties such as writing judgments or to the hearing of Duty Matters (a function which the practitioners noted judges used to perform, and an area of the Court in which judicial resources were perceived to be lacking).

The suitability of rolling lists

39 Most practitioners thought rolling lists were unsuited to the Sydney Registry because they believed more cases in this Registry go to a defended hearing. The greater number of hearings were attributed to the Registry dealing with more complex (particularly property) matters. Some suggested that rolling lists are better suited to registries that deal

with fewer cases, or to high volume courts that deal with relatively routine cases (for example, damages claims for personal injury).[16]

40 A number also stated that rolling lists are inappropriate for Family Law cases generally because Family Law is highly emotional and stressful for the individuals involved. As one practitioner put it "the Family Court is nervous-breakdown territory". Thus, many were of the opinion that when the Sydney Registry introduced rolling lists, it was done without consideration of the effects the procedure would have on the Court's clientele. As another practitioner stated "the purpose of the Court is to resolve cases fairly and expeditiously but without treating people like sausages".

41 When asked about the operation of rolling lists in the Family Court registries in other states, many would not concede that the systems in most other states where really rolling lists, despite what the Court may have called them. Instead they insisted that rolling lists were a Melbourne phenomenon, and were successful because of various differences ascribed to Melbourne and Sydney legal practice.

Problems anticipated or experienced as a result of rolling lists

42 Practitioners were asked to discuss the problems they anticipated or experienced as a result of the rolling lists. Not all of the practitioners experienced problems, but all were agreed about the difficulties rolling lists could cause. While it was conceded that many of the same problems could arise under a fixed lists system, it was contended that they were exacerbated and would occur more frequently under rolling

16 There is a general impression among judges, officers of the Family Court and practitioners that a higher proportion of cases go to a defended hearing in the Sydney Registry. Unpublished Court statistics are consistent with this, indicating that during in 1994–95 financial year 6.3% of cases listed for hearing in the Sydney Registry went through to a defended hearing compared with 4.1% for the Family Court as a whole, and with the other "large" registries, Melbourne and Brisbane (3.53% and 3.21%). However, previous research has shown that more in-depth research is required before this impression can be confirmed, see T. Matruglio, "Matters Heard in the Family Court of Australia" *Civil Issues* No. 7 (Justice Research Centre, 1995).

lists. The most commonly raised problems are discussed under the following headings —

- the availability of original counsel
- the availability of witnesses and other professionals
- the effect of the system on clients
- the effect on work and work practices
- the provision of information
- court management of cases during October 1995.

The availability of original counsel

43 Practitioners believed a major problem with the rolling lists would be the impact they had on the availability of original counsel. While the Court acknowledged this was a potential problem it believed that the problem could be avoided by well prepared briefs. The practitioners thought otherwise.

44 Changes in counsel were considered detrimental because they usually occur late in a case and after considerable contact with the client. This was said to result in clients feeling "abandoned" by their barrister and having their sense of worth undermined. This creates additional stress in what is an already highly stressful situation. Clients, it was commonly stated, do not have confidence in new counsel, and are reluctant to accept the advice of a barrister who has no prior knowledge of either themselves or their case. Many thought that this results in the compromise of some case outcomes through the acceptance of unfavourable settlements or in running cases which would otherwise have settled.

45 Quality of representation, and consequently justice, was another issue consistently raised. This concern was based on two things — one, that late changes do not allow adequate time for case preparation and two, that the abilities of counsel vary. As one practitioner put it "no counsel can pick up and run a case at the last minute as well as original

counsel". Another stated that "the denial of the barrister of choice is a denial of justice, as the client may no longer be adequately represented".

46 Not having enough time to properly prepare for a case was an issue raised by all practitioners and the consequences were considered to be self evident. This is said to be particularly disadvantageous if the other side has been able to retain the services of original counsel.

