

# *Work Allocation in Australian Courts: Court Staff and the Judiciary*

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## *Abstract*

This article examines the statutory basis of judicial workload allocation, before turning to empirical research findings to investigate the functions performed by the judiciary and the court staff in allocating work. The ultimate responsibility for allocating work in a court rests with the chief judicial officer, either as a specific statutory responsibility or as part of their general responsibility to manage the court. In practice, other judicial officers and court personnel are involved in work allocation. This article reports on findings from extensive empirical research examining the processes of work organisation in Australian courts. This research has identified the centrality of court officials, as well as the responsible judicial officer, in allocating work. This may include allocating cases to courts or lists; assigning judicial officers to courts or lists; or, in some circumstances, allocating specific cases to judicial officers. This process of workload allocation requires these court officials to exercise considerable skill in balancing key principles and values of judicial work organisation, including efficiency, fairness, neutral case allocation, and judicial independence.

## **I Introduction**

Managing courts is a complex and multifaceted activity. Complexity derives, in part, from the nature of their work, the institutional environment in which they operate, and the independence of judicial officers.<sup>1</sup> The work usually contains a variety of case types reflecting differences in legal subject matter, case length and complexity. Decisions about resources may be made by an executive department of

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This article relies on some material previously published in a monograph: Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (The Australasian Institute of Judicial Administration, 2012). An earlier version of this article was presented at the International Sociological Association Research Committee on the Sociology of Law Congress 2013 Working Group-Comparative Studies of Legal Professions — Subgroup Management in/and Justice — Reforms and Management of Justice and Judicial Organisations, Toulouse, France, 3–6 September 2013.

<sup>1</sup> The term ‘judicial officer’ is used throughout this article to refer to both judges (judicial officers appointed to superior and intermediate courts in Australia) and to magistrates (judicial officers appointed to magistrates (or local) courts).

government, rather than by the court itself. While independence of judicial decision-making must be protected, courts also must be accountable as publicly-funded institutions. As Langbroek and Fabri point out, workload allocation is ‘the core business of court organisation, because it touches upon ... essential aspects of rendering justice: judicial independence and impartiality, court flexibility and efficiency’.<sup>2</sup>

This article examines the roles of judicial officers and court officials in managing the practical allocation of work to judicial officers. It draws on an extensive body of empirical research conducted into the Australian judiciary over the past 14 years and, in particular, on interviews with key court staff and judicial officers involved in workload allocation in several Australian states and territories.<sup>3</sup> Interviews were undertaken in four magistrates’ courts, two intermediate courts and three higher courts, in five Australian jurisdictions, in 2007, 2008 and 2012. To enable comparison of practices and attitudes across the courts, interviews were structured around key issues relevant to allocation identified from extensive preliminary consultations. Interview questions covered: background information about the court context; the process and method of workload allocation; and principles, values or goals informing workload allocation. Open-ended interview questions allowed interviewees to discuss a full range of issues from their own perspective and in their own words.<sup>4</sup>

Nearly all state and territory courts<sup>5</sup> in Australia use a master calendar system<sup>6</sup> in which each case coming to the court is allocated to a list to be heard on

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<sup>2</sup> Philip M Langbroek and Marco Fabri (eds), *The Right Judge for Each Case: A Study of Case Assignment and Impartiality in Six European Judiciaries* (Intersentia, 2007) 3.

<sup>3</sup> Since 2000, the Magistrates Research Project and the Judicial Research Project of Flinders University, led by Sharyn Roach Anleu and Kathy Mack, have undertaken extensive empirical research into many aspects of the Australian judiciary. The research has used interviews, surveys and observation studies to investigate the attitudes of magistrates and judges towards their work, their experiences of their everyday work and how matters are handled in court. See details at <<http://www.flinders.edu.au/law/judicialresearch>>. The Magistrates Research Project was funded initially by a University-Industry Research Collaborative Grant in 2001 with Flinders University and the Association of Australian Magistrates (‘AAM’) as the partners and received financial support from the Australasian Institute of Judicial Administration (‘AIJA’). From 2002 until 2005, it was funded by an Australian Research Council (‘ARC’) Linkage Project Grant (LP00210306), with AAM and all chief magistrates and their courts as industry partners, and with support from Flinders University as the host institution. From 2006, the Judicial Research Project has been funded by an ARC Discovery Grant (DP0665198). The Workload Allocation Study has been funded by an ARC Linkage Project Grant (LP0669168) 2006–09 with the magistrates courts of Victoria, South Australia and the Northern Territory as well as the AIJA as collaborating organisations. From 2010, additional funding has been supplied by ARC Discovery Grant DP1096888. All phases of these research projects involving human subjects have been approved by the Social and Behavioural Research Ethics Committee of Flinders University. We are grateful to Russell Brewer, Carolyn Corkindale, Colleen deLaine, Elizabeth Edwards, Katrina Hartman, Ruth Harris, Julie Henderson, John Horrocks, Lilian Jacobs, Leigh Kennedy, Lisa Kennedy, Mary McKenna, Rose Polkinghorne, Wendy Reimens, Mavis Sansom, Chia-Lung Tai, Jordan Tutton, Carla Welsh, Rae Wood, and David Wootton for research and administrative assistance in connection with this project.

<sup>4</sup> For more detail about research methods, see the Appendix.

<sup>5</sup> Australia is a constitutional federation; each state and territory has its own court system, and a number of federal courts operate nationwide, see Brian Opeskin, ‘The State of the Judiciary: A Statistical Profile of Australian Courts and Judges’ (2013) 35(3) *Sydney Law Review* 489; James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4<sup>th</sup> ed, 2004).

a specific date, depending on the type of case and the stage of its progress from initiation to final resolution. Individual judicial officers are separately allocated to lists that deal with these specific stages. In some exceptional situations, cases are allocated directly to specific judicial officers.<sup>7</sup>

This article examines the statutory basis of judicial workload allocation, before turning to empirical research findings to examine the functions performed by the judiciary and the court staff in allocating work. It reveals that, despite little in the way of legislative guidance, each stage of workload allocation entails contributions and decisions from different participants and sometimes complex interaction among court staff and the judiciary. Court staff play key roles in allocating work efficiently and fairly, while supporting the core values of neutral case allocation and judicial independence that underpin this process, and maintaining an effective, collaborative working environment within the court.

## II Workload Allocation: Legislation

There are three key aspects to the legislative framework governing the allocation of court workload. First is the identification and location of authority to allocate work. Second is the responsibility for appointment, accountability and direction of court staff, given their involvement in the allocation of workload. Third is the existence of requirements for consultation within the court in relation to workload allocation.

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State and territory courts are generally organised into a three-level hierarchy. The lower courts are magistrates courts (high volume, first instance courts of general jurisdiction), called 'local courts' in New South Wales. Intermediate trial courts deal with more serious criminal cases and civil cases involving higher quantum. The three jurisdictions with the smallest populations (Tasmania, the Australian Capital Territory and the Northern Territory) operate without an intermediate court. Supreme courts deal with the largest civil and most serious criminal cases and hear appeals from both lower and intermediate courts. Each state or territory also normally has a number of specialist courts. The four Commonwealth Courts (the High Court, the Federal Court, the Family Court of Australia, and the Federal Circuit Court) have largely specialised jurisdictions, although the High Court also functions as a final court of appeal for each state jurisdiction.

<sup>6</sup> The alternative is an individual docket or personal diary system, in which each new matter is allocated directly to an individual judicial officer by a routine, non-discretionary or automatic process. That judicial officer then has responsibility for dealing with the case until it is finalised. Neither the head of jurisdiction, nor court staff, allocate particular cases to individual judicial officers apart from the prescribed system. This system is rarely used in Australian state and territory courts, though is common in federal courts: Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (The Australasian Institute of Judicial Administration, 2012), 99. For a detailed examination of its operation in the Federal Court of Australia see Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (Law and Justice Foundation of New South Wales, 2002) and Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 481–93. It will not be discussed in this article, nor will allocation to appeal panels. See Mack, Wallace and Roach Anleu, above, 115–19; see also Brian Opeskin, *Appellate Courts and the Management of Appeals in Australia* (AIIA, 2001).

<sup>7</sup> For example, matters that are especially urgent, raise particular security concerns, or are more complex or lengthy, may be allocated directly to an individual judicial officer at an early stage. For more detailed description and discussion of master calendar systems, see Ernest C Friesen, Edward C Gallas and Nesta M Gallas, *Managing the Courts* (Bobbs-Merrill, 1971); David C Steelman, John A Goerdt and James E McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (National Center for State Courts, 3<sup>rd</sup> ed, 2004).

