THE HIGH COST OF JUDGES: RECONSIDERING JUDICIAL PENSIONS AND RETIREMENT IN AN AGEING POPULATION

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In recent years there has been unprecedented concern about the impact of population change on Australian society. The concerns come from different quarters. Commentators have variously remarked that fertility is too low, immigration is too high, the population is ageing too rapidly, and that uneven spatial distribution is placing too great a burden on the infrastructure of already crowded cities. As further evidence of the growing interest in population dynamics, in 2010 the Australian Government created a new office of the Minister for Sustainable Population to help guide the development of policies to meet Australia's future population needs.

These are important issues in a national population debate, yet demographic change also affects specific workforces in specific ways, and this has led to a new interest in workforce planning.[1] This article examines how demographic change is likely to affect one aspect of the Australian judicial system in the future, namely, the cost of judges. This is an important issue because judges — while clearly essential to maintaining the rule of law in a liberal democracy — are an expensive human resource. A better understanding of the impact of population dynamics on the cost of judges can promote transparency and accountability in the expenditure of public money and inform policy choices about pension arrangements and retirement ages. It may also help in assessing the costs and benefits of alternative dispute resolution mechanisms as substitutes for court-based adjudication.

The principal argument of this article is that substantial increases in the life expectancy of Australians over the next 40–50 years will impose a very significant strain on the current system by which judges are remunerated. This is because the pension payable to a judge during his or her retirement, together with the pension payable to the judge's surviving spouse, will continue to rise substantially, while the

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1 Jacob S Siegel, *Applied Demography: Applications to Business, Government, Law, and Public Policy* (Academic Press, 2002) 330–95; Julie Sloan, *The Workforce Planning Imperative* (Julie Sloan Management Pty Ltd, 2010).

judicial service that the judge can render is constrained by mandatory retirement at 70 or 72 years of age. To illustrate the extent of the future challenges, the Australian Government Actuary estimated that the unfunded liability of all federal judges under the current pension scheme amounted to $586 million at 30 June 2008 — an increase of 23 per cent on three years earlier.[2] This article advocates three changes to legal policy that will help address the long term pressures of demographic change, namely, increasing the maximum retirement age of judges, increasing the minimum age at which judges qualify for the judicial pension, and increasing the minimum length of service required to qualify for the judicial pension.

The article focuses on the cost of judges in the federal judicial system and frequently refers to the experience of the Federal Court of Australia. The Federal Court is a useful example because it is a relatively large court comprising about 50 judges, it operates nationally, and data about its operations are readily available. However, the conclusions apply to all Australian courts that have a similar remuneration framework. Arrangements for the remuneration of judges are broadly similar across all Australian jurisdictions except Tasmania, but important variations will be highlighted if they affect the extent to which the arguments can be generalised beyond the federal system.

The article is structured as follows. Part 1 examines the demographic events that make up the 'life course' of a typical judge, with particular focus on appointment to judicial office and termination of that office. Part 2 considers the principal financial costs associated with a judge's appointment, namely, salary, judicial pension and spousal pension. Part 3 then analyses how the three elements of cost interact with the demographic events that constitute a judge's life course. This is done, first, by focussing on three paradigms that represent potential best-case and worst-case scenarios and, secondly, by developing two metrics to quantify how the cost of judges changes under different assumptions about the age of appointment and termination. Part 4 charts the remarkable rise in the life expectancy of Australians over the past 100 years and discusses the further improvements in life expectancy that are projected over the next 50 years. The impact of these changes on the cost of judges is then examined. Part 5 considers the implications of the analysis for reform of law and policy. The article concludes by making the three recommendations for change outlined above.

1 A JUDGE'S LIFE COURSE

A proper understanding of the cost of judges requires knowledge about those events in the personal and professional life of a judge that have a bearing on salaries and pensions. These events form part of a judge's life course, and a demographic analysis of those events would address issues of timing (when do they occur?), sequencing (in what order do they occur?), and quantum (how many events occur?).[3]

For present purposes, the most important life course events are birth, admission to legal practice, taking silk, judicial appointment, judicial termination, and death. Not all events happen to every judicial appointee. For example, while a majority of judges

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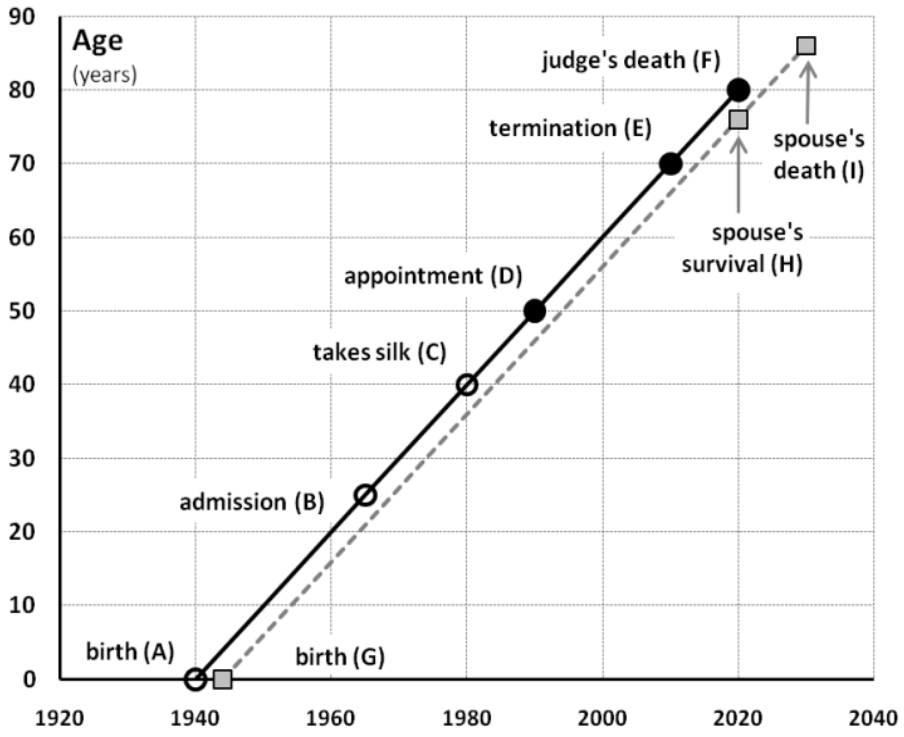
2 Australian Government Actuary, *The Judge's Pension Scheme: A Report on the Long Term Costs, Carried Out by the Australian Government Actuary Using Data to 30 June 2008* (Australian Government Actuary, 2008) [7.2].

3 Francesco Billari, 'Life Course Analysis' in Paul Demeny and Geoffrey McNicoll (eds), *Encyclopedia of Population* (Macmillan Reference, 2003) 588, 588.

have had their senior status at the bar recognised by taking silk prior to their elevation to the bench, this is not universally true. Conversely, some events may happen more than once: a sitting judge may be appointed to a higher court, resulting in two appointments and two terminations. Moreover, some events may occur simultaneously: a judge who dies in office brings together termination and death in a single point in time.

The relationship between the life course events can be visualised using a Lexis diagram, which is the invention of the German actuary and statistician, Wilhelm Lexis (1837–1914). The horizontal axis records calendar time in years and the vertical axis records an individual's age in years. Each judge has a lifeline represented by a diagonal that rises to the north-east at 45°. Figure 1 shows the lifeline of a hypothetical judge (solid line AF) who was born in 1940, was admitted to legal practice in 1965 at age 25, took silk in 1980 at age 40, was appointed a judge in 1990 at age 50, retired in 2010 at age 70, and (prospectively) dies in 2020 at age 80. The Lexis diagram can be populated with other judicial lifelines, representing the demographic experience of a whole court or an entire nation, thus summarising the life course history of a population of judges.

Figure 1:
Lexis diagram showing a typical life course of a male judge and his spouse



There is a second individual — the judge's spouse — who also has an impact on the costs associated with a judge's appointment because of pension entitlements that accrue to a surviving spouse on a judge's death. Figure 1 also illustrates the lifeline of the judge's spouse (dashed line GI), on the assumption that the judge is a male, his female spouse is several years younger than he is, and she lives several years longer than he does. Clearly this is not necessarily true in an individual case, but it is true on a population level and for this reason such assumptions underpin the Australian Government Actuary's estimates of the unfunded liability of the federal judges' pension scheme.[4] The combined effect of the age differential at marriage and the greater longevity of females is that a male judge is likely to be survived by his spouse by approximately 10 years, represented by the interval HI in Figure 1.

Judicial appointments

Judicial systems across the world provide starkly different models for the selection and appointment of judges — from popular election, to career appointment within a judicial bureaucracy, to selection by an independent commission.[5] In Australia, s 72 of the *Constitution* dictates that federal judges are appointed by the executive government, and in practice Cabinet usually decides on appointments following a recommendation by the Commonwealth Attorney-General.[6] The *Constitution* imposes no other requirements for judicial appointment, remaining silent both as to the process of appointment and the criteria for eligibility. This constitutional vacuum is filled to a small degree by legislative eligibility criteria that pertain to each court.[7] Historically, the executive made no attempt to develop standardised selection criteria for judges: appointment was said to be based on 'merit' but the concept of merit was left largely unarticulated.[8] It is only recently that the Australian Government has formulated a list of requisite qualities for appointment as a federal judge, which addresses its conception of merit.[9] Several refinements have been introduced to the appointments process in recent years in relation to consultation with stakeholders, advertising and interviews, but the essence of the process has not changed to any significant degree.

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4 Australian Government Actuary, above n 2, [5.14].

5 George Winterton, 'Appointment of Federal Judges in Australia' (1987) 16 *Melbourne University Law Review* 185, 192–211; Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power* (University of Toronto Press, 2006).

6 A R Blackshield, 'The Appointment and Removal of Federal Judges' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 400, 426; James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004), 63–5; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) [3.6]–[3.19].

7 *High Court of Australia Act 1979* (Cth) ss 6–7; *Federal Court of Australia Act 1976* (Cth) s 6(1); *Family Law Act 1975* (Cth) s 22; *Federal Magistrates Act 1999* (Cth) sch 1 item 1.

8 J W Shaw, 'On the Appointment of Judges' (2000) 74 *Australian Law Journal* 461, 462; Sharyn Roach Anleu and Kathy Mack, 'Judicial Appointment and the Skills for Judicial Office' (2005) 15 *Journal of Judicial Administration* 37, 37–40; Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295, 297–9.

9 Attorney-General's Department, Requisite Qualities for Appointment (5 June 2009) Australian Government Attorney-General's Department <http://www.ag.gov.au>; Senate Legal and Constitutional Affairs References Committee, above n 6, [3.15].

This leaves 'virtually unfettered executive discretion' to the government of the day as to who is chosen and what characteristics they possess.[10]

Two demographic characteristics that have special relevance to this study are sex and age, but the extent to which these are considered during the selection process is not publicly known because the process is 'opaque and secretive'.[11] Neither characteristic is mentioned in the list of requisite qualities of federal judges and there have been few empirical studies of these characteristics.[12] As to the sex of appointees, judicial office has traditionally been a male dominated affair — the product of 'discriminatory, systematic and structural practices in the legal profession' that prevent female advocates from getting the same opportunities as male advocates.[13] Australia's first female judge (Dame Roma Mitchell) was appointed to the Supreme Court of South Australia in 1965. Other noteworthy 'firsts' in the federal judicial system were the appointment of Justice Elizabeth Evatt as the first woman to preside over a federal court (the Family Court of Australia) in 1975; the appointment of Justice Mary Gaudron as the first female justice of the High Court in 1987; and the appointment of Justice Deirdre O'Connor as the first female judge of the Federal Court in 1990. Today about one third of all Australian judges are female, despite the fact that women comprise more than half those who graduate from law schools.[14]

The representation of females in the judiciary varies significantly by court and jurisdiction: generally, the higher up the court hierarchy, the lower the proportion of females. According to gender statistics collected by the Australasian Institute of Judicial Administration (AIJA) as at 31 March 2010, 32 per cent of Australia's 999 judges were female, but only 24 per cent of judges in the state Supreme Courts or Courts of Appeal, and only 16 per cent of judges in the Federal Court, were female.[15] As discussed below, the appointment of females has a measureable impact on the cost of judges because of their different demographic characteristics.