47 Practitioners explained that there is a limited pool of counsel who specialise in Family Law. A last-minute change often results in practitioners having to go outside this pool for counsel. It was also noted by a number of people that the first barrister selected for a case is usually selected on the basis that they would best represent that case. Therefore, even if a solicitor is successful in obtaining the services of counsel from the Family Law specialist pool, "they will often be dealing with second, or even third-best counsel for the particular case at hand". It was noted that this problem was heightened for Legal Aid cases.[17]

48 Although practitioners conceded theoretically that there were "simple" cases in which a change of counsel would not be a problem, these were not the sort of cases that usually resulted in a hearing in the Family Court. Late changes were considered to be a particular problem in pro-bono matters as "they are the most likely to be flicked, and the hardest to find a replacement for".

The availability of witnesses and other professionals

49 The rolling lists were described as also having the potential to "play havoc" with the availability of lay and expert witnesses, and with other professionals, such as translators. The operation of the rolling lists requires that all people involved in a case be "on-call" to attend the hearing. Difficulties arise when lay witnesses have to be called in

17 This is because Legal Aid has an even smaller pool of Family Law barristers from whom they can accept counsel due to the specialist training they provide for practitioners who choose to represent Legal Aid cases.

from interstate or overseas, or when experts either charge to be on call or cannot appear due to their own business commitments. As with counsel, it was explained that there is a limited pool of experts who appear in the Family Court which can result in them becoming "jammed" (this problem is alleviated somewhat by the provision of special fixtures where it is considered necessary).[18]

50 Witness availability problems were said to have been exacerbated during October when, in some cases, the Court failed to honour the "not before" dates which had been given to solicitors.

Effects on clients

51 Apart from the effects of losing their barristers, rolling lists were said to have "dire emotional and financial effects" on clients as the need for them to be "on-call" for the Court can result in considerable disruption to their work and other commitments.

52 It was noted that rolling lists can increase costs because of the need to brief new counsel and to have expert witnesses on call. An example was given of a case which was not reached on the anticipated date "and resulted in the client settling the case in order to avoid having to pay another day's fees for counsel and the expert witnesses who had all been waiting around the Court".

Effects on work and work practices

53 Practitioners said that not knowing when a given case would be in Court made it "extremely difficult" for them to organise their practices. For solicitors, the rolling lists were said to have created a long process of making and re-making appointments and difficulties for the general

18 Legal Aid, which has considerable experience in using expert witnesses, referred to the example of two formerly frequently used experts who now refuse to deal with cases in the Sydney Registry because of the effect rolling lists had on the operation of their own businesses.

day-to-day running of cases. For example, simply knowing what date to put on return of subpoenas (and the like) was described as being a "monumental task". Barristers spoke of disruptions to their cases in other jurisdictions as a result of being on call at the Family Court. This situation was considered so critical by one that he had decided not to accept briefs in the Sydney Registry as long as a system of rolling lists was in operation.

54 Practitioners mentioned the personal stress which resulted from not being able to provide their clients with some degree of certainty about their case, and in some instances, not being able to do as good a job as they knew they should because of the time constraints under which they were operating. Barristers, particularly, expressed considerable dissatisfaction with having to pick up a case at the last moment and not having enough time to prepare fully for the case before they run it in court.

55 One practitioner thought that rolling lists affected the estimates of hearing duration given by solicitors to the Court. Under the old system it was said that solicitors often under-estimated the length of hearing, but now they are providing over-estimates. This behaviour has implications for the cases which follow in the list as it increases the likelihood that they will be called on earlier than anticipated, and may result in the Court not being able to adhere to "not before" dates.

56 Both solicitors and barristers noted that extra work was required from them in the event that a brief had to be passed. This meant increased costs to the client. They were asked what effect the "jamming" of counsel had on the way they worked. Most practitioners interviewed stated they were frequent users of the Family Court, and being able to do the bulk of the preparatory work themselves meant that they rarely engaged counsel until the last moment at any rate. This counters one of the reasons put forward by practitioners as to why rolling lists were successful in Melbourne, and could not be successful in Sydney. Some explained that in the event that they did lose counsel, they would act as

the advocate in the case. This implies that "jamming" is more of a problem for non-specialist firms due to their extra reliance on counsel.

57 Some barristers explained that the rolling lists forced them to pass briefs earlier than they usually would. This practice can, however, result in lost work, as there were occasions during October when barristers found they would have been able to run cases they had passed. Others dealt with the potential problem of becoming jammed through "swapping" cases with colleagues in order to have the cases they were representing in one judge's list.