Of the 25 main Australian courts,<sup>8</sup> 19 are governed by legislation that provides an express statutory authority either specifically for work allocation or for a function that could encompass that responsibility (such as administration of the court).<sup>9</sup> The remaining six have no such provision in their governing legislation.<sup>10</sup> In 18 of the 19 courts that have an express authority, that authority is vested in the chief judicial officer of the court.<sup>11</sup>

In some jurisdictions, there appears to be greater regulation of roles and responsibilities for workload allocation in magistrates courts compared with intermediate or supreme courts. This may reflect those courts' relatively recent separation from the public service<sup>12</sup> or a response to specific issues.<sup>13</sup>

Most magistrates courts have specific legislation creating one or more deputy chief magistrate positions.<sup>14</sup> The precise role or function of these deputies and their relation to the authority of the Chief Magistrate is either unspecified<sup>15</sup> or described as exercising functions as directed by the Chief Magistrate<sup>16</sup> and/or acting when the Chief Magistrate is unable to do so.<sup>17</sup> In two magistrates courts, the governing legislation specifically envisages delegation of some aspects of

<sup>8</sup> The analysis of legislation is confined to 25 courts comprising the main courts for each of the six states, and two territories (the Magistrates Court, the District or County Court and the Supreme Court), together with the four Commonwealth Courts (the High Court, the Federal Court, the Family Court of Australia and the Federal Circuit Court). It does not include appeal courts, or specialist courts in state jurisdictions.

<sup>9</sup> *High Court of Australia Act 1979* (Cth) s 17(1); *Federal Court of Australia Act 1976* (Cth) ss 15, 18A(1); *Family Law Act 1975* (Cth) s 21B(1); *Federal Circuit Court of Australia Act 1999* (Cth) s 89; *Supreme Court Act 1970* (NSW) s 39(1); *Local Court Act 2007* (NSW) s 23(1); *Magistrates' Court Act 1989* (Vic) ss 7(1), 8, 11; *Supreme Court of Queensland Act 1991* (Qld) ss 15–19, 32; *District Court of Queensland Act 1967* (Qld) s 28A(1) see also provision re Judge Administrator div 2AA; *Magistrates Act 1991* (Qld) s 12(1); *Supreme Court Act 1935* (SA) s 9A(2); *District Court Act 1991* (SA) s 11(2); *Magistrates Act 1983* (SA) s 7(1), 8, 11; *District Court of Western Australia Act 1969* (WA) ss 19(3), (5), 20; *Magistrates Court Act 2004* (WA) ss 8, 24, 25, 27; *Magistrates Court Act 1987* (Tas) ss 11, 11A, 14, 15; *Supreme Court Act 1933* (ACT) s 7; *Magistrates Court Act 1930* (ACT) s 5(1); *Supreme Court Act* (NT) s 34; *Magistrates Act* (NT) s 13A(1).

<sup>10</sup> The District Court of New South Wales, the County Court of Victoria, the Supreme Courts of Victoria, Western Australia and Tasmania, and the Local Court of the Northern Territory.

<sup>11</sup> While administrative authority is vested in the Chief Judge of the District Court of Queensland under s 28A of the *District Court of Queensland Act 1967* (Qld), s 28F(1) makes a Judge Administrator responsible for the administration of the court. However, under s 28F(2) the Judge Administrator must consult with the Chief Judge. In the High Court of Australia, authority is vested in the court as a whole: *High Court of Australia Act 1979* (Cth) s 17(1).

<sup>12</sup> Sharyn Roach Anleu and Kathy Mack 'The Professionalization of Australian Magistrates: Autonomy, Credentials and Prestige,' (2008) 44(2) *Journal of Sociology* 185, 189–90.

<sup>13</sup> For example, in the case of the Queensland Magistrates Court, see below n 32 and accompanying text.

<sup>14</sup> *Local Court Act 2007* (NSW) s 15, sch 1 cl 11; *Magistrates' Court Act 1989* (Vic) s 7(2); *Magistrates Act 1991* (Qld) ss 5(7), 13; *Magistrates Court Act 1991* (SA) s 11(3); *Magistrates Court Act 2004* (WA) sch 1 cl 6(2); *Magistrates Court Act 1987* (Tas) ss 3A(3), 6; *Magistrates Act* (NT) s 4(1)(b). The ACT is the exception.

<sup>15</sup> *Magistrates' Court Act 1989* (Vic); *Magistrates Court Act 2004* (WA); *Magistrates Court Act 1987* (Tas) s 6.

<sup>16</sup> *Magistrates Act 1991* (Qld) s 14(a); *Magistrates Court Act 1987* (Tas) s 6(2).

<sup>17</sup> *Local Court Act 2007* (NSW) sch 1 cl 11(3)–(4); *Magistrates' Court Act 1989* (Vic) s 8; *Magistrates Act 1991* (Qld) s 14(b); *Magistrates Court Act 1991* (SA) s 11(3); *Magistrates Court Act 1987* (Tas) s 6(3).

workload allocation. In Queensland, legislation provides for the appointment of supervising or coordinating magistrates with responsibility for allocating caseload.<sup>18</sup> Unusually, New South Wales provides that the Chief Magistrate ‘may delegate to a Deputy Chief Magistrate any of the Chief Magistrate’s functions other than this power of delegation’.<sup>19</sup> No higher court has legislative provision for a deputy or similar role, apart from the statutory provisions for a ‘Judge Administrator’ in the Queensland District Court and the Family Court of Australia.<sup>20</sup>

In managing their courts, chief judicial officers are assisted by the staff of the court, headed by a senior official (variously termed a ‘chief executive officer’, ‘court administrator’ or ‘principal registrar’).<sup>21</sup> In some jurisdictions, the chief court officer is an independent statutory appointment.<sup>22</sup> The governing legislation in all courts provides for the employment of court staff.<sup>23</sup> The senior official and

<sup>18</sup> *Magistrates Act 1991* (Qld) s 12(2)(d).

<sup>19</sup> *Local Court Act 2007* (NSW) sch 1 cl 10(3).

<sup>20</sup> *District Court of Queensland 1967* (Qld) s 28B; *Family Law Act 1975* (Cth) s 21B. A judge administrator could undertake functions to do with workload allocation. Because this role did not exist in the courts studied in this research, the demarcation between the roles of the Chief Judicial Officer and formally designated judge administrators was not examined.

<sup>21</sup> ‘The Chief Executive and Principal Registrar’: *High Court of Australia Act 1979* (Cth) s 18. The ‘Registrar’: *Federal Court of Australia Act 1976* (Cth) s 18B; *Supreme Court Act 1935* (SA) s 82; *District Court Act 1991* (SA) s 18(1); *Supreme Court Act 1959* (Tas) s 5J; *Local Court Act 2007* (NSW) s 18(1); *County Court Act 1958* (Vic) s 18(1); *Supreme Court Act 1933* (ACT) s 46(1)(a); *Magistrates Court Act 1930* (ACT) s 9; *Supreme Court Act* (NT) s 48(1); *Local Court Act* (NT) s 9(1). The ‘Chief Executive Officer’: *Family Law Act 1975* (Cth) s 38B; *Federal Circuit Court of Australia Act 1999* (Cth) s 5; *Supreme Court Act 1986* (Vic) s 106 (a); ‘Principal Registrar’: *Supreme Court Act 1970* (NSW) s 119; *District Court Act 1973* (NSW) s 18G(2); *Supreme Court of Queensland Act 1991* (Qld) s 69(1); *District Court of Queensland Act 1967* (Qld) s 36; *Supreme Court Act 1935* (WA) s 155(1); *District Court of Western Australia Act 1969* (WA) s 25(1); *Magistrates Court Act 2004* (WA) s 26(1)(a); *Magistrates Court Act 1991* (SA) s 13(1). ‘Principal Clerk of Courts’: *Justices Act 1886* (Qld) s 22D. ‘Administrator’: *Magistrates Court Act 1987* (Tas) s 16(1).

<sup>22</sup> See, eg, *High Court of Australia Act 1979* (Cth) s 18, 21; *Federal Court of Australia Act 1976* (Cth) ss 18C, 18E; *Family Law Act 1975* (Cth) s 38C (the Chief Executive Officer of the Federal Circuit Court is also the Chief Executive Officer of the Family Court of Australia: *Federal Circuit Court of Australia Act 1999* (Cth) s 5 (definition of ‘Chief Executive Officer’)); *Magistrates Court Act 1930* (ACT) s 9. Their terms and conditions of appointment may still be governed by the legislation applicable to public servants: *District Court Act 1973* (NSW) s 18FA(4); *Supreme Court Act 1986* (Vic) s 113G; *County Court Act 1958* (Vic) s 17P, cf s 17P(5) in relation to leave entitlements; *District Court of Western Australia Act 1969* (WA) s 25(1).