As to the characteristic of age, most judges are appointed when they are 40 to 60 years old, with appointment in the 50s being the most common. This age band is relatively narrow because of significant constraints at both ends of the age spectrum. At the lower end, most lawyers do not gain their law degrees until they are at least 25

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10 Ronald Sackville, 'The Judicial Appointments Process in Australia: Towards Independence and Accountability' (2007) 16 *Journal of Judicial Administration* 125, 137.

11 Elizabeth Handsley, '"The Judicial Whisper Goes Around": Appointment of Judicial Officers in Australia' in Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power* (University of Toronto Press, 2006) 122, 135.

12 See Andrew Goldsmith, 'A Profile of the Federal Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 365, 373–6.

13 Michael McHugh, 'Women Justices for the High Court' (Speech delivered at the Western Australia Law Society, Perth, 27 October 2004). See also Law Society of New South Wales, *After Ada: A New Precedent for Women in Law* (Law Society of New South Wales, 2002); Barbara Hamilton, 'The Law Council of Australia Policy 2001 on the Process of Judicial Appointments: Any Good News for Future *Female* Judicial Appointees?' (2001) 1 *Queensland University of Technology Law and Justice Journal* 223.

14 For an historical account, see David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) 83–90.

15 Australasian Institute of Judicial Administration, *Judges and Magistrates (% of women)* (3 March 2011) <http://www.aija.org.au/gender-statistics.html>.

years of age. To this must be added the many years of legal practice necessary to ensure that appointees have the breadth and depth of legal experience to discharge their judicial responsibilities. Under federal legislation it is a prerequisite of appointment to any federal court that the individual has been enrolled as a legal practitioner for at least five years.[16] While this is the statutory minimum, it falls far short of what is generally considered to be desirable. Most judges are drawn from the practising bar and a large proportion of them have taken silk prior to judicial appointment. Although jurisdictions differ as to number of years a barrister must have been in active practice before taking silk, in most states and territories 10 years is regarded as a minimum.[17] While some federal judges were appointed when they were less than 40 years of age, this is a rare occurrence.[18] Of the 129 appointments made to the Federal Court between its inception and 30 June 2010, only five (3.9 per cent) have been under 40 years of age.

At the upper end of the age range, there is a constitutional bar to appointing anyone as a federal judge if they have attained 70 years of age.[19] In addition to this, federal pension arrangements make it less attractive for a person to accept federal judicial office beyond 60 years of age. This is because no judicial pension is payable unless a judge has rendered six years of service, and a reduced pension is payable to those who have rendered between 6 and 10 years service. Only those who have been appointed before attaining 60 years of age are able to fulfil the 10 year service requirement prior to reaching the age of 70.

Judicial terminations

The other life course event of great significance to the cost of judges is the age and manner in which a judicial appointment is terminated. The expression 'termination' will be used here to describe all the circumstances in which a judicial appointment is brought to an end. There are four such events: voluntary resignation, reaching a mandatory retirement age, death in office, or removal from office.

The first mode — termination at the initiative of the judge through voluntary resignation — is of great practical significance. Resignation may occur for many reasons, including a desire to return to the Bar, acceptance of a judicial appointment to another court, ill health, or a wish for early retirement. Voluntary resignation is undoubtedly influenced by financial incentives, including parameters of the judicial pension scheme, but it would be inaccurate to suggest that judges act solely as wealth maximisers in making retirement decisions.[20]

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16 *High Court of Australia Act 1979* (Cth) s 7; *Federal Court of Australia Act 1976* (Cth) s 6; *Family Law Act 1975* (Cth) s 22; *Federal Magistrates Act 1999* (Cth) sch 1 item 1.

17 In Queensland, 12 years is the norm: Bar Association of Queensland, *Criteria for Appointment as Senior Counsel* <http://www.qldbar.asn.au/index.php>.

18 A notable example was the appointment of H V Evatt as a justice of the High Court in 1930, at the age of 36: see Peter Bayne, 'Evatt, Herbert Vere' in Michael Coper, Tony Blackshield and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 251.

19 *Australian Constitution* s 72.

20 See Ross M Stolzenberg and James Lindgren, 'Retirement and Death in Office of US Supreme Court Justices' (2010) 47 *Demography* 269, 292, in which the authors argue that the timing of retirement of US Supreme Court justices is in service to the value of reciprocity rather than economic self-interest.

Termination by operation of law is also important for this study. A judge ceases to hold office when he or she reaches the mandatory retirement age, which some judges sardonically call the age of 'statutory senility'. This is 70 years of age for High Court justices, and an age no greater than 70 years, as prescribed by Parliament, for other federal judges. A mandatory retirement age of 70 or 72 years can also be found in the constitutions or statutes of all Australian states and territories.

The other two grounds of termination are rare events and will not be considered in detail in this article. A judicial appointment is terminated if a judge dies in office. This has cost implications because it affects the pension payable to a judge's spouse and the benefit payable in respect of the judge's children.[21] Termination may also occur at the initiative of the state through the process of removal. The grounds of removal are highly restrictive due to the overarching need to preserve judicial independence by isolating the judiciary from executive interference. Under s 72(ii) of the *Australian Constitution*, the only grounds for removal of a federal judge are 'proved misbehaviour or incapacity'. No federal judge has been removed from office under that provision, and removal of judges under equivalent provisions in the states and territories has been rare.[22] This mode of removal also has a potential bearing on the cost of judges because federal law prohibits the payment of a judicial pension to a judge who has been removed from office, unless the Governor-General directs otherwise.[23]

2 PRINCIPAL COMPONENTS OF THE COST OF JUDGES

The three major components of the cost of judges are: (a) the salaries paid to judges during their working lives on the bench; (b) the judicial pensions paid to judges from the time their commissions have terminated until their deaths; and (c) the spousal pensions paid to their surviving spouses from the time of a judge's death until the death of the spouse.

In identifying these items as the major cost components, this article abstracts from some of the details that affect the entitlements of judges in specific circumstances. For example, no account is taken of allowances to which judges might be entitled by reason of travel or long service. Nor is account taken of taxation arrangements such as the superannuation guarantee charge, or the entitlements of dependent children upon the death of a judge. The purpose of these simplifications is to facilitate a deeper understanding of the impact of demographic change on the cost of judges, without the confounding effects of minor real world complications.

The salary and pension costs analysed in this article are just a portion of the total expenses of running a court. There are costs associated with operating buildings, libraries, registries, staff, security, information technology, and so on. Nevertheless, the costs attributable to the judges themselves are a significant component of total costs. For example, the operating expenses of the Federal Court in 2009–10 amounted to $114.2 million, of which the cost of judges (salaries and pensions) accounted for

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21 *Judges' Pensions Act 1968* (Cth) ss 7, 9.

22 The more recent examples are reviewed in Enid Campbell and H P Lee, *The Australian Judiciary* (Cambridge University Press, 2001), 101–31.

23 *Judges' Pensions Act 1968* (Cth) s 17.

23.5 per cent ($26.8 million).[24] While it is not appropriate to extrapolate linearly from the experience of the Federal Court, it is clear that remuneration of the entire Australian judiciary involves a very large expenditure of public money.

Judicial salaries

Institutional arrangements for paying judicial salaries have been a flashpoint between governments and courts throughout history, and they remain an important test of the vigour of judicial independence in any judicial system. Section 72 of the *Australian Constitution* states that federal judges shall receive 'such remuneration as the Parliament may fix', subject to the proviso that the remuneration shall not be diminished during a judge's continuance in office. The *Constitution* thus requires legislative involvement in fixing judicial remuneration but it gives a broad discretion to Parliament to decide both the quantum of remuneration and the process by which that quantum is determined. As discussed in Part 5 below, the adequacy of remuneration is rightly seen as a safeguard for judicial independence, ensuring the judiciary makes impartial decisions free from influence by the executive or the parties to the litigation.[25]

The process for determining the salaries of federal judges has evolved over time. The current model involves an independent tribunal, the Remuneration Tribunal, making a determination at least once each year about the salaries of federal judges.[26] This is done having regard to the national minimum wage orders made by Fair Work Australia,[27] but in practice the Tribunal also considers five guiding principles — judicial independence, recruitment and retention, judicial workload, remuneration relativities, and economic circumstances.[28] The Tribunal's determinations are not automatically binding. Either House of Parliament may disallow a determination within 15 sitting days of it being tabled in that House. If a determination is disallowed it has no legal effect; otherwise it takes effect by force of law.[29]

In its early days, the Remuneration Tribunal had less influence over federal judicial salaries because its powers were limited to *advising* on salaries rather than *determining* them. The ostensible reason for this arrangement was that the *Constitution* prevents any body, other than Parliament, from *fixing* judicial remuneration. During this period there were controversies over judicial salaries, such as when Parliament declined to follow the Tribunal's 1988 recommendation to increase judicial salaries by as much as 80 per cent. In 1989 the Tribunal's powers were strengthened to allow it to determine salaries rather than merely advise on them. The legislative foundation of the disallowance procedure appears to satisfy the constitutional requirement that judicial

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24 Federal Court of Australia, *Annual Report 2009–2010*, (Federal Court of Australia, 2010) 71, 89.

25 George Winterton, *Judicial Remuneration in Australia* (Australian Institute of Judicial Administration, 1995) 19–31.

26 See Remuneration Tribunal, *Determination 2010/03: Judicial and Related Offices — Remuneration and Allowances*, 2010/03, 1 April 2010.

27 *Remuneration Tribunal Act 1973* (Cth) s 5.

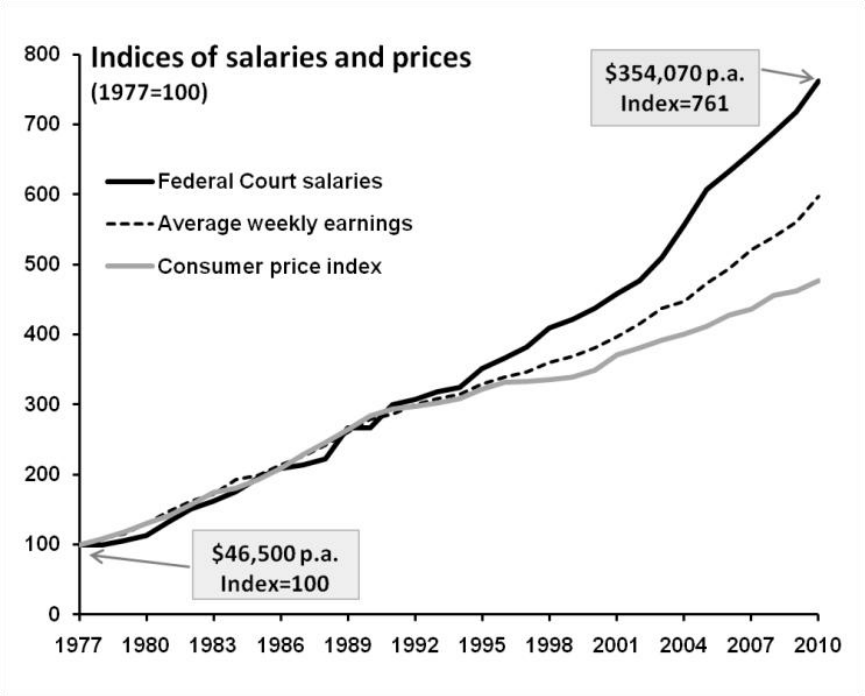
28 Remuneration Tribunal, *Statement on 2001 Review of Judicial and Related Offices' Remuneration*, 2001/23, 1 October 2001.

29 *Remuneration Tribunal Act 1973* (Cth) s 7.

remuneration be fixed by the Parliament. Since 1989 there has been only one occasion on which a determination of judicial salaries has been disallowed.[30]

Figure 2 shows how federal judicial salaries have changed over time under these institutional arrangements, using the salary of a Federal Court judge to illustrate the trends. The solid black line is an index of the nominal annual salary at 30 June from the 1977 base year, when a judge's annual salary was $46 500, to 2010, when a judge's annual salary was $354 070. This is a 7.6-fold increase in nominal salary over 34 years. However, it is inappropriate to compare nominal dollar values over long intervals of time because of changes in the cost of living. Accordingly, the graph also shows changes in the Consumer Price Index, which increased 4.8 times over the same period (grey line). It is evident there was no real increase in judicial salaries before the early 1990s because salaries just kept pace with inflation. Since then the real increase in judicial salaries can be seen in the growing gap between the black and grey lines. By

Figure 2:
Federal Court salaries and consumer price movements, 1977–2010



Sources: Remuneration Tribunal, *Annual Reports* and *Determinations* (various years); Australian Bureau of Statistics, *Consumer Price Index*, Cat No 6401.0 (various years); Australian Bureau of Statistics, *Average Weekly Earnings*, Cat No 6302.0 (various years), Table 2, male total earnings, seasonally adjusted.