The provision of information

58 Most practitioners described the amount of information provided by the Court to the profession about the introduction of the rolling lists as "inadequate". Some said that even the judges and court staff seemed unsure about the new procedures.

59 Others believed the paucity of information provided to have been a "deliberate tactic of the Court". For in not providing the profession with information about the rolling lists, the Court provided no ammunition which could be used to oppose their introduction.

60 Some practitioners also criticised the Court for not consulting with the legal profession during the design of the rolling lists. Consultation was seen as being essential to the design of a system if it is to function satisfactorily for all participants. It was believed that if consultation had taken place between the Court and the profession, many of the problems experienced as a result of the rolling lists could have been avoided (some of the factors considered necessary for effective operation of a rolling list system are described below).

61 Most solicitors were also of the opinion that they were given inadequate notice for cases listed in October. Solicitors stated that under the fixed list system they were usually given two to three

months notice of the hearing date — one month was considered to be the least time within which it is possible to make arrangements for counsel, witnesses and so forth. The amount of time given under the rolling lists for these final preparations was said to have been reduced, having significant effects on the ability of solicitors to organise and to prepare their cases properly for hearing. This contrasts sharply with the Court's account of listing notification.

Court management of cases during October 1995

62 Practitioners said that a major problem with rolling lists, as they operated during October 1995, was a "lack of consistency" from judge to judge in their management of cases. One practitioner said that "the lack of standardisation was absurd" while another said "this made the system even more unpredictable, as solicitors don't know from one judge to another what is going to happen". Yet another stated that the running of the rolling lists by the Court was "simply too ad hoc".

63 All practitioners interviewed believed a fixed lists system was preferable to one of rolling lists. Nevertheless, some had had comparatively better experience with the rolling lists system than others and credited this to efforts of a few judges and their associates to make the system work. Based on this experience they suggested that rolling lists could be made to work more effectively with —

- a higher degree of communication between the Court and the profession
- a higher degree of co-operation between the Court and the profession
- greater attention to the need for pre-trial case management
- providing approximate start dates and strict adherence to "not before" dates
- earlier provision of listing information to solicitors
- and, most important, a high degree of uniformity in the practices of the judges.

64 These suggestions are reinforced by comments the practitioners made about their understanding, confirmed by the Court itself, of the operation of the rolling lists system in Melbourne. The Melbourne system is a form of master calendaring, and the lists are organised by one individual (the List Registrar) who has close knowledge of the cases and the case mix, and who is responsible for assigning priority to cases and for moving cases when a "jam" occurs in a judge's list. Cases are given a "not before" date 13 weeks in advance. It was also noteworthy that both Sydney practitioners and the Melbourne Registrar commented on the fact that Melbourne solicitors rely less on counsel in the early stages of their cases.

The Court's view

65 The Court's objectives and therefore the perceived benefits of rolling lists were provided earlier. We held further discussions with Court representatives immediately following the series of practitioner interviews, and again following the announcement that the rolling lists system was to be abandoned.

Court response to practitioners' concerns and assessment of the operation of the rolling lists system

66 The discussions that immediately followed the series of practitioner interviews sought to ascertain the Court's response to their concerns as well as an assessment of the operation (successful or otherwise) of the rolling lists system during the period under review.

67 It was conceded that rolling lists increased the likelihood that briefs would need to be passed due to the unavailability of counsel — and that some clients would not be happy in the event that this occurred. However, it was also believed that a well-prepared brief would counter any problems that a last-minute change could produce and that

any dissatisfaction experienced by the client would be offset by them having their case resolved faster than it otherwise would be. We were told that the main complaint the Court receives from its clients was about the amount of time it takes for cases to reach a hearing. Further, the Court also conceded that under a rolling lists system, solicitors are under pressure to prepare briefs in greater detail. Nevertheless, it was stressed that the extent to which a last-minute change of counsel occurred would be depend on the individual requirements of cases. For example, where there was an obvious need to retain original counsel, some degree of flexibility existed under the system to provide for this.