<sup>23</sup> *High Court of Australia Act 1979* (Cth) pt III; *Federal Court of Australia Act 1976* (Cth) ss 18B, 18N; *Federal Circuit Court of Australia Act 1999* (Cth) ss 96, 101; *Supreme Court Act 1970* (NSW) ss 119, 120; *District Court Act 1973* (NSW) ss 18A–18B, 18G, 18H; *Local Court Act 2007* (NSW) ss 18–20; *Supreme Court Act 1986* (Vic) s 106, pt 7 div 2A; *County Court Act 1958* (Vic) pt 1 div 3B, div 4; *Magistrates’ Court Act 1989* (Vic) ss 17, 21 pt 2A; *Supreme Court of Queensland Act 1991* (Qld) ss 69, 73; *District Court of Queensland Act 1967* (Qld) ss 36, 36D, 41; *Magistrates Courts Act 1921* (Qld) ss 3, 3A, 3B, 3C; *Justices Act 1886* (Qld) ss 22C, 22D; *Magistrates Act 1991* (Qld) pt 9A div 1; *Supreme Court Act 1935* (SA) pt 6; *District Court Act 1991* (SA) pt 3 div 3; *Magistrates Court Act 1991* (SA) pt 3 div 2; *Supreme Court Act 1935* (WA) ss 155, 155A; *District Court of Western Australia Act 1969* (WA) pt II div 5; *Magistrates Court Act 2004* (WA) s 26; *Supreme Court Act 1959* (Tas) s 5J; *Magistrates Court Act 1987* (Tas) ss 16, 16A; *Supreme Court Act 1933* (ACT) s 46; *Magistrates Court Act 1930* (ACT) ss 9, 9A; *Supreme Court Act* (NT) ss 48, 50; *Local Court Act* (NT) s 9.

other staff may be employed by the court directly<sup>24</sup> or, more often, by a department of government, and would ordinarily be subject to public service terms and conditions.<sup>25</sup>

Nearly half (12) of the 25 main Australian courts have express consultation requirements of some kind. Six courts require their chief judicial officer to consult with the other judges or magistrates of the court in relation to matters such as: the assignment of caseload (either generally, individually, or to particular court locations);<sup>26</sup> the constitution of the court in particular matters or classes of matters;<sup>27</sup> the assignment of judicial officers to particular court locations;<sup>28</sup> and the functions that may be exercised by particular judicial officers or categories of judicial officer.<sup>29</sup> In all Victorian courts and the South Australian Supreme Court, legislation requires an annual ‘Council of Judges’ or ‘Council of Magistrates’ to

<sup>24</sup> *Federal Court of Australia Act 1976* (Cth) s 18N(4); *Family Law Act 1975* (Cth) s 38N(4); *Federal Circuit Court of Australia Act 1999* (Cth) s 5 (definition of ‘Chief Executive Officer’).

<sup>25</sup> *Supreme Court Act 1970* (NSW) ss 119, 120; *District Court Act 1973* (NSW) s 18G(2); *Local Court Act 2007* (NSW) s 18(1); *Supreme Court Act 1986* (Vic) s 106; *County Court Act 1958* (Vic) s 18(1); *Magistrates’ Court Act 1989* (Vic) s 17(1); *Supreme Court of Queensland Act 1991* (Qld) ss 69(3), 73(3); *District Court of Queensland Act 1967* (Qld) ss 36(3), 36D(2), 41(2); *Supreme Court Act 1935* (WA) s 155(1); *District Court of Western Australia Act 1969* (WA) s 36(2); *Magistrates Court Act 2004* (WA) s 26(3)–(4), (6) (with the exception of deputy registrars who are also members of the police force: *Magistrates Court Act 2004* (WA) s 26(5)); *Supreme Court Act 1959* (Tas) s 5J; *Magistrates Court Act 1987* (Tas) ss 16(1), (3), 16A(1). An exception is the High Court of Australia, which determines the terms and conditions of its own employees: *High Court of Australia Act 1979* (Cth) s 26(4). In South Australia, court staff are employed by the State Courts Administration Council, a body independent of control by executive government: *Courts Administration Act 1993* (SA) ss 3, 17–18, 21A, 22; *Supreme Court Act 1935* (SA) pt 6; *District Court Act 1991* (SA) pt 3 div 3; *Magistrates Court Act 1991* (SA) s 12. The position in the Queensland Magistrates Court is a little confusing: a principal clerk appointed to the court is a public service employee (*Justices Act 1886* (Qld) s 22D(2)), although there is no explicit requirement that a clerk of the court be a public service employee (*Justices Act 1886* (Qld) s 22C). The principal clerk is also the principal registrar (*Magistrates Courts Act 1921* (Qld) s 3A) and can only delegate functions in that capacity to staff who are public service employees (*Magistrates Courts Act 1921* (Qld) s 3B). The position in the Northern Territory is not clear: see *Supreme Court Act* (NT) ss 48, 50; *Local Court Act* (NT) s 9. Court staff performing quasi-judicial functions (such as judicial registrars or, in some cases, registrars) are often independent statutory appointments or exempted from public service employment provisions: *Family Law Act 1975* (Cth) s 26A; *Supreme Court Act 1986* (Vic) s 113F; *County Court Act 1958* (Vic) ss 17N–17P; *Magistrates Act 1991* (Qld) s 53C. There may be provisions designed to reinforce the independence of these court staff in the exercise of their judicial and quasi-judicial functions, for example, by providing that they are not subject to the control or direction of any person in the exercise of their functions: see, eg, *Family Law Act 1975* (Cth) s 26A; *Magistrates Act 1991* (Qld) s 53G (judicial registrars); *Federal Circuit Court of Australia Act 1999* (Cth) s 104 (registrars); *Magistrates Court Act 1991* (SA) s 13(2) (principal registrar); *Supreme Court Act* (NT) s 49A (registrars and masters). In some courts, judges’ personal staff are also exempted from public service terms and conditions of employment: see *Supreme Court Act 1935* (WA) s 155A(1); *District Court of Western Australia Act 1969* (WA) s 25; *District Court of Queensland Act 1967* (Qld) s 36D(2).

<sup>26</sup> *Federal Court of Australia Act 1976* (Cth) s 15(1AA)(a); *Family Law Act 1975* (Cth) s 21B(1A)(a)(i); *Local Court Act 2007* (NSW) s 23(1)(a), (c), (3).

<sup>27</sup> *Federal Court of Australia Act 1976* (Cth) s 15(1AA)(a); *Family Law Act 1975* (Cth) s 21B(1A)(a)(ii); *Local Court Act 2007* (NSW) s 23(1)(a), (3); *Supreme Court Act 1933* (ACT) s 7; *Supreme Court Act* (NT) s 34; *Magistrates Court Act 1930* (ACT) s 5(2).

<sup>28</sup> *Local Court Act 2007* (NSW) s 23(1)(b), (3).

<sup>29</sup> *Local Court Act 2007* (NSW) s 23(1)(d), (3); *Magistrates Act 1991* (Qld) s 12(2)(a), (c).

consider the ‘working of the offices of the Court’.<sup>30</sup> In the High Court of Australia, the whole Court is involved in its administration.<sup>31</sup> The legislation governing the Queensland Magistrates Court creates a court governance advisory committee, with particular focus on decisions to transfer magistrates between different court locations.<sup>32</sup>

Legislative provisions give only limited guidance for workload allocation in Australian courts. About one-quarter are silent on the authority for chief judicial officers to allocate work and about half do not expressly require consultation as part of the process of administering the court. Where consultation is required, only 12 courts are subject to an express legislative requirement of consultation on any aspect of workload allocation.<sup>33</sup> There is no clear role identified in legislation for court staff in workload allocation processes, and only in three courts is there legislative recognition of the role of a judicial officer other than the chief judicial officer in workload allocation.<sup>34</sup> More importantly, no legislation articulates values or principles that inform workload allocation.

There are a number of measures used for assessing performance at an institutional level in Australian courts, such as disposition rates or backlog.<sup>35</sup> Court staff involved in workload allocation experience considerable pressure to ensure that matters are processed through the court in a timely fashion to meet these measures. In some jurisdictions, courts operate to targets for disposition rates set by the executive. There is also concern among court staff and judicial officers to ensure that allocation of work was fair and equitable as between judicial officers, and that court staff allocating workload did not ‘flog the willing horses’ (as one interviewee expressed it), along with recognition that institutional workload measures are not appropriate to assess individual judicial performance, especially in a master calendar system.<sup>36</sup>

As Opeskin has pointed out, there is little or no empirical data on many important aspects of the Australian judicial system.<sup>37</sup> While there has been

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<sup>30</sup> *Supreme Court Act 1935* (SA) s 16; *Magistrates’ Court Act 1989* (Vic) s 15(1)(b); *County Court Act 1958* (Vic) s 87; *Supreme Court Act 1986* (Vic) s 28.

<sup>31</sup> *High Court of Australia Act 1979* (Cth) s 17(1).

<sup>32</sup> *Magistrates Act 1991* (Qld) s 15. This structure arose out of conflict among Queensland magistrates in relation to transfer decisions, see Rosemary Hunter, ‘Fear and Loathing in the Sunshine State’ (2004) 19(44) *Australian Feminist Studies* 145; *Payne v Deer* [2000] 1 Qd R 535; *Gribbin v Fingleton* [2003] 1 Qd R 698; *Fingleton v The Queen* (2005) 227 CLR 166.