30 This occurred in 1990: Winterton, above n 25, 52, 55–6.

2010, Federal Court judges were 60 per cent better off in real terms than in 1977. This corresponds to an increase in real judicial salary of 1.4 per cent annually since 1977 or 2.4 per cent annually since 1992. For the purpose of comparison, Figure 2 also shows how average weekly earnings of male workers have changed over the same period.

The regularity with which federal judicial salaries increase provides a convenient basis for projecting the future cost of judges because it allows salaries to be modelled as a mathematical function following a simple pattern of geometric growth. The Australian Government Actuary makes a similar assumption when costing the pension scheme for federal judges, which is dependent on future judicial salaries. That analysis assumes an annual real rate of salary increase of two per cent.[31] The same assumption will be made in this article, although it is more conservative than the 2.4 per cent real growth that has been observed in practice since 1992.[32]

The process for fixing judicial salaries in the Australian states is similar to that described above. In the past, most states followed the federal model of establishing an independent tribunal to make determinations about salary, subject to disallowance by Parliament. New South Wales and Western Australia still adopt this approach.[33] South Australia also continues to rely on its state Remuneration Tribunal to determine salaries of state judges but, unlike the federal model, its determinations are binding on the state executive and are not subject to disallowance.[34] In Tasmania, the salary of the Chief Justice of the Supreme Court is determined by the Auditor-General as the average of salaries payable to the Chief Justices of South Australia and Western Australia, and the salary of puisne judges is calculated as 90 per cent of the Chief Justice's salary.[35] While this procedure is unique, the salaries so determined are ultimately referable to the decisions of independent state remuneration tribunals. More radically, Queensland and Victoria have taken a different path in abolishing or limiting the role of their remuneration tribunals and instead fixing the remuneration of state judges by direct reference to the determinations of the federal Remuneration Tribunal.[36] The new system for determining judicial remuneration in Queensland was described as administratively simpler than the old model, while helping to achieve national consistency in judicial remuneration and ensuring that Queensland continues to attract and retain high-quality appointees.[37]

The quantum of state judicial salaries also bears a close relationship to the salaries of federal judges, making the federal data generally relevant at the state level. Since 1990 there has been an informal agreement among Attorneys-General about the relativities between Australian judicial salaries, which was intended to discourage

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31 Australian Government Actuary, above n 2, [5.6].

32 A higher rate of salary growth would not only increase the absolute cost of judges' salaries and pensions but also the proportionate contribution to total cost of those expenditures incurred far into the future (ie pensions) relative to those incurred in the near future (ie salaries).

33 *Statutory and Other Offices Remuneration Act 1975* (NSW); *Salaries and Allowances Act 1975* (WA).

34 *Remuneration Act 1990* (SA) ss 18, 19.

35 *Supreme Court Act 1887* (Tas) s 7.

36 *Judicial Salaries Act 2004* (Vic) s 5(4); *Judicial Remuneration Act 2007* (Qld) s 5.

37 Queensland, *Parliamentary Debates*, House of Representatives, 17 October 2007, 3665–6 (K Shine, Attorney-General).

leap-frogging (or price competition) between jurisdictions.[38] Pursuant to this understanding, the salary of a state Supreme Court judge should be no more than that of a Federal Court judge, which itself should be no more than 85 per cent of the salary of a High Court justice. Queensland and Victoria have embodied this understanding in legislation — their Supreme Court judges are explicitly entitled to be paid the same salary as Federal Court judges.[39] In some smaller states, Supreme Court salaries are lower than their Federal Court counterpart. However, the variation is seldom more than five per cent, which does not jeopardise the general applicability of the arguments in this article.

How do judicial salaries relate to other comparable occupations? A useful comparison may be made with barristers, from whose ranks most judges are drawn. An Australian Bureau of Statistics (ABS) survey of barristers in 2007–08 revealed that at 30 June 2008 there were 3869 barristers, who made an average annual operating profit of $261 100 each. However, there were significant regional variations, ranging from an average profit of $132 100 in the ACT to $320 500 in Western Australia. There were also significant variations by barrister type. Nationally, junior barristers made an average annual operating profit of $195 800, while senior counsel (a more appropriate comparator for judges) averaged $580 900.[40] Comparison may also be made with other senior public offices exercising independent judgment and high order legal skills. For example, the base salary (and total remuneration) of the most senior federal law offices are: Solicitor-General $425 000 ($567 640); Director of Public Prosecutions $341 510 ($448 750); and Ombudsman $264 920 ($369 800).[41]

Judicial pensions

The second major component of cost is the pension payable to a judge from the time the judicial appointment is terminated until his or her death. The pension arrangements for most federal judicial officers are regulated by the *Judges' Pensions Act 1968* (Cth).[42] This is a complex piece of legislation — reflecting amendments over many years — but its essential features can be readily described. The federal judges' pension scheme is *non-contributory* in the sense that it is funded from Consolidated Revenue and judges make no financial contribution during their years of service towards their later pension entitlements. It is also *uncapped* in the sense that there is no predetermined limit to the total value of pensions that a qualifying judge and his or her spouse can draw from the scheme over their lifetimes — their actual entitlements will be determined largely by their longevity.

To be eligible for a full judicial pension a judge must have ceased to be a judge (other than by reason of death); he or she must be at least 60 years of age; and he or she

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38 Remuneration Tribunal, *Major Review of Judicial and Related Offices' Remuneration* (Remuneration Tribunal, 2002) [5.4.5].

39 *Judicial Salaries Act 2004* (Vic) s 5(4) (effective 1 July 2007); *Judicial Remuneration Act 2007* (Qld) s 5 (effective 14 March 2008).

40 Australian Bureau of Statistics, *Legal Services, Australia*, Cat No 8667.0 (Australian Bureau of Statistics, 2009) 9–10.

41 Remuneration Tribunal, *Determination 2010/10: Remuneration and Allowances for Holders of Full-Time Public Office*, 16 February 2011.

42 Federal Magistrates are subject to a separate regime: see *Federal Magistrates Act 1999* (Cth) sch 1 pt 2.

must have served as a judge for not less than 10 years.[43] If a judge ceases to hold office by reason of death, separate death benefits are payable to a surviving spouse and dependent children. If a judge has not attained 60 years of age, no pension is payable regardless of the period of service. If a judge has served for less than 10 years, the pension entitlement is proportionately reduced, and if the period of service is less than six years no pension is payable at all.[44] The combined effect of the qualifying conditions — one relating to the judge's age and the other relating to the duration of service — creates interesting cost dynamics, which are explored in Part 3.

The quantum of the judicial pension is also defined by federal legislation.[45] In nearly all cases it is 60 per cent of the 'appropriate current judicial salary'. This is defined, *not* as the judge's exit salary, but as the salary that would be payable to the judge if he or she had not retired or died. An important consequence of this definition is that judicial pensions continue to increase over time at the same rate as judicial salaries, and thus the 2.4 per cent real annual growth that has been experienced in judicial salaries since 1992 is fully reflected in the growth of judicial pensions. Because the Remuneration Tribunal often justifies increases in judicial salaries by reference to productivity gains, the judicial pension arrangements have the unusual and anomalous effect of granting retired judges the productivity gains made by their successors. This is illustrated in Figure 3, which shows an index of judicial salary — increasing at two per cent per year — from the year of appointment (index=100) until 50 years into the future (solid black line). The index of judicial pension in any given year is 60 per cent of the value of the salary index, except during the first 10 years of judicial service when the pension is zero for the first six years and pro-rated from then until the 10th year (solid grey line).

This basic framework is varied by a multitude of special circumstances. These deal with situations such as retirement on grounds of disability or infirmity; counting prior judicial service; adjusting judicial pensions where other pensions are payable; removing pension entitlements for judges who have been removed from office; special entitlements for Papua New Guinea judges; and accounting for taxation debts due under the superannuation contribution tax scheme.[46] Although these provisions may be of significance in particular cases, none of them affects the general analysis in this article.

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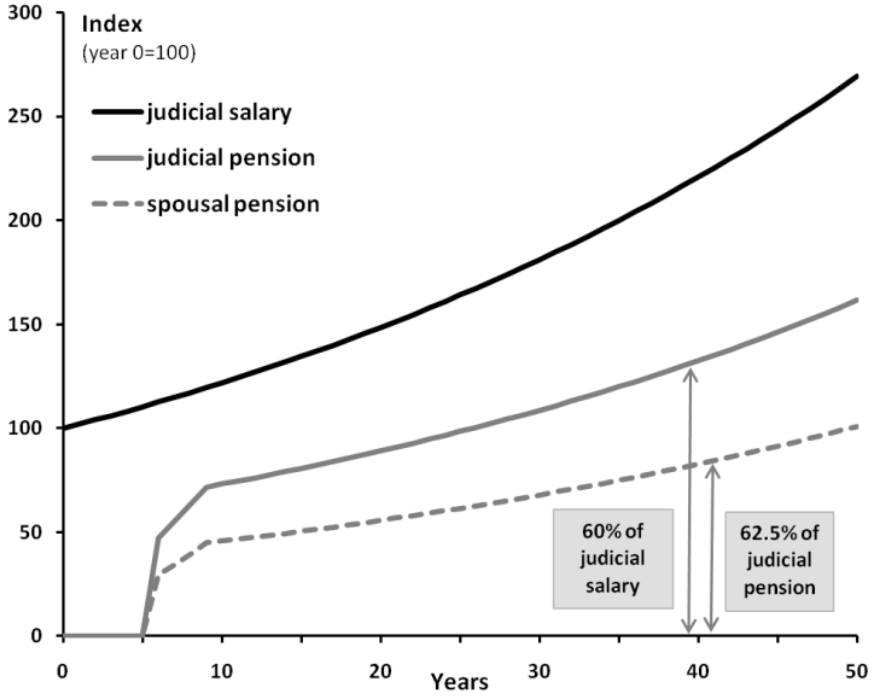
43 *Judges' Pensions Act 1968* (Cth) s 6.

44 Ibid s 6A(4).

45 Ibid ss 6A, 6B.

46 The superannuation guarantee charge was a tax levied on the superannuation contributions of high income earners from 1997–2005. In 2003 the High Court held that the tax was invalid in its application to state judges: *Austin v Commonwealth* (2003) 215 CLR 185. The surcharge was abolished in 2005 but accrued liabilities remain. The effect of the tax is that a federal judge can face a significant lump sum liability upon retirement; and the later the retirement, the larger the debt.

Figure 3: Salary, judicial pension and spousal pension



Judicial pensions in some states and territories follow a similar pattern to the federal scheme because they either expressly adopt that scheme or are modelled along similar lines.[47] Other states have interesting variants with respect to eligibility conditions and pension rates. In Victoria, Supreme Court judges are entitled to a 60 per cent pension on retirement only after they have reached 65 years of age (compared with 60 years in the federal scheme), although the pension is payable at any age after 20 years of service.[48] In Western Australia, a 60 per cent pension is payable to judges who are 60 years of age and have completed 10 years service, as in the federal scheme, but a lesser pension of 50 per cent is payable to judges who are 55 years of age and have completed 10 years service.[49]

South Australia adopts the federal model in so far as it grants a pension to a judge who has attained 60 years of age and completed 10 years service. However, the baseline pension is only 40 per cent of judicial salary, increasing by one per cent for every six months of service that is completed after the first five years of service, to a

47 *Supreme Court Act 1933* (ACT) s 37U(4); *Judges' Pensions Act 1953* (NSW) s 4; *Judges (Pensions and Long Leave) Act 1957* (Qld) s 4; *Supreme Court (Judges Pensions) Act 1980* (NT) s 4.

48 *Constitution Act 1975* (Vic) s 83(1). A similar rule applies in the County Court: *County Court Act 1958* (Vic) s 14(2).