68 In general, the Court was satisfied with the operation of the rolling lists system during the period 3 October to 17 November. The system was considered to have "run smoothly" and to have increased the efficiency on the Court. In response to the issues raised by the practitioners during the interviews, the Court believed some were confusing the effects of the rolling lists with the consolidated lists. From the Court's perspective, there was little difference between the operation of the Sydney Registry before and after the introduction of the rolling lists system — particularly since the over-listing ratio remained constant. The court processing statistics bear this out with regard to case through-put.

69 At the time these discussions took place the Court was considering the issues raised by the legal profession and the Court's own experience and was conducting a review of system procedures and operation. Sometime following these discussions the Court announced that it had reviewed the rolling lists procedure and it was to be replaced with yet another system of listing. With this announcement we sought further contact with the Court in an attempt to understand why.

Replacement of the rolling lists system

70 The rolling lists system, as it operated in the Sydney Registry, was described as having three main shortcomings. The first was that once cases were allocated to judges' lists, there was no centralised registry control over the remainder of the listing procedure. The second was the system had resulted in too high a proportion of cases being adjourned not-reached (a fact borne out by the registry statistics presented in Table 2). Last, that there was no standardisation of operation and too little communication between the judges themselves. The result of this was that there were, in fact, a number of systems operating — with some judges adhering more to the principles of rolling lists than others. Each of these reasons for the abandonment of the rolling lists procedure reflects issues raised by the profession during the interviews.

71 The Court also recognised that there was too little consultation with the profession before the introduction of the new listing procedure, the result of which was confusion about the intended operation of it, which was then compounded by the introduction of the consolidated lists so soon after the procedural change.

The new listing system

72 In June 1996 the Sydney Registry replaced the rolling lists system with one that combines features of both fixed and rolling lists. The essential features of the new case listing system are —

- the allocation of cases to one of two tracks — the Standard Track or the Direct Track
- the subsequent listing of cases for hearing in either the "Judge-specific list" or the "Reserve list".

73 The bulk of the cases in the Sydney Registry are allocated to the Standard Track. This track accommodates matters that are expected to

take from two to five days hearing duration. The Direct Track picks up both the simple cases (less than two days) and the complex cases (more than five days). This track is designed to get such cases before a judge as quickly as possible to either facilitate settlement (simple cases) or for appropriate case management (complex cases).

74 Once placed in a management track, cases are allocated to one of the two hearing lists. The Judge-specific List provides cases with a fixed hearing date. It has no over-list ratio to ensure that all matters in the list will be reached. Cases allocated to the Reserve List are also given a fixed hearing date. However, they will only be reached in the event that a matter in the Judge-specific List is settled before hearing. Thus, all cases in this list are "on-call" and the possibility exists that none may be reached. The Reserve List therefore serves as the Court's over-list. Cases that are not reached in the Reserve List are, however, then guaranteed a fixed hearing date in the Judge-specific List within three months.

6

Discussion and conclusion

75 This study was undertaken shortly after rolling lists were introduced in the Sydney Registry of the Family Court. Its aim was to provide a systematic account of practitioners' concerns about this initiative, and the Court's perspective on both the operation of the rolling lists procedure and practitioner concerns. However, in light of the subsequent abandonment of the procedure, the greater value in this account lies in reflecting briefly on the general lessons the experience of the Sydney Registry has to offer other courts contemplating caseflow management reforms.

76 There seem to be three important aspects of this experience to consider. The first relates to the different perspectives from which the Court and practitioners viewed the two case listing methods, and the different values they ascribed to features of each. The second concerns the level of communication and collaboration between the Court and practitioners. The third has to do with the nature of the problems the Court was trying to solve and the method it adopted to solve them.

Court and practitioner perspectives and values

77 The contrasting perspectives of the Court and the practitioners are illustrated by three examples. The first is that most practitioners did not believe there was a serious delay problem in the Sydney Registry,[19] and somewhat ironically perhaps, they were more inclined than the judges to view gaps in the list as time released for "equally valuable activities" such as writing judgments and hearing Duty Matters.