<sup>33</sup> *Federal Court of Australia Act 1976* (Cth) s 15(1AA)(a); *Family Law Act 1975* (Cth) s 21B(1A)(a); *High Court of Australia Act 1979* (Cth) s 17(1); *Local Court Act 2007* (NSW) s 23(1), (3); *Supreme Court Act 1986* (Vic) s 28; *County Court Act 1958* (Vic) s 87; *Magistrates’ Court Act 1989* (Vic) s 15(1)(b); *Magistrates Act 1991* (Qld) ss 12(2)(a), (c), 15; *Supreme Court Act 1935* (SA) s 16; *Supreme Court Act 1933* (ACT) s 7; *Magistrates Court Act 1930* (ACT) s 5(2); *Supreme Court Act* (NT) s 34.

<sup>34</sup> *Magistrates Act 1991* (Qld) s 12(2)(d); *District Court of Queensland Act 1967* (Qld) s 28F; *Local Court Act 2007* (NSW) sch 1 cl 10(3).

<sup>35</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services* (Productivity Commission, 2014), vol C, ch 7.

<sup>36</sup> Mack, Wallace and Roach Anleu, above n 6, 160.

<sup>37</sup> Opeskin, above n 5.

examination of case management in Australian courts,<sup>38</sup> there has been surprisingly little investigation of the process by which cases are allocated. A substantial literature has investigated workload allocation practices in United States courts;<sup>39</sup> however, US courts generally use individual docket systems that, as noted above, are rarely used in Australia, particularly in the state courts that are the focus of this research.<sup>40</sup>

Given the lack of legislative detail, understanding the actual practices of judicial workload allocation in Australian courts requires considerable original empirical research. The workload study reported in this article began with preliminary consultations with court staff and judicial officers in several courts to develop the research strategy. Systematic, semi-structured interviews were undertaken with judicial officers and court staff in a variety of roles at different courts and locations. This qualitative research method enabled them to discuss a wide range of issues, based on their own experiences and knowledge.<sup>41</sup> Data from the interviews was supplemented by examination of internal court documents, and later consultations in several courts after the release of a draft report. The results of this innovative research provide descriptive information and insight into key aspects of the workings of the Australian judicial system that is not accessible outside the courts and is not always well understood internally.<sup>42</sup>

Analysing actual judicial workload allocation practices discloses the significant roles played by court staff in the allocation process. This entails complex interaction with the judiciary while balancing important, but often implicit, principles of judicial independence and neutral case allocation, with organisational demands for efficiency in work processing and fairness in work allocation.

### III Workload Allocation: Roles and Responsibilities

Judicial workload allocation incorporates several distinct processes: allocation of judicial officers to specific court locations or divisions; allocation of cases to particular lists at set days and times;<sup>43</sup> and, as a separate process, allocation of judicial officers to those lists. Each list deals with a stage in the case resolution process, so that matters that do not resolve in earlier stages, for example, by way of a plea of guilty in a criminal case, are ultimately allocated to a trial list on a specified date for hearing.<sup>44</sup>

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<sup>38</sup> For a recent overview, see Australian Centre for Justice Innovation, *The Timeliness Project: Background Report* (Monash University, October 2013) ch 4.

<sup>39</sup> See, eg, Steelman, Goerdts and McMillan, above n 7.

<sup>40</sup> Opeskin, above n 5.

<sup>41</sup> See Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage Publications, 2<sup>nd</sup> ed, 1998).

<sup>42</sup> For more detail, see Mack, Wallace and Roach Anleu, above n 6.

<sup>43</sup> These second and third steps are stages in a master calendar system. As noted above (above n 6), the alternative — an individual docket system — is not discussed in detail in this article.

<sup>44</sup> This summary describes processes across a range of different courts and does not attempt to capture the variety within each court or across different jurisdictions or levels of court. See Mack, Wallace and Roach Anleu, above n 6.



## **A** *Allocation to Courts/Divisions*

A key feature of the structure and work organisation in Australian courts is the creation of divisions to deal with particular types of cases. All courts distinguish criminal and civil (non-criminal) cases.<sup>45</sup> Larger courts may also manage their work in a range of specialist jurisdictions, such as a commercial division, small claims, domestic violence, motor accident, or children's court.

The initial allocation of judges or magistrates to particular courts or divisions or locations can be for lengthy periods or may be part of a regular rotation, such as every three years. Alternatively, depending on the policy of the court or the views of the chief judicial officer, allocations may vary considerably within a shorter time, for example, involving a mix of civil and criminal cases within the space of a year or less.

In practice, allocations to a particular court location or division or to a significant role are made by the chief judicial officer, as envisaged by legislation. Regardless of whether consultation is required by statute, these allocations are generally discussed with the individual judicial officer concerned. While their wishes are taken into account, the needs of the court are predominant; the skills and abilities of the judicial officer might also be considered.<sup>46</sup> In some very large courts, this allocation role might be delegated to a deputy chief judicial officer, but will generally be exercised in consultation with the chief judicial officer in the event of queries or concerns.

## **B** *Allocation of Cases to Lists*

Allocation of cases to lists in Australian courts is largely an administrative, calendaring function, carried out by court staff. When a case is filed, or ready for another stage in its progress, court staff allocate it to an available date and time according to a prearranged schedule. For example, where a case on a directions list does not resolve, it will go on a trial list. A member of the court staff will allocate the case to the trial list on the next suitable date considering availability of parties, lawyers and other essential participants. At the time of setting the trial date, it will often not be known which judicial officer is allocated to the trial list for that date.

## **C** *Allocation of Judicial Officers to Lists and Cases*

The next stage of work allocation is the allocation of judicial officers to particular lists and, usually as the very last step, the allocation of judicial officers to an individual case for hearing. At each level of court, this process has particular challenges. In high volume criminal lists in lower courts, allocation processes must ensure that, as far as possible, all matters listed are dealt with on that day. This

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<sup>45</sup> Opeskin, above n 5.

<sup>46</sup> See Anne Wallace, Kathy Mack and Sharyn Roach Anleu, 'Caseload Allocation and Special Judicial Skills: Finding the "Right Judge"?' (2012) 4 *International Journal for Court Administration* 68 (Special Issue: Research in Judicial Administration).

often entails frequent adjustments throughout each day, in addition to advance planning. In intermediate courts, trial allocation will involve considerations such as courtroom, juror and counsel availability. In higher courts, judgment writing obligations may be an added complexity.

Notwithstanding that legislation vests this responsibility in the chief judicial officer, in practice, this function is often carried out primarily by a court officer (or perhaps a master, in higher courts)<sup>47</sup> who works in close consultation with, and under the supervision of, the chief judicial officer or another senior judicial officer with delegated responsibility. For example, the judicial officer responsible for allocation will generally provide the relevant court officer with details of those judicial officers in the court who are available for particular lists or types of work within a certain time frame. The court officer then allocates those available judicial officers to the lists. With a trial list, the decision as to which judicial officer will be allocated which case may be made by a court officer, depending on judicial availability, determined quite close to or even on the trial date.<sup>48</sup>

#### **IV Workload Allocation: Contributions**

This brief description of the workload allocation process, and of the roles performed by court staff and judicial officers in that process, does not fully convey the complexity of the interactions involved, and the extensive contributions of court staff to that process. Interviews with a variety of participants, who describe and reflect on their experiences and perspectives, provide data that enable a fuller and more systematic understanding of the actual practices of the Australian judicial system in relation to workload allocation.<sup>49</sup>

Court staff undertake substantial roles in most phases of the workload allocation process: first, they consult with the judiciary when making allocations; second, they deal with objections to allocations; and third, they manage transfers of cases as needed to maximise use of scarce judicial resources and court facilities. Their overarching contributions throughout the process are fostering general organisational communication and good working relationships. These contributions require distinctive personal qualities, especially good interpersonal and communication skills, as well as administrative abilities of a very high order.

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<sup>47</sup> Now often called an 'associate judge' in Australian courts.

<sup>48</sup> In Australia, there is no formal process for recognising judicial specialisation, such as the 'ticketing' system used in parts of the United Kingdom, and no formal performance appraisal for promotion as in some European countries. However, perceived differences in subject matter, expertise and relevant skills may be taken into account in the allocation process. See Wallace, Mack and Roach Anleu, above n 46, for a fuller discussion of these factors in the allocation process.

<sup>49</sup> All interviews were recorded and transcribed, to enable use of verbatim quotations in this article. Where direct quotations are used, they are verbatim, except where identifying information has been deleted. Some quotes have been edited so that the excerpt used focuses on the specific point being made. All changes are indicated by the use of square brackets ([ ]) or ellipses (...).