49 *Judges' Salaries and Pensions Act 1950* (WA) s 6.

maximum pension of 60 per cent of salary.[50] These arrangements give judges a graduated financial incentive to serve for at least 15 years in order to secure the maximum pension of 60 per cent of salary. A South Australian judge who has served for 15 years but retires before reaching age 60 is entitled to a judicial pension of 60 per cent of salary once he or she reaches 60 years of age.

More radically, Tasmania has abandoned the non-contributory judicial pension scheme found in other jurisdictions and has instead adopted an accumulation superannuation scheme to which the Tasmanian Government makes employer contributions of nine per cent of judicial salary.[51] This is such a significant departure from the federal arrangements that the proposals in this article cannot be applied to Tasmanian judges.

The pension arrangements for judges may be usefully compared with those for federal Members of Parliament. Members who entered Parliament after 9 October 2004 are subject to superannuation arrangements in which the Government makes a contribution of 15.4 per cent of salary into the Member's accumulation superannuation fund. However, Members who entered Parliament before that date are subject to a compulsory scheme — the Parliamentary Contributory Superannuation Scheme (PCSS) — which is now closed. Unlike judicial pensions, the PCSS requires Members to make regular financial contributions (11.5 per cent of salary for the first 18 years of service), which are paid into consolidated revenue. This entitles the Member to a lifetime pension once the qualifying conditions are met.[52] The qualifying conditions are 12 years service (or four parliamentary terms) for voluntary retirement, and eight years service (or three terms) for involuntary retirement (ie loss of preselection or loss at an election). The pension becomes payable only at age 55 or on invalidity. The base pension rate is 50 per cent of salary, but this rises steadily to 75 per cent of salary for those who have served 18 years or more. At 30 June 2008, the accrued liabilities under the scheme were estimated at $701.6 million. This is nearly 20 per cent higher than the liabilities under the federal judicial pension scheme, but for a much larger membership.[53]

Spousal pensions

The third major component of cost is the pension payable to a spouse of a judge after the judge has died in office or during retirement. The spousal pension was introduced at the federal level in 1948, when the female labour force participation rate was significantly lower than it is today, and when the absence of superannuation benefits left a surviving spouse with little by way of alternative support. Those background

50 *Judges' Pensions Act 1971* (SA) ss 5–6.

51 *Retirement Benefits Act 1993* (Tas) s 5 (for appointments after 1 July 1999). See Alan Blow, 'Judicial Pensions and Superannuation' (Paper presented at the Eighth Colloquium of the Judicial Conference of Australia, Adelaide, 1–3 October 2004).

52 Department of Finance and Deregulation (Cth), *Parliamentary Contributory Superannuation Scheme Handbook* (Department of Finance and Deregulation, 2010).

53 Mercer Australia, *Parliamentary Contributory Superannuation Scheme: Actuarial Investigation as at 30 June 2008* (30 June 2008) Department of Finance and Deregulation <http://www.finance.gov.au/superannuation/parliamentary-superannuation/long-term-cost-report.html>. The PCSS had 545 members at that date (including current contributors, former member pensioners, and spouse pensioners); the federal judges' pension scheme had less than half that number (270 current judges and pensioners).

circumstances have changed but the spousal pension remains an ingrained part of the package of judicial remuneration.

The spousal pension is payable for the duration of the spouse's life. Under federal legislation, a 'spouse' is defined as a person who had a 'marital or couple relationship' with the judge at the time of the judge's death. This includes a same-sex relationship, and it is satisfied if the parties ordinarily lived together on a permanent and bona fide domestic basis, evidenced by at least three years cohabitation.[54] Where the judge dies in retirement, the marital or couple relationship must have begun before the judge retired, or before the judge reached age 60, or have continued for at least five years up to the time of death.

The pension payable to a surviving spouse on the death of a retired judge is set at 62.5 per cent of the judicial pension that would have been payable to the retired judge had he or she not died.[55] Since the judicial pension is itself calculated at 60 per cent of the 'appropriate current judicial salary', the spousal pension can also be expressed as a fraction of the current judicial salary, namely 37.5 per cent. This is shown as the dashed grey line in Figure 3. Clearly, if there is no surviving spouse, no spousal pension is payable. This has a demographic significance that is discussed in Part 3.

Federal legislation also provides for an additional pension to be paid to a judge's spouse where the judge dies in office or during retirement with dependent children. The pension rate is 12.5 per cent of the judicial pension for each eligible child, up to a maximum of 37.5 per cent.[56] Thus, a surviving spouse with three dependent children would be paid a sum equivalent to the judge's full judicial pension, namely, 62.5 per cent as a spousal pension and 37.5 per cent as a children's pension.

Spousal pensions follow a similar pattern in the states and territories, with minor variations in the pension rate and eligibility conditions. Victoria, Western Australia, ACT and Northern Territory adopt the same spousal pension rate as for federal judges: 62.5 per cent of the judicial pension or 37.5 per cent of the current judicial salary.[57] New South Wales and Queensland have lower spousal pensions — 50 per cent of the judicial pension or 30 per cent of the current judicial salary.[58] South Australia has a slightly higher spousal pension rate of two-thirds (66.7 per cent) of the judicial pension. However, the practical effect of this depends on the judge's period of service because South Australia has a graduated entitlement to the judicial pension.[59] The spousal pension is thus equivalent to 26.7 per cent of judicial salary (less than the federal standard) in respect of judges who serve only 10 years, but equivalent to 40 per cent of judicial salary (more than the federal standard) in respect of judges who serve 15 years.

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54 *Judges' Pensions Act 1968* (Cth) ss 4AC, 4AB, 4(1).
55 Ibid s 8(1).
56 Ibid s 9(1), 10.
57 *Constitution Act 1975* (Vic) s 83(2); *Judges' Salaries and Pensions Act 1950* (WA) sch 2 item 2; *Supreme Court Act 1933* (ACT) s 37U(4); *Supreme Court (Judges Pensions) Act 1980* (NT) ss 5, 6.
58 *Judges' Pensions Act 1953* (NSW) s 6 (but only 25 per cent of judicial salary if the judge had served less than ten years); *Judges (Pensions and Long Leave) Act 1957* (Qld) ss 7, 8.
59 *Judges' Pensions Act 1971* (SA) s 8.

3 MEASURING THE COST OF JUDGES

This Part examines how the demographic events that constitute a judge's life course interact with the salaries and pensions that constitute the principal costs associated with each judicial appointment. This interaction is examined first by exploring three paradigms, which are stylised examples of potential real world situations. The article then develops two measures to quantify how the cost of judges changes under different assumptions about the age of appointment and the age of termination.

Three paradigms of appointment and termination

The salary and pension costs associated with judicial service are directly affected by the age and sex patterns of judicial appointment and termination. This section explores these relationships by studying three paradigms, or simulations, that represent best-case and worst-case scenarios, while the following section situates these paradigms within a broader matrix of possible cost outcomes.

Paradigm I concerns a male who is appointed as a judge at a young age and enjoys a long judicial career. Let us assume that the judge is appointed at age 40 and retires after 30 years on the bench, when he reaches the age of mandatory retirement at 70. These assumptions reflect the practical maximum period of judicial service under current institutional, constitutional and statutory arrangements. It is also necessary to make several assumptions about the demographic attributes of the judge and his spouse. None of them is necessarily true in an individual case but their validity at a population level makes them a reasonable basis for examining the cost of judges under this paradigm.

Specifically, let us assume the following.

- The judge was in a 'marital or couple relationship' at the time of his death. This assumption is based on census data showing that 78 per cent of males aged 65–74 years are in a marital or de facto relationship.[60]
- The judge's spouse is two years younger than the judge. This assumption is based on marriage data showing a 2.3 year differential in the median age at which males and females marry. Although the median age at marriage has increased over time, the age differential at marriage has remained fairly steady.[61]
- The judge will live to age 83, and his spouse to age 90. These assumptions are based on actuarial calculations of life expectancy of Australian males and females in 2007. In that year, the life expectancy at birth was 79.3 years for males and 83.8 years for females.[62] However, these figures underestimate the expected life span of a person who has already reached mature years by surviving the perils of early life. A male judge who reaches age 60 (the

60 Australian Bureau of Statistics, *Social Marital Status by Age and Sex, 2006 Census Tables*, Cat No 2068.0 (Australian Bureau of Statistics, 2007).

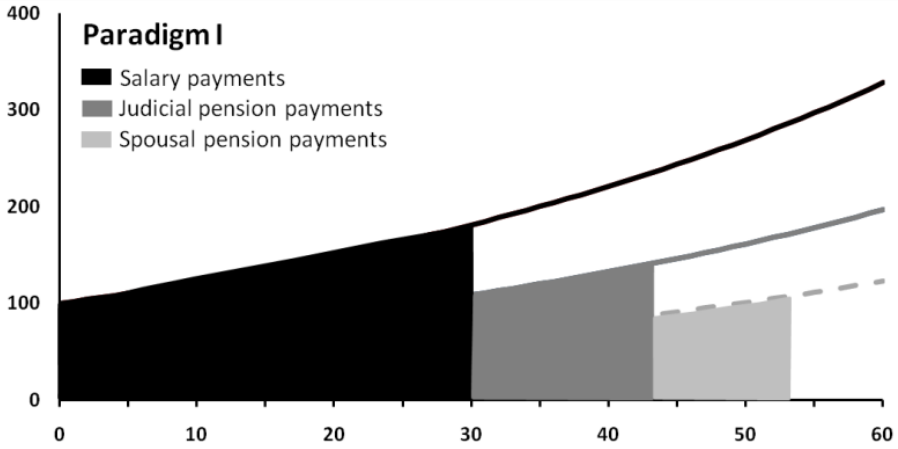
61 Australian Bureau of Statistics, *Marriage, Australia, 2007*, Cat No 3306.0.55.001 (Australian Bureau of Statistics, 2008), tables 6, 7.

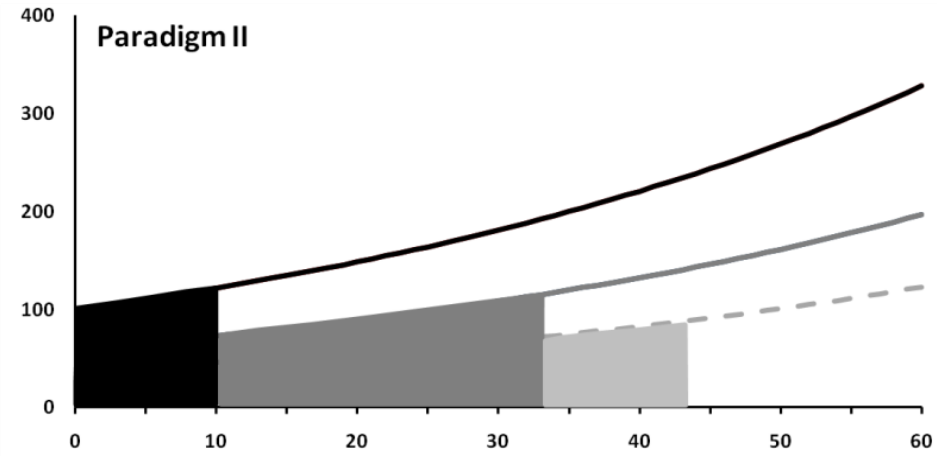
62 These figures are based on the author's calculations using the Reed-Merrell method for determining the probability of dying between exact ages. They correspond closely with the ABS estimates: Australian Bureau of Statistics, *Life Tables, Australia, 2006–2008*, Cat No 3302.0.55.001 (Australian Bureau of Statistics, 2009).

youngest age at which the judicial pension vests) can expect to live another 22.8 years at 2007 mortality rates, giving an expected life span of 82.8 years. Similarly, if a judge's spouse survives until the judge's death, she will be on average 80.5 years at his death (82.8 less the 2.3 year age differential at marriage) and can expect to survive another 9.7 years at 2007 mortality rates, giving an expected life span of 90.2 years. To simplify, we will assume that the judge's spouse can expect to live 10 years beyond the judge's death.