---

19 It should be noted again, however, that their estimate of actual delay in the Court was incorrect.

78 Second is the effect of a last-minute change of counsel. To practitioners this was a crucial concern — it affected the quality of representation a client received and, equally bad if not worse, it undermined the client's sense of self-worth and confidence in the process. The Court's view was that the problems a late change of counsel might produce could be addressed by better prepared briefs (and any resulting client unhappiness would be offset by reduced delay). This difference suggests a different view of the nature of the service that counsel provides. The fact that barristers also expressed dissatisfaction with their preparation when they were briefed late — and one barrister we interviewed had determined not to practise any longer in the jurisdiction because of the prevalence of late briefing under the rolling lists system — may belie some of the assumptions which underpinned the Court's view.

79 Finally, the Court and practitioners had markedly difference perspectives on what was most important to litigants and, perhaps consequently, on the goals of a listing system. The Court believed that litigants were most concerned about the time it takes to resolve their cases. Consequently, the Court's immediate concern was with the efficient use of its resources. In contrast to this, practitioners believed that litigants were concerned more by their legal costs and the stresses of a Family Court dispute. Consequently what they valued most in listing was certainty, and a sense of control. Although what is most important to Family Court litigants cannot be resolved, for now, without question all of these issues concern litigants.[20]

80 Litigation is a complex process, involving many participants. It is important to recognise that no one perspective provides a complete view of it. It is also important that each participant recognise the perspectives

20 It appears that both Court and practitioner beliefs were shaped by what litigants chose to complain to each about, but what litigant choose to complain about, to whom, does not necessarily indicate what matters *most* to them. For research on factors affecting litigants' evaluations of their experience, see T. Matruglio, *Plaintiffs and the Process of Litigation* (Justice Research Centre, 1994), and M. Delaney and T. Wright, *Plaintiffs' Satisfaction with Dispute Resolution Processes* (Justice Research Centre, 1997) — forthcoming.

and values of other participants. This leads on to the second point, about communication and collaboration.

Communication and collaboration between the Court and practitioners

81 Just as it is, in retrospect, obvious that Court and practitioner perspectives were different, it is also apparent that they exchanged little information about their perspectives. The implementation of the rolling lists system was accompanied by limited consultation, and some distrust between practitioners and the Court.[21]

82 The result was that there was no opportunity for the Court and practitioners to collaborate on ways of making listing meet both of their goals. Those goals are compatible. Moreover, it is important to realise that problems like "down-time" due to last-minute settlements, and continuances due to cases over-running their allocated hearing time, are influenced by the behaviour of both. The response of the Family Court, namely to over-list, is a common reaction. However, the problem of last-minute settlements and adjournments is due in part to practitioners leaving critical processes to the last minute, and practitioners will tend to do this more when they are not certain that their cases will be heard when they are listed for hearing.[22] Similarly,

21 On the one hand, the Court expected the profession to resist its reforms out of self-interested opposition to change of any kind, while on the other hand, the profession suspected the Court of being disinterested in its concerns, and of taking a strategic decision not to consult. This was a rather inauspicious start.

22 The cycle set up by these reactions of the court and practitioners has been analysed by Maureen Solomon and described as the "cycle of unpreparedness" in her classic monograph *Caseflow Management in the Trial Court* (American Bar Association, 1973); see now M. Solomon and D. Somerlot, *Caseflow Management in the Trial Court: Now and for the future* (American Bar Association, 1987). For an Australian application of the analysis, see E. W. Wright, "Victoria's approach to reducing criminal case delays: Specific initiatives" in *Papers Presented at the Eighth Annual AIJA Seminar* (Australian Institute of Judicial Administration, 1989) at pp25–51.

the problem of cases over-running is in part due to practitioners under-estimating hearing durations.[23]

83 While it is evident that practitioners placed a high value on certainty of hearing date, their own behaviour (indicated by the problems) was not conforming to the optimal model that "date certain" listing systems are supposed to engender. The rolling lists system was the Court's reaction to this failure. It is, however, the repeated experience of caseflow management programs elsewhere that reform is more likely to succeed if it changes the behaviour of participants rather than simply reacting to it. Changes in behaviour are better accomplished through co-operation and sharing responsibility, than by edict.