## A *Consultation*

Legislative requirements for consultation relating to work allocation focus on consultations between the chief judicial officer and judicial officers or among the judiciary as a whole. Our research finds that, while consultations at that level do occur, in practice, extensive consultation between judicial officers and court staff with workload allocation responsibility is an important part of the allocation process.<sup>50</sup>

Once an Allocating Court Officer ('ACO') has prepared the allocations, there is usually some consultation between the ACO and Allocating Judicial Officer ('AJO'). The nature and extent of that consultation may vary depending on the extent to which the AJO wishes to be involved, as the following quotes from two different AJOs illustrate:

So that's what [the ACO] brings, [s/he] says these are my views, this is what the list is, and I'll say 'look yeah, fair enough'. And [name] might need a break or [name] needs a break or [name] hasn't been there long enough, why isn't [s/he] in court X. (AJO)

I'm given a copy of this and I basically say to them [the ACO] look, I give the tick off saying that's OK for today, for tomorrow, so round about four, quarter past four, I get a list, look at it to make sure I'm happy with it. (AJO)

At the stage of the initial allocation, the AJO may raise particular issues, such as illness or potential conflict of interest, of which the ACO may be unaware, or concerns about the fairness of the allocation. As an ACO in an intermediate court commented:

But the ones who ... are very productive ... they will get more work ... Sometimes we're very much looking a bit at numbers and the Chief will remind me ... 'don't flog the willing horses'. (ACO)

Court staff also consult with judicial officers to whom lists or cases are being allocated. It may take several attempts to settle on a final workload allocation, and a number of versions of the documentation might be necessary. Rosters and lists that indicate proposed allocations may be circulated to obtain feedback and facilitate the identification of possible discrepancies. As one ACO described the process in their court:

The first time it goes out people will say 'well that doesn't work for me, can you please change that?' and so whenever that goes out, within the first week it will be changed about two or three times straight away, and then there'll be rolling changes. (ACO)

Consultation might also occur on a daily basis, as issues of concern to either the ACO or AJO arise:

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<sup>50</sup> To avoid repetition, in this article the court staff person with responsibility for workload allocation is referred to as the 'Allocating Court Officer' and the term 'Allocating Judicial Officer' is used to describe the judicial officer with primary responsibility for making allocations. In very small courts, these roles may be undertaken by the chief judicial officer and the senior court officer, but this is rare.

So, any magistrate issue I've got at all, I'll go to [the AJO] about it, any listing issue I'll go to [her/him] about it, and [s/he'll] do the same thing, and we just talk to each other on and off all throughout the day and so we both know what's going on, and if [s/he] comes across an issue before I do [s/he] will let me into it and vice versa. (ACO)

## **B** *Dealing with Objections to Allocations*

Judicial officers may also raise issues about, or objections to, their allocation at any stage. These may range from concerns about being inconvenienced in some way or overloaded (either absolutely or in comparison with others), to expressions of dislike or preference for particular types of work.<sup>51</sup> The ACO will often be the first in the line to deal with these concerns:

You might get occasionally where a magistrate will come and say 'look this is not right, I'm sick of this' but not — I've got to say it's not often. They may voice some sort of concern to you, or they may voice a concern with [AJO] — you know you work through the issue and you try and address that later on. ... But it doesn't happen that often. (ACO)

In some courts, complaints may be a regular occurrence, as one ACO outlines:

The thing is ... no matter what they've been given, they still complain ... they can complain to me but whether I, I do take some things on board but when it's just a general whinge I go 'oh well, never mind' and off I go, and I do my job. (ACO)

ACOs employ various strategies to deal with objections. One prefers simply not to engage:

I don't get into too much of [a] conversation with them about it — it's the way it is and it's how it has to be 'cos I don't have a choice. (ACO)

On occasions, assertiveness skills are required when dealing with pressure or enquiries from judicial officers, as another ACO explains:

You have to be able to say no and stand your ground — you have to have that, but you could do it with ... courteous [sic] though, you're not rude. (ACO)

Others take quite a conciliatory approach as the following comments from two ACOs illustrate:

[I]f they speak to me I can sort it out, if I know they're unhappy ... even at the very last minute, at one minute to 10, I can make changes. It's when they don't speak to me and I don't know until after the fact that it gets hard. (ACO)

Well, I'd see, you'd see how tired they were, I guess, and you'd look at what they dealt with the day before — how big the list was, then you might compromise or something — 'I can't swap you at the moment because it's all been allocated', but I'll keep it in mind for the rest of the week and try and give [them] some easy courts. (ACO)

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<sup>51</sup> Mack, Wallace and Roach Anleu, above n 6, 105.

Sometimes ACOs might find themselves caught in conflicting expectations about how to handle queries or objections from judicial officers about their workload allocation. One AJO in a higher court suggested that an appropriate response to any such objection would simply be to tell the judge to ‘take it up with the Chief Judge’, on the basis that, ‘they usually don’t come, they end up taking the case’. An ACO endorsed this approach saying:

We will ask them, and the process is for them to approach the Chief Judge and get permission to be removed from the roster. We won’t entertain any of those applications or those requests unless it comes from the Chief Judge. (ACO)

However, such a robust approach is not always feasible as two other ACOs explain:

It is very hard, it’s not cut and dry, just go speak to the Chief, it’s not simple. (ACO)

The registry is the meat in the sandwich ... they are under a lot of pressure because people say no to them, which happens, and then they’re not always in the position where they can say to the judge ‘oh well you go and speak to the Chief’. (ACO)

These ACOs imply that escalating a concern to the chief judicial officer might create more difficulties for them. For example, it may cause the ACO to appear unable to handle their own responsibilities, or to seem rude or uncooperative to a judicial officer with whom they must work regularly. The three chief judicial officers interviewed expressed a willingness to take complaints on these issues, however, it was rare for a judicial officer to escalate a concern to that level, suggesting perhaps that ACOs were generally successful at resolving complaints from judicial officers about their allocations. Court culture may also be a significant factor contributing to a reluctance to take a complaint too far. As one ACO noted:

Well, I think that the culture is that people don’t express unhappiness because it’s a very hard-working culture and it’s a — and a culture of — which is respectful essentially of the role of the [ACO], so people generally don’t complain. (ACO)

In practice, many objections appear to be resolved through a process of negotiation, because ACOs are cognisant that cultivating a good working relationship with the judicial officers in their court will enable them to achieve their goals of having the court’s workload dealt with in a timely fashion, and enlist assistance from judicial officers to deal with unexpected workload issues. As one ACO explains:

[T]here’s no point in having an attitude ‘well, just do your job’ because it’s not like that, you’ve got to be considerate of everybody because ... they get to help you out as well, and you help them out. (ACO)

Organising workload in such a way as to forestall likely objections was a common strategy. One ACO indicates:

Each judge will get a long case at some stage, but I try not to give judges a long case when he [or she] finishes writing that judgment. Give him [or her] another long case, I say, ‘uh, oh, he’s had too much that’s not fair’. (ACO)

Another ACO describes adjusting the timing of the distribution of the final allocation list to minimise opportunities for objections:

I don't put it out until the end of the day ... if I put it out early I am changing it once again, like five times maybe, or six times. (ACO)

### C *Transfer of Cases*

ACOs monitor the progress of each list in each court on a daily basis. This sometimes requires the transfer of cases between different courts to facilitate getting through the work, particularly in high volume magistrates courts with large lists. Managing these transfers requires the ACO to identify spare capacity among other judges or magistrates in the court. However, the ACO has no authority to direct those judicial officers to take on that additional work, and can only request, or attempt to persuade them. As one ACO states:

[T]he fact is it's at their call whether or not they can or can't sit. (ACO)

In higher courts, this situation commonly arises when a scheduled or ongoing trial unexpectedly collapses and an unallocated case is ready to be heard. Some judges might offer assistance in that situation, as one ACO explains:

The judge usually lets me know. If I've got another case I'll say, 'well look I've got this case, when could you take it' and he or she might say, 'well, send the file over and we'll start it ... after I've had a look at it'. (ACO)

In other cases, the ACO may need to initiate the request, as another explains:

[T]here's a not-reached trial there on Tuesday that is awaiting being heard, the Criminal Trial Allocations officers will contact the chambers and say, 'look I understand ... that your civil matter has fallen over or it's settled, would you be available to hear a criminal trial that we have here' — and it's only provided it's suited ... it needs to be by consent all of it ... (ACO)

Asking a judicial officer to take on an extra case or cases is one of the most sensitive, and potentially difficult, aspects of an ACO's role. Judicial officers vary in their capacity or willingness to assist in taking overflow work. This can be because of other workload demands, as one ACO explains:

Because as you say they may have reasons that we're unaware of, they may have outstanding judgments, trials by judge alone that they need to write up and determine and things like that. (ACO)

It may also be the product of specialisation and preferences for different types of work, as an AJO describes:

[O]bviously different personalities provide for different outcomes ... so for us to contact and say we have a civil trial, maybe a judge has a real focus in dealing with matters that relate to criminal aspects, it might be a 70% yes as opposed to a 95 ... (AJO)

An ACO's approach might vary depending on the individual, as these remarks from two ACOs illustrate:

But I pick my magistrates also because I know which ones are more likely to say 'yes'. (ACO)

There are judges I can ask things of that I wouldn't dream of asking other judges. (ACO)

At the same time, the ACO needs to be careful to avoid situations that could cause resentment and affect the working relationships between individual judicial officers, as one indicates:

It is tricky. As a coordinator it doesn't take you long to get to know what each magistrate that you have is capable of, or is willing to do ... So that's something that I have to take into account each time that the magistrates that move a lot of work get a bit resentful of magistrates that are slower because they know that they get more work than the slow magistrate, so you have to ... try and not take advantage of their work ethic. (ACO)

ACOs generally prefer not to risk their working relationship with a judge or magistrate by taking difficulties to the AJO, except where really serious difficulties arise. In addition, although nearly all of the day-to-day management is handled by the AJO and ACO, ultimately, it is the chief judicial officer's authority that will be brought into play, if needed. As one AJO explains:

If it's got to a point where there needs to be some counselling of the magistrate involved, then the Chief would always do that. (AJO)

## **D *Fostering Communication and Working Relationships***

Looking at the work of ACOs and AJOs more broadly, each make important general contributions to fostering communication and working relationships within the court. The capacity within the court for good organisational communication is very important for an effective workload process, as these comments from two ACOs illustrate:

Communication is really important. If you have a good communication between the registry and judiciary, you are really on a good pathway to success. (ACO)

I feel I can talk to them and, hopefully, they feel they can talk to me about issues before they arise. That's the whole point to try and encourage them to talk as soon as something happens, rather than fester on it and get it to me later on when it's almost impossible for me to do something about it. (ACO)

Fostering communication is often done informally. One AJO explains how they promote communication and maintain working relations in their court:

I've made a habit, and we're lucky here I suppose, we all lunch together and so, and that's a really important thing because we talk about things and if you get the vibe that there are issues, then you talk through those. (AJO)

In courts where there may be fewer opportunities for such informal interactions, working relationships might be fostered at more formal events such as organised lunches or evening drinks.