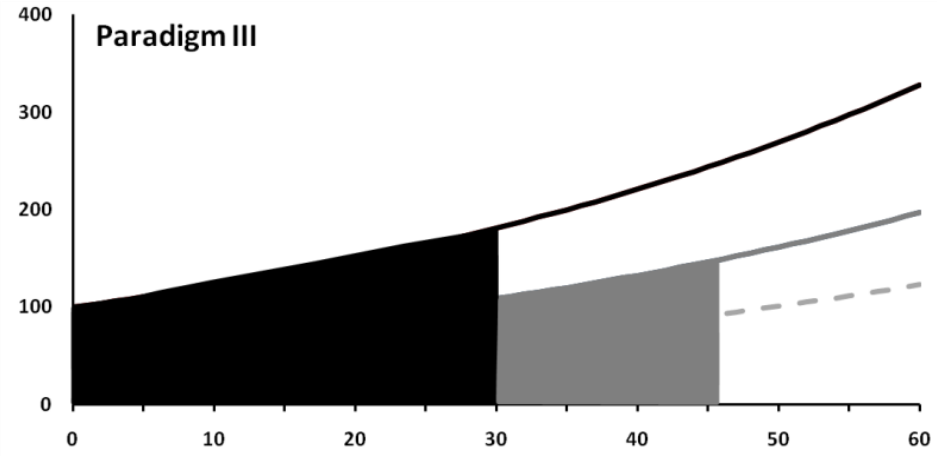
The impact of these assumptions on the cost of judges is shown in the top panel of Figure 4. The three lines, which are taken from Figure 3, represent the *annual* streams of real salary, judicial pension and spousal pension expressed as an index in which the year of appointment is the base year (index=100). The three areas below those lines represent the *total payments* over the period under investigation. The black area is the total judicial salary (measured in real Year 0 dollars) over the 30 year period when the judge is aged 40–70 years; the dark grey area is the total judicial pension over a 13 year period when the judge is aged 70–83 years); and the light grey area is the total spousal pension over a 10 year period, when the judge's spouse is aged 80–90 years. It is readily apparent that the black area is substantially larger than the sum of the two grey areas. In other words, the salary costs directly associated with the working years of the judge's life are greater than the pension costs directly associated with the years of retirement and death.

Figure 4: Three paradigms of salary and pensions





Paradigm II illustrates a different work pattern in which two key variables — the age of appointment and the age of retirement — are changed. In this paradigm it is assumed that a male judge is appointed at age 50 (instead of age 40) and retires after ten years service on attaining age 60 (instead of age 70). Under these assumptions, the judge retires as soon as his pension vests, having satisfied the 60 years age requirement and the 10 year service requirement. All the demographic assumptions remain unchanged: the judge again survives to age 83 (after 23 years in judicial retirement), and his spouse survives him for a further 10 years.



The three shaded areas now show a very different pattern of costs, illustrated in the middle panel of Figure 4. The black area is substantially smaller than the sum of the

two grey areas. In other words, the salary costs directly associated with the working years of a judge's life are smaller than the total pension costs directly associated with the years of retirement and death. The majority of public expenditure is thus directed towards pensions because there is a long tail of retirement relative to the years of judicial service. An additional difference is that total expenditure, represented by the sum of the three areas, is significantly less than in Paradigm I. This is the combined effect of having fewer years of judicial service and bringing pension payments forward in time, when they are less affected by cumulative increases in real judicial salary at two per cent per year.

To this point the paradigms have involved only male judges. What happens if this assumption is changed? Paradigm III returns to many of the assumptions of Paradigm I by supposing that the judge is appointed at age 40 and retires at the mandatory retirement age of 70. However, this paradigm assumes the judge is female. This has two important demographic consequences — she is likely to be two years younger than her spouse, rather than older, and she is likely to live longer than her spouse. Specifically, at 2007 mortality rates a 60 year old female has a future life expectancy of 26.1 years, giving an expected life span of 86.1 years.[63] As a result, the judge can expect a long retirement but her spouse is not expected to survive her. This situation is represented in the bottom panel of Figure 4. It is apparent that the total payments in judicial salary are identical to Paradigm I, but the relative pension costs are less easy to assess. This is because the absence of a spousal pension in Paradigm III is partially offset by the longer period of judicial retirement (16.1 years rather than 13 years) at a higher pension rate (60 per cent of judicial salary rather than 37.5 per cent). Under some assumptions, female appointees will be less costly than male appointees; but that is not a legitimate reason for giving preference when there are other compelling reasons for seeking greater gender equality in the judiciary.

An absolute measure of cost (the ARE)

A comparison of the three paradigms shows that the cost of judges varies significantly with the age of appointment and termination, the length of judicial service, and the demographic parameters that underpin differential mortality by age and sex. Before considering the impact of the demographic parameters in Part 4, the remainder of this Part develops metrics to quantify how the cost of judges changes in response to the age of appointment and termination. No single metric captures the full complexity of these relationships and it is useful, therefore, to examine two measures that highlight different aspects of the problem.

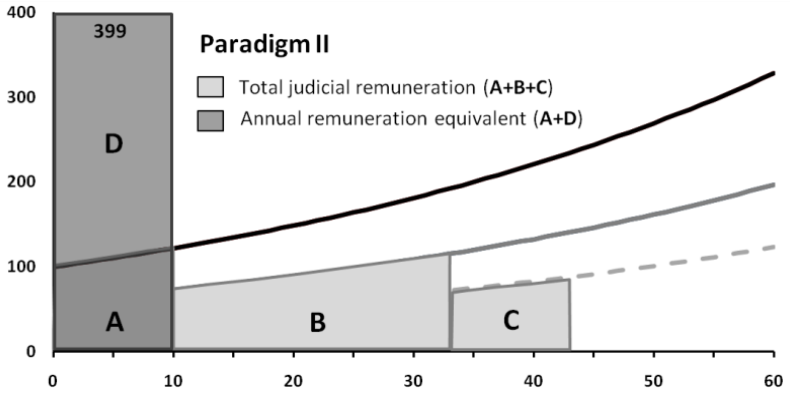
The first measure focuses on the absolute cost of appointing a judge, taking into account the years of judicial service rendered by the judge. The measure is constructed in the following way. Suppose that no pensions are paid to a retired judge or a surviving spouse but that, instead, the economic value of those expected benefits are paid to the judge wholly during the period of judicial service. How much would a judge have to be paid in each year of active service to cover the full cost of the remuneration package, comprising salary plus pensions? This sum will be called the

63 For comparability with previous paradigms, future life expectancy and expected life span have been calculated for a 60 year old, which is the youngest age at which the judicial pension vests.

annual remuneration equivalent (ARE), and it provides an absolute measure of the real cost of a judicial appointment for each year of active service.

Figure 5 illustrates the ARE concept for Paradigm II, namely, a male judge who is appointed at 50, retires at 60, dies at 83, and is survived by a spouse for 10 years. The total judicial remuneration over the life course of the judge and his spouse is given by the areas (A+B+C). If this sum were to be paid wholly during the 10 years of judicial service, the judge would receive an annual payment equivalent to areas (A+D). Numerically, if the base salary in the year of appointment is 100, the ARE under Paradigm II is 399 for each year of service, or approximately four times the starting salary. A practical application helps to put this in perspective. In Part 2 we saw that the annual salary of a Federal Court judge at 30 June 2010 was $354 070. If a Federal Court judge were appointed in 2010 and conformed to the assumptions of Paradigm II, he would have to be paid $1.41 million per year (in real 2010 dollars) for 10 years to cover his salary and expected pension benefits in retirement and death.

Figure 5: Annual Remuneration Equivalent (ARE), Paradigm II

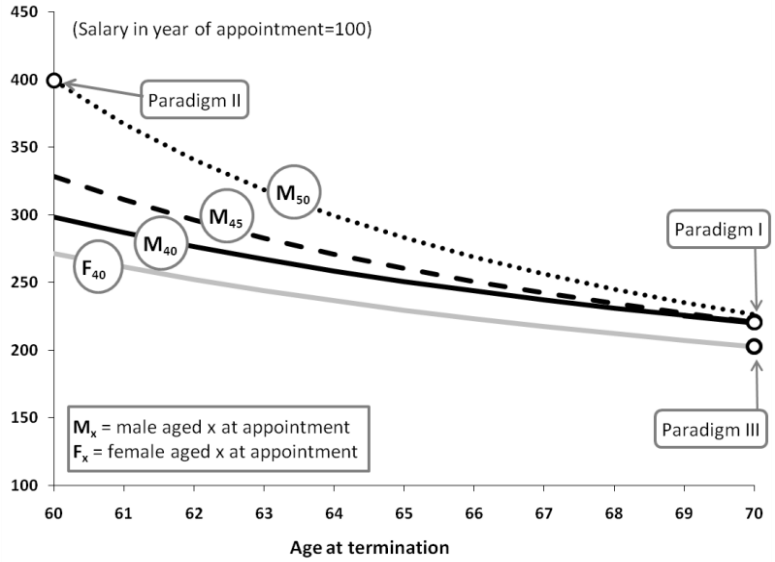


Paradigm II is a 'worst-case' scenario representing the shortest period of judicial service that will qualify a judge for full pension rights. At the other end of the spectrum, Paradigm I is a 'best-case' scenario representing the longest period of judicial service that is feasible under current institutional, constitutional and statutory arrangements. Paradigm I results in an ARE of 220 for each year of service (2.20 times the starting salary), or in the case of a male Federal Court judge appointed in 2010 and conforming to the assumptions of Paradigm I, a salary of $781 000 (in real 2010 dollars) every year for 30 years. Analogously, Paradigm III represents the 'best-case' scenario for a female judge who is appointed at 40, retires at 70, dies at 86, and is not survived by a spouse. For such a judge, the ARE is 203 for each year of service (2.03 times the starting salary), or in the case of a female Federal Court judge appointed in 2010 and conforming to the assumptions of Paradigm III, a salary of $718 000 (in real 2010 dollars) every year for 30 years.

The paradigms described above are just three examples from a family of possibilities, representing different combinations of ages at appointment and termination. This can be seen in Figure 6, in which each curve shows how the ARE

varies with age of termination for a given age of appointment and a given set of demographic parameters. For example, the solid black line shows that for a male judge appointed at age 40 the ARE declines as the termination age increases. This is the combined effect of declining absolute pension costs (each additional year of judicial service is one less year of judicial pension) and a longer period of active service over which to amortise those declining pension costs. The lower endpoint of that curve represents a male judge who is appointed at 40 and retires at 70 — in other words, Paradigm I, with its associated ARE of 220. This may be contrasted with the highest contour, representing a male judge who is appointed at age 50. The upper end point of the dotted line corresponds to Paradigm II, and reflects an ARE of 399. The solid grey line represents the ARE associated with a female judge appointed at age 40. That line lies wholly below the equivalent line for a male judge appointed at age 40, and its lower endpoint corresponds to Paradigm III, with an ARE of 203.

Figure 6:
Annual Remuneration Equivalent (ARE), by age at appointment and termination



A relative measure of cost (the RSP)

The second metric is a relative measure that focuses on the relationship between the costs directly associated with a judge's active judicial service and those directly associated with a judge's retirement and death. This relationship was highlighted previously when contrasting the black and grey areas lying under the curves in Figure 4. Specifically, this section utilises the *ratio of salary to pensions* (RSP) as a relative measure of the various cost components under different assumptions about age of appointment and termination. When RSP=1, total salary costs are equal to total pension costs; when RSP>1, total salary costs are greater than total pension costs; and when RSP<1, total salary costs are less than total pension costs. The latter case is a

situation of concern because more is then being paid to a judge and spouse in retirement and death than is being paid to the judge during active judicial service. That outcome should attract heightened policy scrutiny.

Returning to the hypothetical examples used above, in Paradigm I the RSP is 1.59, meaning that salary costs are 59 per cent greater than the combined pension costs. In Paradigm II the RSP is 0.38, meaning that salary costs are 62 per cent lower than the combined pension costs. And in Paradigm III the RSP is 2.00, meaning that salary costs are 100 per cent greater than the combined pension costs. However, as with the absolute measure of cost (the ARE), these paradigms are just three examples from a family of possibilities, representing different combinations of ages at appointment and termination.

In practice, the combinations of greatest interest are those that correspond with an age at appointment between 40–60 years and with an age at termination between 60–70 years. As discussed in Part 2, the limitation on the age at appointment arises from the fact that individuals generally lack the skills and experience to be appointed to the bench younger than age 40, while appointment beyond age 60 is generally unattractive to potential candidates because of the limited pension entitlements. The limitation on the age at termination arises from the fact that judges generally do not retire before age 60 because 60 is the minimum qualifying age for the judicial pension, and judges cannot be appointed (and therefore cannot retire) beyond age 70 for constitutional or statutory reasons. This suggests a matrix of 200 possible combinations of age at appointment and age at termination, by single year of age. In fact there are fewer age combinations of real significance because judges generally do not retire within 10 years of appointment, regardless of their age, because 10 years service is an additional qualifying condition for the judicial pension.