Maximising the use of case hearing time

84 Finally, some comment should be passed on the problem of "under-use" of court time which the Court was trying to address by introducing rolling lists. It appears from the Court's case processing statistics that it may already have been using court time optimally. While the Court did not monitor use of court time directly, the number of cases it finalised by moving over to rolling lists did not increase, although similar numbers of cases were listed.[24] Moreover, while it managed to reduce the number of cases adjourned part-heard, it did this largely at the expense of an increase in matters not reached. Case management research has established that it is impossible to fully use

23 Of interest is whether the Court had inadvertently created incentives to do this (for example by making long cases wait longer for hearing dates). There is no clear indication of this, but it was noted in the practitioner interviews that rolling lists removed the disincentives to over-estimating.

24 Listing cases in a rolling list inherently involves a higher level of over-listing than listing the same number of cases in a fixed lists system and therefore, if under-use of court time had been a significant problem then an increase in finalisations should have resulted.

available court time[25] and, for reasons discussed above, if a court seeks to do so by increasing over-listing, it may actually make its problems worse.

85 It should be iterated that the objective of this study was to record practitioners' concerns about the Family Court's rolling lists system shortly after its implementation. Notwithstanding the value, it is hoped, of these reflections on the general lessons which can be drawn from this experience, it must be stressed that this study is not an evaluation of the relative merits of rolling versus fixed lists (or, for that matter, master calendaring versus individual listing). That research remains to be done.

25 B. Lind, D. Weatherburn and J. Packer, *Planning Optimum Court Capacity* (NSW Bureau of Crime Statistics and Research, 1991); E. W. Wright, "Victoria's approach to reducing criminal case delays: Specific initiatives" in *Papers Presented at the Eighth Annual AIJA Seminar* (Australian Institute of Judicial Administration, 1989) at pp25–51.

Appendix — Interview schedule*

Note that we are interested in information about the rolling lists only — not the consolidated lists which commenced on 20 November. Therefore, please consider these questions for only those cases listed throughout October to 17 November.

1. How many cases did you have in the rolling lists prior to 17 November 1995? Did you represent applicants or respondents or both?

2. About how many of your cases listed prior to 17 November:
   - settled prior to the listed date?
   - settled on the day of the hearing (ie: without evidence)?
   - went to hearing?

3. Did the operation of the rolling lists impact upon the way your cases were resolved? That is, would those cases which settled have settled at any rate, and those which went to hearing have been heard at any rate? (ie: did the procedures introduced by the rolling list program change the resolution pattern of your cases?)

4. Did you anticipate that the introduction of rolling lists would create problems? If yes, what did you anticipate, and did the problems occur?

5. Did any unanticipated problems occur?

6. Do you consider that the *outcome* of cases was affected by them being a part of a rolling list system? That is, would the case outcomes have been different if operating under a fixed list? If yes, in what way/s? Were your client/s satisfied with the outcome of the case?

7. Do you believe the introduction of a rolling list was of benefit or detriment to your client? Or did it have little or no impact at all? Why?

8. Do you believe the introduction of rolling lists impacts upon the costs associated with conducting a Family Law matter? If yes, how? For example: were your costs/fees higher than usual, were extra costs incurred as the result of the rolling lists (transport, accommodation etc)?

9.* Were your clients able to retain the advice of their original counsel, or did jamming prevent this? If counsel was jammed, what did you do?

10. Did you make any specific arrangements which could be put into effect in the event of jamming? If yes, what were they? How effective were they in practice?

11. Was the profession provided with adequate information about the operation of the rolling lists? Was it received with enough time for you to adequately prepare for them?

12.* Did the court provide you with sufficient notice about the inclusion of your cases in the rolling lists?

13. In practice, is the operation of the rolling lists much different from that of fixed lists? If yes, in what way/s?

14. Has the introduction of the rolling lists changed the nature of the work, work requirements, or the workload, which was previously done in Family Court matters? If yes, in what way/s?

15. If the rolling list has introduced extra requirements, what, if anything, did you do to deal with them? How successful have you been in meeting these requirements?