ACOs also pay attention to informal strategies for promoting communication, as one outlines:

I make it a point every, at the end of every lunch time while they're still sitting in their lunch room, OK I can see them just as a matter of course, just to give them the opportunity if any of them want to speak to me about things that might have happened during the morning ... just to touch base with them, just to say 'hello' to one that I might not have caught up with in the morning. So, they call into my office on their way out just to say they're going or to ask me, they might ask me something about the next day. (ACO)

A regular channel of communication and a good working relationship with the chief judicial officer or AJO is particularly valued by ACOs. Such a relationship allows the ACO to discuss problems with candour and enable adjustments to be made, as one explains:

I find here that most judges are very hard working, but what I do notice is some judges are more efficient than others, and that's just a fact that I have to — you become aware of ... basically what I do I monitor that, I might have a word to the [AJO] and say 'Judge Bloggs is, you know, needing a bit of time' that type of thing, 'needs more time, a bit behind with judgments ...'. (ACO)

Methods of fostering good communication in courts were often designed to promote a cooperative workplace culture. One AJO states:

It's become accepted that no-one leaves the court until all the work is allocated and all the work is done, so you might have a huge list but, suddenly, by lunch time, three people are free, in the afternoon it's split between four people. (AJO)

Such a culture could make it much easier for the ACO to undertake necessary consultations, to deal with objections to allocations and especially to manage the sensitive issue of transfer of cases or urgent matters to judicial officers who have already completed their own lists for the day.

The idea of teamwork was often used in consultations, particularly in magistrates courts. These two AJOs in magistrates courts see it as important that the judiciary and court staff work well together, as the following comments illustrate:

Our door is never closed, to the staff area, you make a point of going out again ... if the relationship doesn't work the court doesn't work and you need to foster that very positive atmosphere of being part of an overall entity, being the court. (AJO)

In my view, it really is a partnership. My experience in smaller regions ... is that unless there is harmony, unless there's cooperation between the two sections, then the court's not very productive and it's not a very pleasant place to work at. (AJO)

However, interviews also reveal that the actual working relationship is essentially hierarchical, with court staff assuming primary responsibility for the maintenance and management of those relationships. This can entail considerable emotion



management or emotional labour, a concept that has been explored in other legal contexts.<sup>52</sup>

The importance of this emotion work is illustrated in the approach of one ACO, who is careful to respect the hierarchical nature of the relationship, and exercises considerable tact in discussions with judicial officers about workload allocation:

So that's just a matter of putting cards on the table and asking and trying to sense if they're not real happy and give them an out, it's asking them, not telling them, and being appreciative when they agree, and thanking them the next time you see them, just to keep the relationship as smooth as you can because that's the key to a lot of this stuff — is having good relationships. (ACO)

An ACO in a higher court expresses it this way:

You've got to use your personality very hard in this job. Sometimes you think, 'oh gosh, I don't know if I can do this again,' but you do, yeah. I think you've got to be very diplomatic. (ACO)

Managing these relationships requires court staff to draw heavily on valuable personal qualities and skills. Good communication skills are essential, as one ACO explains:

The listing position is a really important one, you've got to be able to communicate with people definitely and [with] empathy as well, 'cos there's things that happen. (ACO)

To perform a workload allocation role effectively, it was also important that an ACO has the trust and confidence of the judiciary. As one ACO puts it:

They [the judiciary] trust me, they know I'm a very hard worker. (ACO)

ACOs sometimes feel that they experience reactions from judicial officers that are unfair. An ACO describes one such situation:

Well, a magistrate last year, there was pretty much no pleasing this particular magistrate, no matter what I did he wasn't happy about it and he'd come storming in to my office at the end of the day ranting and raving because he didn't feel the day had gone well at all; of course I couldn't do anything about it at that point . . . . (ACO)

The following comment from an AJO in an intermediate court implicitly recognises the demands the hierarchical relationship makes on court staff and the obligation of judicial officers to ameliorate this:

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<sup>52</sup> Arlie Russell Hochschild, *The Managed Heart: Commercialization of Human Feeling* (University of California Press, 1983); Jennifer L Pierce, 'Emotional Labor Among Paralegals' (1999) 561(1) *Annals of the American Academy of Political and Social Science* 127; Kathryn J Lively, 'Reciprocal Emotion Management: Working Together to Maintain Stratification in Private Law Firms' (2000) 27(1) *Work and Occupations* 32; Lloyd C Harris, 'The Emotional Labour of Barristers: An Exploration of Emotional Labour by Status Professionals' (2002) 39(4) *Journal of Management Studies* 553; Sharyn Roach Anleu and Kathy Mack, 'Magistrates' Everyday Work and Emotional Labour' (2005) 32(4) *Journal of Law and Society* 590.

[P]eople when they're a bit pressured can be quite unpleasant and I think it's improved a lot the attitude that judges have towards registry staff. It used to be a very much upstairs downstairs mentality but I think now it's generally better but still an individual stressful situation, they're put under a lot of pressure and we have to protect them. (AJO)

ACOs often display considerable understanding of the stress that judges and magistrates experience. This insight generally enables ACOs to take a reasonably phlegmatic approach when they feel they are treated unfairly. As two ACOs express it:

But it's just mainly little things, magistrates getting stressed and they don't want to hear things ... Magistrates throw it out sometimes saying 'give it to a magistrate who's not doing anything'. You know, take it on the chin. It doesn't upset me. (ACO)

But they can complain — like you have to have a broad shoulder 'cos they do whinge, but that's like anyone. (ACO)

However, such incidents were by no means universal. An ACO in a higher court indicated that complaints rarely occur in their court:

People don't express unhappiness because it's a very hard working culture and it's a culture which is respectful essentially of the role of [ACO] so people generally don't complain. (ACO)

Given the skill set required, it is not surprising that most of the ACOs consulted in this study had been in their position for some time. Most had a background in other roles within the court, such as bench clerk,<sup>53</sup> and, in the higher courts, may have worked in the legal profession. However, there were concerns in some courts that it is not always possible to fill these positions with experienced staff. High turnover of staff in these roles, lack of experience, or undertaking workload allocation responsibilities on a part-time basis, could impinge on the effective and equitable distribution of workload.

## V Principles of Workload Allocation

The critical role that court staff play in workload allocation is clear from this research. They juggle competing demands in a very pressurised environment to ensure that workload is allocated to judicial officers in an efficient and fair way. While there are no explicit statements of values or criteria to guide the way work should be allocated to judicial officers, whether in legislation or internal guidelines, the role of court staff is heavily impacted by important, but implicit, principles. Analysis of the interview data revealed two particular values that strongly inform allocation processes: neutral caseload allocation and judicial independence. Although these were rarely expressly articulated, it was clear that these principles were influential in a number of ways.

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<sup>53</sup> A member of the court staff who sits in court and assists the judicial officer with paperwork and other details during court hearing.

## A *Neutral Case Allocation*

The principle of neutral case allocation ordinarily requires that cases will be randomly distributed to judicial officers, in an essentially automatic process, with safeguards designed to ensure that neither the government, the judiciary, court staff nor litigants can manipulate the system to direct a particular case to a specific judicial officer.<sup>54</sup> At the very least, the principle requires that objective criteria for caseload allocation (such as the need to avoid conflict of interest) be expressly articulated, with clear rules for any necessary reallocation.<sup>55</sup> Such a process offers two advantages. First, it is a way of reinforcing public confidence in the impartiality of judicial decisions by ensuring that the outcome of cases cannot be manipulated by assigning a case to a particular judge.<sup>56</sup> Second, it promotes fairness in distribution of work; so that, over time, all judicial officers have an equal probability of receiving more or less difficult or more or less interesting cases.<sup>57</sup>

The European concept of the ‘natural judge’<sup>58</sup> or the ‘lawful judge’<sup>59</sup> enshrines this principle, generally in statute or constitutional law that specifies a particular transparent and random process by which an individual judge is selected to hear a particular matter and may not be removed from the case except in very limited circumstances. The principle is designed to provide guarantees of independence and impartiality. Neutral case allocation processes in Australian courts are neither so elaborate, nor contained in legislation. They are not committed to writing in any of the courts studied in this research. Nevertheless it appears that close attention is paid to the principle. In particular, courts have a number of strategies to limit the capacity for legal representatives to manipulate the allocation of their cases to (or away from) a specific judicial officer.