Figure 7 shows how the RSP varies with different combinations of age at appointment and age at termination, assuming (as before) a male judge who lives to age 83 and is survived by his spouse for 10 years. It does this using a contour plot in which two variables are shown on the axes — age at appointment on the horizontal axis and age at termination on the vertical axis — and the third variable (the RSP) is represented by grey pixels whose colour corresponds with different values of the ratio.[64] The darker the pixel, the greater the deterioration in the RSP. Of particular significance is the black zigzag line, which marks out the combinations of age at appointment and termination for which the RSP=1. In every cell below this line, more is being paid to a judge and his spouse in retirement and death than is being paid to the judge during his working life.

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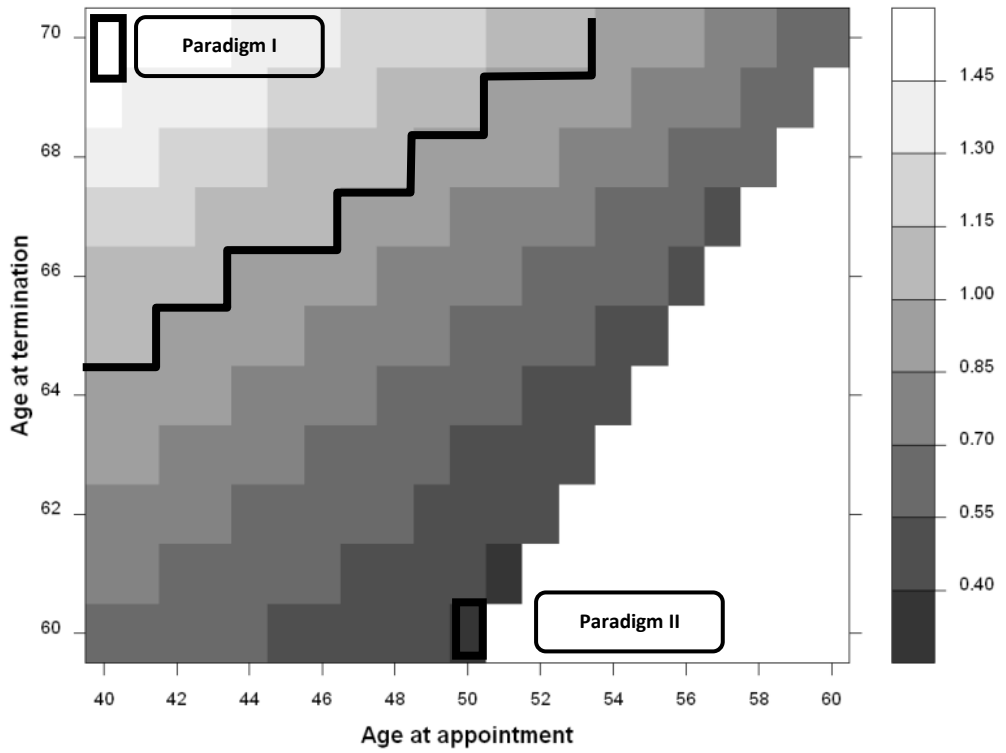
64 The contour plot was generated using the Lexis 1.1 software developed under the auspices of the Max Planck Institute for Demographic Research: K Andreev, *Demographic Surfaces: Estimation, Assessment and Presentation, with Application to Danish Mortality 1835–1995* (PhD Thesis, University of Southern Denmark, 1999).

Figure 7:
Ratio of Salaries to Pensions (RSP), by age at appointment and termination



The diagram shows how two of the previous paradigms fit into a larger family of possibilities. Paradigm I concerned a male who was appointed at age 40 and retired at age 70. This is the most favourable cost scenario (the highest RSP) and is represented by the rectangle at the top left. Paradigm II concerned a male who was appointed at age 50 and retired at age 60. This is the least favourable cost scenario (the lowest RSP) and is represented by the rectangle at the bottom right. In between there is a range of possibilities, which follow two general principles. First, for any given age at termination, the greater the age at appointment the less favourable the RSP. This is because there is a relatively shorter working life for a given pattern of costs in retirement and death. Secondly, for any given age at appointment, the greater the age at termination the more favourable the RSP. This is because there is a relatively longer working life and a shorter period spent in judicial retirement.

4 DEMOGRAPHIC CHANGE AND THE COST OF JUDGES

The analysis to this point has been based on three simple demographic assumptions: (a) judges are in a 'marital or couple relationship' at the time of their death, provided their spouses survive that long; (b) there is a two year age differential at marriage, with males being the elder partner in any couple; and (c) the age-sex mortality patterns of 2007 prevail. The last assumption provided data on longevity, which were applied in calculating absolute and relative measures of cost.

However, the assumption that the 2007 mortality patterns will continue to apply in the future is very unlikely to hold true. Long term improvements in mortality of males and females will increase the expected age at death and therefore adversely affect the relative cost of salaries and pensions. This Part investigates this claim by examining Australia's historical experience and future projections of life expectancy, and by estimating how the expected improvements in life expectancy will impact on the cost of judges over the next 40–50 years.

Life expectancy in Australia

Australia has one of highest life expectancies at birth in the world, reflecting mortality rates that are at historically low levels by international standards. In 2009, the life expectancy at birth for the whole population was 81 years, ranking eighth behind Japan (83 years); Hong Kong, Macao, Switzerland, Italy and San Marino (82 years); and Spain (81 years).[65] This compares with an average world life expectancy at birth of 69 years.[66] Australia's striking life expectancies are part of a secular trend of improving mortality that has been evident for over a century (see Figure 8). Three features of the graph deserve comment: the sustained rise in life expectancy of males and females; the higher life expectancy of females over males in every year, by a margin of 5–10 per cent; and a number of irregularities such as the short-term decline in life expectancy during the 1918 influenza pandemic and the slowing of mortality improvements, especially for men, during the 1950s and 1960s.

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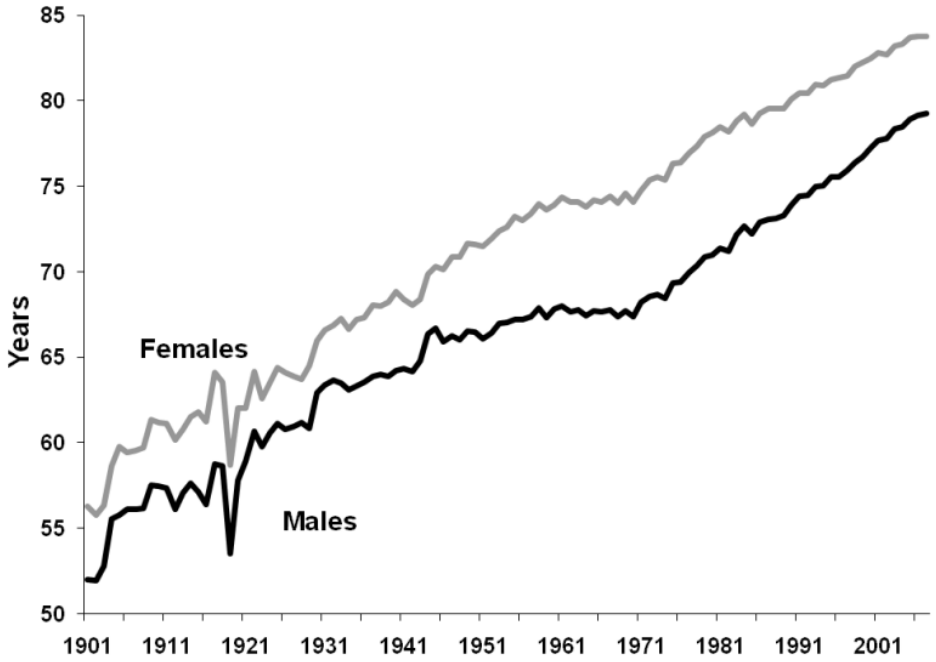
65 Population Reference Bureau, *2009 World Population Data Sheet* (Population Reference Bureau, 2009) 10–13.

66 Ibid 10.

Figure 8: Life expectancy at birth, Australia 1901–2007



What is likely to happen to Australian life expectancy by the middle of the 21st century? For over one hundred years, life expectancy at birth has been improving at the rate of about 3.0 years every decade for males and 2.5 years every decade for females. In making projections about future mortality a critical question is whether these trends are likely to continue. Scholars are divided on the question of whether humans are approaching the limits of life expectancy.[67] The pessimistic view is that humans are born with a maximum potential life expectancy that is the result of biological processes of senescence. Physiological degradation and mortality are seen as the inescapable by-products of organisms that are not designed for post-reproductive survival.[68] An alternative view has a more optimistic outlook, claiming that if there is an upper limit to longevity we are not close to reaching it. Experts have repeatedly asserted that life expectancy at birth is approaching a ceiling but they have been repeatedly proved wrong.[69] Underpinning this optimistic assessment is the view that

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67 Population Reference Bureau, 'The Future of Human Life Expectancy: Have We Reached the Ceiling or is the Sky the Limit?' (Research Highlights in the Demography and Economics of Aging No 8, National Institute of Aging, March 2006).

68 Jay Olshansky, Bruce Carnes and Christine Cassel, 'The Future of Long Life' (1998) 281 *Science* 1611, 1612.

69 Ronald Lee, 'Predicting Human Longevity' (2001) 292 *Science* 1654.

'reductions in mortality should not be seen as a disconnected sequence of unrepeatable revolutions but rather as a regular stream of continuing progress'.[70]

The Australian Bureau of Statistics (ABS) makes projections of Australia's population into the future. These projections are not predictions or forecasts, 'but are simply illustrations of the growth and change in population which would occur if certain assumptions about future levels of fertility, mortality, internal migration and overseas migration were to prevail over the projection period.'[71] From the countless permutations of demographic variables, the ABS produces three projection series (Series A, B and C), which represent high, medium and low growth scenarios. The mortality assumption underlying Series A is that male and female life expectancy at birth will continue to increase by 3.0 years per decade and 2.5 years per decade, respectively, until 2056. On that assumption, life expectancy at birth will reach 93.9 years for males and 96.1 years for females by 2056. The more conservative assumption, which underpins Series B and Series C, is that improvements in life expectancy will continue at the historical rate only until 2011, and thereafter will slowly decline until 2056. On that assumption, life expectancy at birth will reach 85.0 years for males and 88.0 years for females.[72]

While the extent of future improvements in life expectancy is a matter of debate, this article follows the assumption of lower mortality (higher life expectancy) that underpins the Series A population projections. Thus it will be assumed that by 2056 life expectancy at birth for the population as a whole will be 93.9 years for males and 96.1 years for females. This is a reasonable conjecture in view of the long historical trends in mortality and the absence of any evidence suggesting a slowing in mortality improvements (see Figure 8).

The projected increase in population life expectancy at birth probably understates the true measure of *judicial* longevity for the purpose of this study for two reasons. First, the high socioeconomic status of judges and their spouses is likely to be associated with higher life expectancy than for the population as a whole because mortality is well-known to be inversely related to education, occupational prestige, income and wealth.[73] Secondly, life expectancy at birth is an index measure that summarises different mortality experiences at different ages. Improvements in mortality are not evenly spread across all age groups, and in practice males aged 55–74 years and females aged 64–74 years have experienced some of the most notable improvements in mortality in the past, and can be expected to enjoy similar gains in the future.[74]

Nevertheless, this article will assume that population life expectancy at birth provides a reasonable measure of mortality improvements for the judicial sub-

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70 Jim Oeppen and James Vaupel, 'Broken Limits to Life Expectancy' (2002) 296 *Science* 1029, 1029.

71 Australian Bureau of Statistics, *Population Projections, Australia 2006 to 2101* Cat No 3222.0 (Australian Bureau of Statistics, 2008) 3 (ABS, *Population Projections*).

72 Ibid 20–6.

73 A J McMichael, 'Social Class (as Estimated by Occupational Prestige) and Mortality in Australian Males in the 1970s' (1985) 9 *Community Health Studies* 220; Australian Institute of Health and Welfare, *Australia's Health 2008* (Australian Institute of Health and Welfare, 2008), 125–8.