16. Has the introduction of the rolling lists impacted on the rest of your practice?

17. Have you found any aspects of the program particularly difficult? If yes, for what reason/s?

18. Do you see that there was a need for the introduction of rolling lists? What do you see as being the main advantages and disadvantages of having a rolling list system? (for the court, the practitioners and the individuals who take their cases to the court).

19. Are you in favour of the continuation of the rolling lists? Has your perception of the rolling list program changed since you have had experience with it?

20. Are there any changes which you would suggest in regard to the operation of the system which would improve effectiveness or efficiency?

---

* Note that this is the schedule as sent to participating solicitors. The schedule sent to barristers excluded question 9 and question 12 was worded as follows:

"Were you provided with sufficient notice about the inclusion of your cases in the rolling lists?"

Other publications in this series

TW Beed, RW Fitzgerald and D Worthington *The Role of Conciliation* (1990)

TW Beed and RI McEwin *Lawyers in Civil Litigation* (1990)

D Worthington *The Pace of Litigation in New South Wales* (1991)

E Rasink *Demands on the Compensation Court: Preliminary Thoughts and Suggestions for Empirical Research* (1993)

E Rasink *Investigation into the Resources of the Dust Diseases Tribunal* (1993)

T Matruglio *So Who Does Use the Court?* (1993)

D Worthington and J Baker *The Costs of Civil Litigation* (1993)

J Baker *Who Settles And Why?* (1994)

T Matruglio *Plaintiffs and the Process of Litigation — and Technical Appendices* (1994)

D Worthington *Compensation in an Atmosphere of Reduced Legalism* (1994)

D Worthington and M Delaney *Awards made under the Motor Accidents Act 1988* (1995)

T Matruglio and J Baker *An Implementation Evaluation of Differential Case Management* (1995)

C Guest and T Murphy *Economic Evaluation of Differential Case Management* (1995)

T Matruglio *Case Management — Rolling Lists in the Family Court: Sydney Registry* (1996)

M Cunningham and T Wright *The Prototype Queensland Access to Justice Monitor* (1996)

M Delaney and T Wright *Plaintiffs' Satisfaction with Dispute Resolution Processes* (1997)The Justice Research Centre

The Justice Research Centre

The Justice Research Centre was founded by the Law Foundation of New South Wales in 1989, as the Civil Justice Research Centre. The Centre acquired its new name in 1996, when the Board of Governors of the Foundation decided that its work should be expanded from civil to justice system issues more generally.

Our mission is to support effective justice system reform, through high quality research. Today, the Centre is recognised nationally and internationally for influential research characterised by an interdisciplinary, empirical approach to public policy issues, and rigorous standards of quality, objectivity and independence.

The Centre's research program is broadly focussed, examining issues such as the delivery of legal services and the operation of the legal services market, court processes and dispute resolution, accident compensation, and court and justice system performance.

The Justice Research Centre receives core funding from the Law Foundation of New South Wales. The additional revenue it needs for its operations from grants and donations from government and private sector organisations.

Advisory Board

David Bowen
Assistant Director, Policy and Legislation, NSW Attorney-General's Department

The Hon Justice Sally Brown
Family Court of Australia

Dr Janet Chan
Associate Professor, School of Social Science and Policy, UNSW

Professor Hilary Charlesworth
Faculty of Law, University of Adelaide

David Fairlie
Governor, Law Foundation of NSW and Partner, Mallesons Stephen Jaques

Isobel Holthouse
Senior Counsel, NRMA Insurance

Professor Marcia Neave
Faculty of Law, Monash University

Clare Petre
Assistant Commonwealth Ombudsman

Bret Walker S.C.
Governor, Law Foundation of NSW and President-elect, Law Council of Australia

Dr Don Weatherburn
Director, NSW Bureau of Crime Statistics and Research

Professor David Weisbrot
Dean, Faculty of Law, University of Sydney

Staff

Director

Professor Ted Wright BSc LLB MA

Research

Joanne Baker BSc (Hons)
Mary Cunningham BA LLB (Hons)
Marie Delaney BA MA
Tania Matruglio BA MA

Administration

Nuria Rodriguez
Lucy Smink LLB (Amsterdam)