The greatest opportunity for ‘judge shopping’ occurs at the point of direct assignment of a particular case to a specific judicial officer. However, the risk is minimised because direct allocation usually only occurs late in the process, even at the last minute. The decision depends primarily on the availability of the judicial officer in light of their other work. As one ACO in a higher court explains:

We don’t tell them [members of the legal profession] who it’s been listed before until the day or the day before when it comes out on the list ... they often want to know and we don’t tell them because we don’t want to encourage forum shopping. (ACO)

ACOs do come under pressure, mainly from lawyers, to manipulate listings, but they are strongly committed to resisting these attempts. One ACO confirms

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<sup>54</sup> Petra Butler, ‘The Assignment of Cases to Judges’ (2003) 1 *New Zealand Journal of Public and International Law* 83, 108, 110, 112.

<sup>55</sup> *Ibid.*

<sup>56</sup> Sage, Wright and Morris, above n 6; David C Steelman and James R James, *Assuring Randomness and Security in the Individual Calendar Assignment of Cases to Judges in the Cuyahoga County Court of Common Pleas* (National Center for State Courts, 1988).

<sup>57</sup> Sage, Wright and Morris, above n 6; Steelman and James, above n 56.

<sup>58</sup> Langbroek and Fabri, above n 2.

<sup>59</sup> Butler, above n 54.

that they respond to requests to list matters before particular judges in the following terms:

Ah yes and we just say ‘ah nah’ and in fact I get a bit annoyed. We’re pretty careful on the forum shopping, they can’t do that, that doesn’t happen at all, they might try but they only try once. (ACO)

This also occurs in magistrates courts, as another ACO confirms:

Magistrate-shopping has been going on for years and I don’t think you’re ever, ever, going to get away from that. I think some of the more junior staff can be intimidated to a degree to do something that the solicitor wants but I think the more experienced you get the more you can push back a bit. (ACO)

However, the interests of efficient case disposal might incline an ACO to take account of the reactions of legal practitioners to particular judicial officers, as another ACO explains:

I must admit that I do take into account the type of magistrate, and ... some people don’t like going before certain ones and ... I don’t think there’s a point in me putting a case before a certain magistrate where it’s going to be an adjournment application that he’ll grant because that means I’m not meeting my 85% target [for disposal of matters], so I’d think very carefully before I’d put a magistrate in that situation for my sake. (ACO)

There is no suggestion of impropriety in this allocation decision, though it does indicate that the process or standard for granting adjournments can be an avenue for attempts to manipulate case allocation. However, seeking an adjournment carries risks to the party, and intentions to seek adjournments may not always be carried out or succeed. Even if an adjournment is granted, and it may not be, it is unknown which judicial officer will preside over the case on the new date, so that any hoped-for benefit of being before a different judicial officer may not be realised. It also illustrates an ongoing tension between the efficiency imperative and the desire to achieve a fair distribution of caseload, which largely falls to court staff to resolve.<sup>60</sup>

A potential risk to the principle of neutral case allocation can occur when a case is allocated directly to a specific judicial officer outside of the routine allocation processes. Although the courts studied generally use a master calendar system, a small number of cases are directly allocated to a judicial officer at an early stage. Cases that might be allocated in this way include more complex or lengthy matters, where early allocation to an experienced judicial officer is seen as desirable to ensure the most effective case management and pre-trial preparation. As one judicial officer with workload allocation responsibilities explains:

There would be a small number of cases of pre-allocating trials to judges, for example in our sex list we will allocate cases, pre-allocate those cases, complex cases that require management of a style different to that managed in the general list, a much more personal and detailed management will sometimes be pre-allocated, so complex, long, sex, new points of law type cases ... . (AJO)

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<sup>60</sup> Mack, Wallace and Roach Anleu, above n 6, 132–5.

High profile or particularly controversial cases may also be directly allocated, as a member of the court staff in one court outlines:

Ah, you've got certain, er, contentious matters and, for example, [a matter involving a high profile defendant] and it's the sort of matter that has to go before the right magistrate ... it's just a judgment call that somebody has to make. Probably the Chief Magistrate at some stage. (ACO)

Where a case is specifically allocated, the AJO, or chief judicial officer (where that is not the same person) will usually select the judicial officer to take the case, often after some degree of consultation with the ACO and the judicial officer concerned. Such non-routine allocation can be consistent with the principle of neutral allocation as long as the reasons for the allocation are transparent and demonstrably objective. Our research suggests that, while this does appear to be the case, those reasons are generally not communicated beyond the judicial officers and court staff immediately involved in the allocation.

## **B** *Judicial Independence*

Impartial decision-making is an essential requirement for the proper functioning of the judiciary in a society governed by the rule of law.<sup>61</sup> An independent judiciary is a central mechanism to support this impartiality. Independent judicial officers can decide each case on its merits, without fear or favour, thereby enhancing the legitimacy of the court system generally, as well as protecting the parties appearing before the court in each case.<sup>62</sup>

Judicial independence is usually understood as independence from the external control of the executive branch of government; it also encompasses freedom from internal control by other judicial officers, including the chief judicial officer.<sup>63</sup> At the same time, it is well recognised that good judicial administration is also essential for independent, impartial and legitimate exercises of judicial authority.<sup>64</sup> Any administrative process to allocate judicial workload needs to ensure that it does not impinge on the actual or perceived independence of the judicial function.<sup>65</sup> There are ongoing debates about approaches to court governance and management that strike an appropriate balance between

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<sup>61</sup> *Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region* (1995), adopted in its final form at the 7<sup>th</sup> Conference of Chief Justices of Asia and the Pacific in August 1997, art 4; Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997); *R v Moss; Ex parte Mancini* (1982) 29 SASR 385, 388; Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge University Press, 2<sup>nd</sup> ed, 2013); Kathy Mack and Sharyn Roach Anleu, 'The Security of Tenure of Australian Magistrates' (2006) 30(2) *Melbourne University Law Review* 370, 372–4.

<sup>62</sup> Shetreet and Turenne, above n 61; Mack and Roach Anleu, above n 61.

<sup>63</sup> Shetreet and Turenne, above n 61; Mack and Roach Anleu, above n 61.

<sup>64</sup> Kathy Mack and Sharyn Roach Anleu, 'The Administrative Authority of Chief Judicial Officers in Australia' (2004) 8 *Newcastle Law Review* 1.

<sup>65</sup> Butler, above n 54, 85–7; David C Steelman and Marco Fabri, 'Can an Italian Court Use the American Approach to Delay Reduction?' (2008) 29(1) *The Justice System Journal* 1, 13–15.

independence and accountability.<sup>66</sup> The research findings demonstrate that judicial officers and court staff are mindful of the potential tension between these principles.

Although judicial independence was rarely raised expressly as an issue in relation to workload allocation in the interviews, examination of allocation processes reveals that it is a strong influence on the nature of the working relationships between judicial officers and court staff involved in workload allocation. It is reflected, in part, in the extent to which their relationship is perceived as hierarchical, and in concerns expressed in some courts to ensure a substantial role for the judiciary in work allocation.

The following statements from ACOs at all court levels reveal a strong awareness of the hierarchical nature of the relative roles of court staff and the judiciary:

It's very much about supporting what they [judges] need to run their court. So I don't ever see our roles as challenging that — I see it more as a support for that. (ACO)

I would say I was a housekeeper ... but one treated with respect for that role. (ACO)

See the thing is with judicial officers they are different — they're different to us. ... they are judicial officers, they are up here compared to what we are, and basically, well we're just the little fish ... all the little fish do the work and then they do the other part of it, so it's a hard thing to explain really. (ACO)

However, while accepting a clear demarcation in roles, not all ACOs see their role as secondary, as the following quote from an ACO in a magistrates court illustrates:

My role in terms of magistrates is simply to allocate them work and deal with any issues that come up from time to time if it's appropriate for me to deal with. Essentially it's an administrative function that I perform where I allocate them work and as independent judicial officers they sit and dispose of that work in a timely manner. (ACO)

The importance of judicial independence is reflected in concerns to ensure a substantial degree of judicial involvement in workload allocation in some jurisdictions. As one judicial officer explained:

I think ... we're all very conscious that we want to control the list, the magistrates. We don't want the registry staff to ever say 'right, this is how it's going to be, you have to do that'. (AJO)

However, there was general support for the view expressed by another interviewee that the principle of judicial independence did not necessarily require that

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<sup>66</sup> See, eg, Opeskin, above n 5, 492; John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: A Managerial Perspective* (Australasian Institute of Judicial Administration, 2004); Elizabeth Handsley, 'Issues Paper on Judicial Accountability' (2001) 10 *Journal of Judicial Administration* 180; Special Issue 'Evaluating Judicial Performance' *Oñati Socio-Legal Series* (forthcoming) <<http://opo.iisj.net/index.php/osls/index>>.

allocation work of an administrative nature must be done by a judicial officer; it could be done, perhaps better, by 'a senior administrator or a senior lawyer with administrative skills'.