74 ABS, *Population Projections*, above n 71, 22–3.

population in question. This conservative assumption may underestimate the future cost of judges, but the difference is unlikely to be large. Specifically, if male life expectancy at birth is projected to be 94 years in 2056, it will be assumed that life expectancy of a male who is 60 years old in 2056 is 34 years. This may seem a surprising assumption given the earlier claim that the total life span of someone who has survived to mid-life is higher than life expectancy at birth by some years. However, it can be shown that this is a demographically valid assumption in circumstances of very low mortality implicit in extreme longevity.[75]

Impact of life expectancy on the cost of judges

How will this increase in longevity affect the cost of judges? *A priori*, one should expect a deterioration in the cost of judges, calculated by either metric, because judges and their spouses are supported over progressively longer periods of retirement, while each judge's period of service remains unchanged. The extent of the change is quite significant. Figure 9 shows how one metric, the *ratio of salary to pension* (RSP), declines as expected life span increases.

Consider Paradigm I — the most favourable cost scenario for a male judge — in which the judge is appointed at age 40 and retires at age 70. In 2007, a 60 year old male had an expected life span of 83 years, with a corresponding RSP of 1.59. However, the RSP declines quickly as life expectancy improves over time (solid black line). By the time expected life span reaches 92 years, the RSP falls below 1.0; and by the time expected life span reaches 94 years, the RSP is just 0.9. This means that, even in the *most favourable* case, by 2056 more will be paid in pensions during retirement and death than in salary during active judicial service. Increases in longevity alone result in a 43 per cent decline in the RSP over 50 years. A similar pattern can be observed for Paradigm III — the most favourable cost scenario for a female judge (solid grey line).

Paradigm II is the least favourable cost scenario for a male judge, namely, a judge who is appointed at age 50 and retires at age 60. Here too the RSP declines substantially, by 36 per cent from 0.38 to 0.24. This situation is quite remarkable because, by 2056, judges and their spouses can be expected to be paid more than four times as much in retirement and death than during active service.

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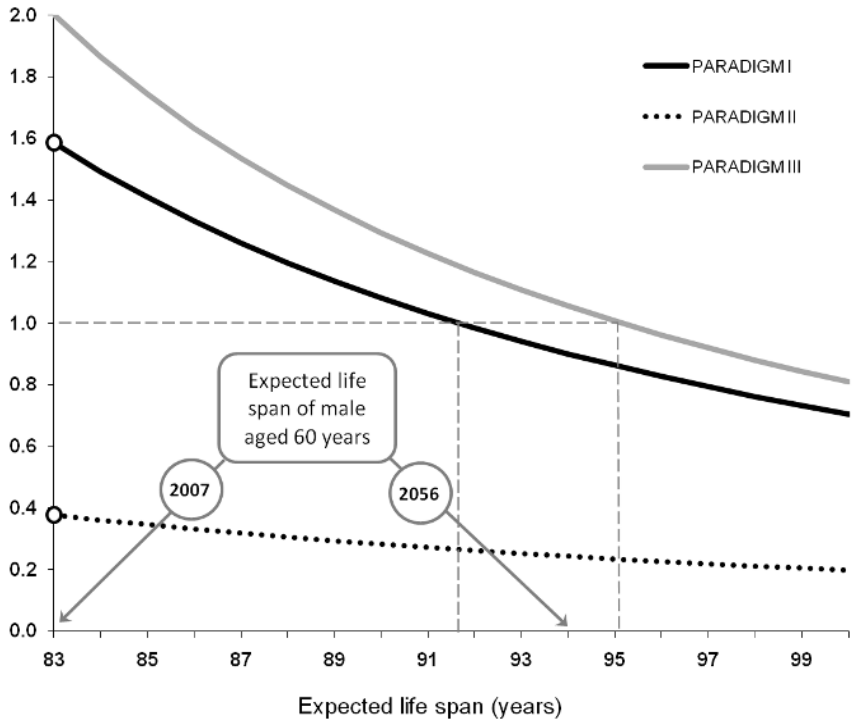
75 It can be shown using the 2007–09 ABS life tables that if life expectancy at birth is 94 years, then life expectancy at age 60 will plausibly lie between 34–39 years, giving a total life span of 94–99 years. The outcome depends on the assumptions made about mortality of those below age 60. If under–60 mortality is assumed to be unchanged from 2007–09 levels, then life expectancy at age 60 will be 39 years. (A life expectancy at birth of 94 years can be achieved only by relatively lower mortality of those above age 60). If under–60 mortality is assumed to be zero, then life expectancy at age 60 will be 34 years. (A life expectancy at birth of 94 years can be achieved only by relatively higher mortality of those above age 60.) Trends in mortality (especially for children) suggest that the latter is a more reasonable assumption. I am grateful to Rebecca Kippen for this analysis.

Figure 9:
Projected Ratio of Salary to Pensions (RSP) with increasing longevity



5 REFORMING LAW AND POLICY

Two challenges

The preceding discussion has identified two problems regarding judicial pensions and retirement which are conceptually distinct but closely related. The first problem is that, at current levels of longevity, some patterns of appointment and termination impose significantly greater costs than others (see Part 3). This is because the entitlements to judicial and spousal pensions are uniform for all appointees, once the qualifying conditions of age and duration of service have been met. The second problem is that, for any given pattern of appointment and termination, the increasing longevity of the Australian population significantly changes the cost of judicial appointments (see Part 4). This is because judges and their spouses are supported over longer periods of retirement, while the period of active judicial service remains unchanged.

The first problem requires policymakers to rethink the parameters that underlie the remuneration of judges, as set out in the *Judges' Pensions Act 1968* (Cth) and equivalent state and territory legislation. The history of change in judicial pension arrangements

suggests that these parameters should not be regarded as immutable. The original pension arrangements for justices of the High Court (the first federal judges) stipulated a 15 year qualifying period and a pension set at 50 per cent of salary.[76] When the first comprehensive pension scheme for federal judges was introduced in 1948, the legislation reduced the qualifying period to 10 years service, introduced a qualifying age of 60 years, reduced the maximum pension to 40 per cent of judicial salary, and extended pension benefits to spouses and children.[77] The revised pension arrangements under the 1968 Act retained this basic structure but increased the pension to 50 per cent of judicial salary, and this was increased to 60 per cent of salary in 1973.[78] The 1968 Act itself has been altered by 23 separate amending statutes over the past 40 years, suggesting that change, rather than constancy, is the norm.

There are good reasons for approaching judicial pension arrangements with an open mind. In 1968 the federal judiciary was very small, comprising only the High Court of Australia (with seven justices) and two specialised courts — the Federal Court of Bankruptcy and the Commonwealth Court of Conciliation and Arbitration.[79] By 1976 two new federal courts had been created — the Family Court and the Federal Court — and in 1999 the Federal Magistrates Court was added. Today there are over 150 federal judges, accounting for 15 per cent of the Australian judiciary. A generous remuneration scheme conceived in an age when there were few federal judges will not necessarily be appropriate for a large and growing cohort of judges.

The second problem challenges policymakers in a different way. The past decade has seen an increasingly vigorous debate about the impact of population change on different aspects of Australian society. One strand of this debate concerns the effect of an ageing population on the capacity of government to deliver social services in health and aged care within an acceptable public finance framework. In 2002 the Australian Treasury produced the first *Intergenerational Report* examining these issues.[80] Successive reports are required to be delivered every five years 'to assess the long term sustainability of current Government policies over the 40 years following the release of the report, including by taking account of the financial implications of demographic change.'[81] Forward planning for demographic change has already resulted in important shifts in public policy, such as raising the age at which individuals qualify for the aged pension. Similarly, such planning efforts ought to inform the discussion about the long term viability of arrangements for judicial remuneration.

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76 *Judiciary Act 1903* (Cth) s 48A, as inserted by *Judiciary Act* 1926 (Cth) s 3, repealed by *Judges Pensions Act 1948* (Cth) s 5.

77 *Judges' Pensions Act 1948* (Cth) ss 6–9, repealed by *Judges' Pensions Act 1968* (Cth) s 3.

78 *Judges' Pensions Act 1968* (Cth) s 6, later amended by *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth) s 35.

79 Crawford and Opeskin, above n 6, 27–9. See also Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 495.

80 Treasury (Cth) 'Intergenerational Report 2002–03' (Budget Paper No 5, Treasury, 14 May 2002).

81 *Charter of Budget Honesty Act 1998* (Cth) s 21. The two subsequent reports are: Treasury (Cth), *Intergenerational Report 2007* (Treasury, 2007) and Treasury (Cth), *Australia to 2050: Future Challenges* (Treasury, 2010).

Policy constraints

Any reformulation of the policy parameters affecting judicial retirement and remuneration is necessarily constrained by a number of legal, economic and pragmatic considerations. Six constraints deserve special mention.

First, it is vital to emphasise that the objective of any reconsideration of policy is not simply to make judges cheaper. That simplistic goal could be achieved through any number of blunt tools such as reducing the proportion of judicial salary paid as judicial pension or reducing the pension entitlements of spouses. Yet those suggestions are fraught with risk. Judicial office must continue to be attractive to the most meritorious barristers and solicitors, nearly all of whom have lucrative alternatives in the legal profession. A pension is not a gratuity; it is 'simply part of the price' of making judicial office attractive.[82] If the opportunity cost of accepting a judicial appointment is too high, it will become more difficult to recruit judges and the quality of appointees may fall. That would impose other costs on the judicial system which should be avoided — costs such as erroneous decisions, unnecessary appeals, declining public confidence in the judiciary, and destabilisation of the rule of law. A well-functioning judicial system is not a cheap attribute of a liberal democracy, yet few could doubt the importance of maintaining it. The challenge is to design a system of judicial remuneration that is cost-effective and sustainable in the long term, without eviscerating the benefits paid to judges. An effective way to achieve this is through mechanisms that convert costs that are directly associated with a judge's retirement and death into costs that are directly associated with a judge's active judicial service.

Secondly, the remuneration of judges should reflect the status of their office. Collectively, judges constitute the third arm of government and they are entitled to have that position recognised financially, as well as through their social status. The relevance of remuneration to public perceptions of the judiciary has been tacitly recognised by the Australian Government in the past.[83]

Thirdly, judicial remuneration must be sufficient to ensure the high degree of judicial independence necessary for judges to discharge their responsibilities without fear or favour, according to law. As George Winterton has remarked, a judge's salary must not be 'so low that they are tempted either to compromise their integrity or undertake remunerated extra-judicial activities. Moreover, their status and morale or self-esteem must be sufficiently high that they enjoy community respect and feel able to resist pressure from any quarter.'[84] In this way, financial independence assists judges to 'draw apart from the world of moneymaking'.[85] Yet it should also be remembered that the resources available to judges in retirement are not derived solely from their period of judicial office. Judges have usually had profitable careers prior to appointment (often as much as 20–30 years in the private sector), and increasingly they have professional lives after they leave the Bench — as acting judges, arbitrators,

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82 Burke Shartel, 'Pensions for Judges' (1928) 27 *Michigan Law Review* 134, 150–1.

83 *Judicial and Statutory Officers Remuneration Legislation Amendment Act 1989* (Cth), raising the salaries of Family Court judges to equal those of Federal Court judges.

84 Winterton, above n 25, 28.

85 Senate Select Committee on Superannuation, Parliament of Australia, *The Parliamentary Contributory Superannuation Scheme and the Judges' Pension Scheme* (1997) pt B ch 1 [1.2] quoting Evidence to Senate Select Committee on Superannuation, Parliament of Australia, Canberra, 1 May 1997 (Justice Davies).

mediators or legal practitioners.[86] Like other members of the community, they can be expected to make provision for their retirement during their non-judicial working lives, as can their spouses.