The process of work allocation can present occasions of apparent tension between the managerial needs of court administration and the principles of judicial independence. For example, as one AJO explains, it is regarded as inappropriate for a judicial officer with workload responsibilities to venture into counselling another judge or magistrate about their work practices:

It's not for me to determine because it, they are independent judicial officers so I'm not going to say to them 'you've got to speed up' because they would rightly say to me 'well you can ...' ... so you respect each person. (AJO)

This attitude, along with the absence of formal mechanisms in most courts for providing feedback to judicial officers,<sup>67</sup> results in a situation where concerns about judicial attitudes and approaches to work have to be addressed delicately, as another judicial officer indicates:

I am firmly of the view that it's not for me to say to somebody 'pick up your act', what my job is is to say 'look if you're having difficulties tell me what the difficulties are, and how do I ... make sure that we can overcome the issues'. (AJO)

This comment suggests the potential for the principle of judicial independence to be misused as a shield for the individual judicial officer, rather than as a guarantee of the court's impartiality. This could occur, for example, where individual judicial officers declined to cooperate with particular work processes, such as taking transfers of cases from other lists. The solution was generally seen as the responsibility of the chief judicial officer, as one judge states:

The fact is that it's the work of the court and has to be allocated and the question is entrenching a fair mechanism by which people understand this is the system and this is what we expect and I think only the Chief can do that. (AJO)

This comment clearly and succinctly sums up the challenges of work allocation in the courts and the recognition that the ultimate responsibility, as envisaged by legislation, is with the head of the jurisdiction.

## VI Conclusion

The empirical research reported in this article reveals important aspects of judicial work allocation not visible through an analysis of governing legislation or from available statistical data such as the Reports on Government Services issued by the Productivity Commission.<sup>68</sup> It provides an understanding of the 'dynamic characteristics of the judicial system' and enables 'future policies affecting the

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<sup>67</sup> Marilyn Warren, 'Enhancing Our Self-perception: 360-degree Feedback for Judicial Officers' (2011) 21 *Journal of Judicial Administration* 3; Law Reform Commission of Western Australia, *Complaints Against Judiciary*, Final Report, Project 102 (2013).

<sup>68</sup> Steering Committee for the Review of Government Service Provision, above n 35, ch 7.

system ... to be empirically well grounded'.<sup>69</sup> By analysing how the judicial workforce is deployed, this research can inform policies concerned with 'the supply of judicial labour' including projections of court workloads.<sup>70</sup>

The findings demonstrate that, in practice, skilled court staff play an important role in the process of allocating workload to judicial officers. Working with judicial officers, including the chief judicial officer, they undertake wide consultation to make work allocations to judicial officers, deal with objections, and facilitate transfers of cases. In doing so, they deploy a range of personal qualities and skills to promote organisational communication and working relationships. This is a consistent practice at all levels of court, even though the formal authority for allocating work to judicial officers is vested in the head of the jurisdiction. In practice, the chief judicial officer's role is focused on: the initial allocation of judicial officers to courts, divisions or locations; dealing with specific problems that cannot be resolved by negotiation at a lower level; and the occasional need for a specific case allocation.

ACOs demonstrate considerable understanding of, and respect for, the nature of the work and the demands of the workload of judicial officers. They must exercise a great deal of tact and display considerable deference to judicial officers. These roles require experienced staff, with exceptional organisational and communication skills, a sound understanding of the court's work and an ability to negotiate sometimes complex working relationships within the court hierarchy.

Nonetheless, there are clear limits to the roles of court staff and the authority that they can exercise in allocating work. Although neutral case allocation and judicial independence are not expressly identified as requirements in legislation or court documentation, and were rarely explicitly mentioned in the interviews, they have considerable impact on the actual practice of workload allocation.

When a judicial officer is uncooperative in some way, court staff are quite clear that they have no authority to direct a judicial officer. This challenge is usually dealt with informally through negotiation and the implementation of a range of strategies to foster communication and good will, rather than direct confrontation. Even in situations where the chief judicial officer has indicated that they will provide support, court staff may be reluctant to draw directly on this authority.

Examining the actual practices of court staff and those members of the judiciary involved in allocating workload reveals the potentially conflicting values, goals and demands embedded within that process. It might be thought that the interests of transparency and the principle of judicial independence require that the implicit principles governing the workload allocation be more clearly articulated, or that the powers of chief judicial officers, and the responsibilities of court staff, in relation to that process, be more clearly defined or even enshrined in legislation.

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<sup>69</sup> Opeskin, above n 5, 515.

<sup>70</sup> Ibid 516; Brian Opeskin and Nick Parr, 'Population, Crime and Courts: Demographic Projections of the Future Workload of the New South Wales Magistracy' (2014) 23 *Journal of Judicial Administration* 233.



However, such refinement, especially if legislated, would reduce the flexibility inherent in the present system that allows courts to prioritise some goals or values over others, to meet the needs of particular volumes and types of caseload. A more rigid system could render courts more vulnerable to executive interference to monitor or even challenge any apparent deviation from prescribed practices. Any clarification or formal development of the principles, roles and responsibility for work allocation in the courts needs to begin with an understanding of the significant role currently played by court staff in that process and be undertaken in consultation with court staff and the judiciary.

## **Appendix: Research Methodology**

This article draws on data from material developed on a national basis as part of the Magistrates Research Project and Judicial Research Project, primarily consultations with court staff and judicial officers involved in workload allocation. Interviews were conducted in four magistrates courts in 2007 and 2008, in one higher court in 2008 and in another higher court and two intermediate courts in 2010. To provide comparative information on aspects of workload allocation, these included the three jurisdictions that are industry partners to the research and one other jurisdiction in which magistrates and/or court staff agreed to be interviewed. In total, 11 judicial officers and 14 court officers or court administrators were formally interviewed. Interviews were embedded in a longer term process of formal and informal consultation, over several years, with a number of courts. This process included lengthy consultations with court staff and judicial officers by phone and in meetings in various contexts, to confirm and validate the data, including the provision of feedback on a draft report. The interviews and consultations, and all stages of the research, were approved by the Flinders University Social and Behavioural Research Ethics Committee.

Each interview was conducted by two researchers, usually Anne Wallace and Sharyn Roach Anleu; five were conducted by Anne Wallace and Kathy Mack and three were conducted by Sharyn Roach Anleu and Kathy Mack. Usually, interviewees were alone: on one occasion an additional interviewee was present, and one interview involved four interviewees at once. Most interviews lasted between one and one-and-a-half hours.

A semi-structured format was used for the interviews, with questions based around a series of key issues that were identified from preliminary consultations with courts that were industry partners in the research. This structure enabled the researchers to gather similar information from all courts and to enable comparison of practices and attitudes across the interviewees. Interview questions covered: background information about the court context, including the volume and nature of work undertaken and data available that describes this; specific details about the process and method of workload allocation; and specific inquiries about principles, values or goals in connection with workload allocation. Interview questions were open-ended, allowing interviewees to discuss a full range of issues from their own perspective and in their own words, based on their experiences and knowledge.

All interviews were recorded and transcribed, to enable use of verbatim quotations in this article. To maintain confidentiality, transcriptions were completed in-house by project staff. To maximise accuracy, transcripts were checked and corrected by one or both interviewers against the audio record of their notes. Where direct quotations are used, they are verbatim, except where identifying information has been deleted. Some quotes have been edited so that the excerpt used focusses on the specific point being made. These changes are indicated by the use of square brackets ([ ]) or ellipses (...).

Transcripts were then read several times in order to identify emerging themes and patterns.<sup>71</sup> Four broad themes were identified. The responses from interviewees in the magistrates courts were then coded into these themes: those that referred to *principles* underlying workload allocation, those describing the allocation *process*, those related to the *context* in which allocation occurs (for example, size, location of court, types of work), and a fourth category to record *miscellaneous* information outside those categories that might have relevance to other aspects of the research. Each theme contained various subthemes that were compared across the three jurisdictions generating a large spreadsheet matrix which summarised similarities and differences. Interview transcripts from the small number of intermediate and higher court interviews were compared with these summaries at a later stage of the research.

As well as the interview data, the researchers were also provided with written material, such as rosters or statistical data kept by the courts, which were relevant to the research question. Further consultations were undertaken with chief magistrates and key administrators at three magistrates courts in 2010 after distribution of a draft report, as well as consultations with magistrates in these three courts in 2010, after a summary of the draft report was distributed.

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<sup>71</sup> John Lofland et al, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (Thomson Wadsworth, 4<sup>th</sup> ed, 2006); Strauss and Corbin, above n 41.