Fourthly, any change to federal judicial remuneration must honour the requirement in s 72 of the *Constitution* that the remuneration of federal judges 'shall not be diminished during their continuance in office'.[87] This protection would prohibit any diminution in the salary or future pensions of a serving judge because both these components are part of a judge's total remuneration. It is less certain whether pension entitlements of a retired judge could be reduced after termination of the judge's appointment. This might amount to an acquisition of property by the Commonwealth, for which 'just terms' are required.[88] Whether that is so or not, it would be imprudent for a legislature to press the point, remembering that federal judges would themselves be required to adjudicate any dispute. The practical implications of this constraint are very significant: the future salary and pension costs of all serving federal judges are 'locked in' and only future appointees would be affected by such legislative changes. This makes a reconsideration of the policy parameters all the more urgent because the benefits of change will be realised only gradually over time. There may be greater legal capacity to effect change in the states, where protection of the judicial branch is not always constitutionally entrenched,[89] but prudence dictates the same prospective approach to policy reform in that quarter. Inevitably, prospective changes to remuneration arrangements will lead to differential treatment of judges appointed before and after the amendments. This may in turn breed resentment, especially in a collegiate institution in which even the Chief Justice is merely *primus inter pares*. However, to reject change on that basis alone would be to freeze policy choices at a single point in time, in the face of significant changes in social and economic circumstances.

Fifthly, not all factors that influence the cost of judges are equally amenable to reform through policy manipulation. The cost of judges is influenced by a range of factors that can conveniently be divided into four categories, namely, those relating to salaries, pensions, demographic attributes, and miscellaneous matters. Federal judicial salaries are set by a statutory body that applies legislative criteria to the annual task of recalibrating judicial salaries. The tribunal's independence from government places judicial salaries outside the relevant policy framework. By contrast, the pension entitlements of judges and their spouses are directly specified by legislation. The statutory provisions regarding pension rates and qualifying conditions are amenable to change, and these parameters thus fall within the policy framework. Demographic determinants of judicial cost include life expectancy of males and females, proportions married, and age differentials at marriage. These determinants reflect deep population processes that may change slowly over time but they are not open to short-term policy manipulation. The final category comprises miscellaneous factors. Judicial cost is

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86 Chief Justice Murray Gleeson, 'A Changing Judiciary' (Paper presented at the Fifth Colloquium of the Judicial Conference of Australia, Uluru, 7–9 April 2001) 3.

87 For judicial consideration of the equivalent 'Compensation Clause' in the *United States Constitution*, see *United States v Hatter,* 532 US 557 (2001).

88 *Australian Constitution* s 51(xxxi). See Doug Drummond, 'A Proposal for Cancelling Judicial Pensions' (2009) 29 *Proctor* 23, 23.

89 Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 343–9.

influenced by the age and sex of appointees. At the point of selection, these attributes are within the control of the executive arm of government, which chooses judges bearing particular age–sex characteristics, whether consciously or not. Judicial cost is also influenced by the age at which judicial service is terminated. This is affected by the maximum retirement age fixed by constitutional or statutory provisions, and by the voluntary decisions of judges to retire before that age.

The sixth constraint arises not from limitations on policy options available to government but from the ambit of this study. The recommendations discussed below are refinements of the current system for determining judicial pensions but they maintain the core structure of the existing scheme. Not all jurisdictions have adopted this course. In 1999 Tasmania abandoned its defined benefits scheme for judges in favour of an accumulation scheme, to which the Tasmanian Government makes superannuation contributions at the rate of nine per cent of gross salary. The retirement incomes of Tasmanian judges appointed after that date are determined by the sum of these government contributions and the investment performance of the superannuation fund.[90] Similarly, in 1992 New Zealand replaced its defined benefits scheme with a contributory superannuation scheme, to which the Government initially contributed 20 per cent of salary and judges contributed a further eight per cent.[91] The Governing Council of the Judicial Conference of Australia, and others, have criticised accumulation schemes as potentially impairing the independence of the judiciary: when judges bear the risk of investment performance they may approach retirement with undue concern for their post-retirement incomes.[92] However, whatever the merits of these arguments, an assessment of contributory superannuation schemes for judges requires separate analysis that falls outside the scope of this article.

With these constraints in mind, the following sections consider three ways to reform judicial pension and retirement policy to address the changing patterns of appointment and retirement and the increasing longevity of Australia's population. The proposed changes seek to eliminate those combinations of 'age of appointment' and 'age of retirement' that are least cost-effective and to open up new combinations that are more favourable. This is achieved not by reducing salaries or pensions but by restructuring available benefits to transform pension costs associated with retirement and death into salary costs associated with productive judicial service.

Increasing the mandatory retirement age

One constraint on the capacity of judges to lead fuller working lives is the requirement that they retire at age 70 or, in some states, at age 72. If the age of mandatory retirement were increased, judges could choose to remain in active judicial service for longer, thereby converting a period of retirement into employment, and thus converting pensions into salary. This possibility raises many questions: would judges choose to work longer, what should the new age of mandatory retirement be, and would older judges impose other costs on the judicial system through lower productivity or declining skills?

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90 Blow, above n 51, 4–5.

91 Dame Sian Elias, 'Judicial Retirement Benefits: Superannuation' (Paper presented at the Eighth Colloquium of the Judicial Conference of Australia, Adelaide, 1–3 October 2004) 1. There have been subsequent changes to the contribution rates.

92 Blow, above n 51, 8; ibid 3.

Before addressing these questions, it is worth recalling how the mandatory retirement age came into being for federal judges.[93] From 1901–1977, the *Australian Constitution* made no mention of judicial tenure other than providing that a judge could be removed from office on the ground of 'proved misbehaviour or incapacity'.[94] The High Court interpreted this provision to mean that federal judges enjoyed life tenure in the absence of removal on these limited grounds.[95] In 1977, the Australian people were asked to approve a constitutional amendment that would introduce a compulsory retirement age for federal judges. For justices of the High Court of Australia this was to be 70 years of age; for judges of other federal courts, 70 years was to be the maximum age but Parliament could set a lower limit if it chose to do so. The proposal received overwhelming support — the referendum passed in all six states and was approved by 80.1 per cent of the population.[96]

The rationale for the constitutional amendment rested on a number of grounds. A fixed retirement age had already been adopted in all state Supreme Courts and it was thought appropriate to make similar provision for the growing number of federal judges. The proposal was also expected to lead to a younger body of judges who were 'closer to the people' and have 'current day sets of values'.[97] And the demographics of ageing must also have provided an important subtext to the constitutional changes. Judges were clearly 'not immune from the geriatric processes of mental decay' as they approached average life expectancy,[98] which in 1977 was 70 years for males and 77 years for females.

Public opinion about retirement ages has shifted significantly over the intervening years. Age discrimination legislation and related policy changes have effectively removed compulsory retirement ages for most workers.[99] It is not surprising, then, that the retirement age of federal judges was reconsidered in 2009 by the Senate Legal and Constitutional Affairs References Committee.[100] The Committee concluded that 70 years was too low for mandatory retirement. Citing the broader social trends of increased life expectancy and later retirement, the Committee recommended that the age be increased to at least 72 years or possibly 75 years.[101] It also acknowledged that

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93 For a fuller account, see Brian Opeskin, 'Constitutions and Populations: How Well Has the Australian Constitution Accommodated a Century of Demographic Change?' (2010) 21 *Public Law Review* 109, 127–30.

94 *Australian Constitution* s 72(ii).

95 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ('*Alexander's Case*').

96 Ian McAllister, Malcolm Mackerras and Carolyn Brown Boldiston, *Australian Political Facts* (Macmillan, 2nd ed, 1997), 108.

97 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, (Michael Hodgman), 220 (Maurice Neil).

98 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 206 (Lionel Bowen).

99 *Age Discrimination Act 2004* (Cth). See Human Rights and Equal Opportunity Commission, *Age Matters: A Report on Age Discrimination* (Human Rights and Equal Opportunity Commission, 2000) 39–43.

100 The same committee had recommended a judicial retirement age of 70 years in 1976, leading to the referendum the following year: Commonwealth, *Report on Retiring Age for Commonwealth Judges*, Parl Paper No 414 (1976).

101 Senate Legal and Constitutional Affairs References Committee, above n 6, [4.16], [4.21]–[4.26].

further increases in life expectancy may bring the matter to the fore again in the not too distant future, and that s 72 of the *Constitution* should accordingly be amended at the next referendum to allow Parliament to fix the retirement age for federal judges, rather than have a specific age entrenched in the *Constitution*.

With the prospect of change afoot, it must be asked whether increasing the age of mandatory retirement is desirable. From the perspective of judicial cost, the answer depends on the extent to which judges would avail themselves of the opportunity of later retirement. Anticipating retirement behaviour in the absence of the age 70 constraint is difficult; however an approximation can be made from data for the Federal Court. Other courts may exhibit similar patterns but they would require separate analysis because ultimately these are empirical questions.

Since the Federal Court was established in 1977, 129 justices and chief justices have been appointed to the Court. Of these, 49 were serving on the Court at 30 June 2010, and 80 no longer held office because they had retired, resigned or died in office. The Federal Court provides a special opportunity for analysing the effect of changing the mandatory retirement age because the first 22 appointees took office prior to the 1977 constitutional referendum coming into force, and they thus enjoyed life tenure. The remaining 107 appointees have been subject to mandatory retirement at age 70. Of the 22 who held life tenure (none of whom still holds office), 9 judges (41 per cent) retired beyond age 70, and the average age of retirement of all life tenure judges was 67.0 years. Of those who held fixed tenure to age 70 and have now retired (58 judges), 14 judges (24 per cent) retired exactly at age 70, and the average age of retirement of all fixed tenure judges was 62.5 years — 4.5 years lower than for life tenure judges.

These data suggest that extending the mandatory retirement age beyond 70 years would permit about one quarter of fixed tenure judges to work longer if they chose to. However, the impact may be greater than this because many judges who left the Federal Court before reaching age 70 did so to take up appointments on other courts, and were thus not lost to the system as a whole.[102] How much longer are judges likely to work if given the opportunity? Of the 9 life tenure judges who retired above age 70, 5 had retired by age 72; 6 had retired by age 75; and only 2 continued into their 80s. The experience of the Federal Court (albeit a small population) provides grounds for thinking that increasing the age of mandatory retirement would have a positive effect on judicial cost, but the effect is likely to be modest because it removes a constraint that currently applies only to a minority of judges, and the additional years of service are not large. Although an increased retirement age could be adopted for new appointees and sitting judges without constitutional objection (thereby providing immediate benefit), it seems that additional policy interventions are needed.

Increasing the minimum qualifying age

A second way of addressing the balance between salary costs and pension costs is to increase the minimum age at which a judge is entitled to draw a judicial pension. Currently, federal judges must be 60 years of age. This is relatively young by today's standards, especially when many retired judges have continuing opportunities for remunerated professional work. In most states, 60 years is also the minimum age at which the highest pension can be drawn, although lower pensions can be drawn from 55 years of age in some states.

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102 Of the 58 fixed tenure judges, five went ultimately to the High Court alone.

A qualifying age of 60 years can be contrasted with two other situations. In Victoria, Supreme Court judges are entitled to a pension on retirement only after they have reached 65 years of age.[103] An alternative comparison can be made with the aged pension that is available to the population at large on a means-tested basis. The Commonwealth aged pension was introduced in 1910 for men aged 65 years and women aged 60 years.[104] At that time, about 50 per cent of the male population could expect to reach retirement age, and a male retiring at age 65 could expect to spend 11 years in retirement.[105] This qualifying age has applied to males for over 100 years, and the qualifying age for females will be brought into parity by 2013. Yet there has been a fundamental change in the demographics of the Australian population. By 2009, more than 85 per cent of males could expect to reach a retirement age of 65 years, and then to spend a further 19 years in retirement. Recognising this shift, the Australian Government announced in the 2009–2010 Budget that the qualifying age for the aged pension will be increased from 65 years to 67 years. This is to be done in a graduated way commencing in 2017, with the qualifying age increasing by six months every two years until it reaches 67 years in 2023. This measure was justified as helping to 'reduce the long-term cost to the budget of a substantial and growing expenditure'.[106]

Increasing the qualifying age for the judicial pension along similar lines raises a number of important questions: how many judges would be affected by postponing the pension entitlement; would such a measure have negative supply-side effects by making judicial office less attractive than other professional alternatives; and how large would the cost saving be? An indicative answer to the first question can once again be found in the Federal Court data. Of the 80 appointees who no longer hold commissions on the Court, 30 judges (38 per cent) departed when they were aged 60–67 years. An increase in the qualifying age to 67 years is therefore likely to have a very substantial impact on retirements, provided judges respond to the changed financial incentives and do not forego their judicial pension entirely by retiring before age 67.

However, increasing the qualifying age for a judicial pension reduces judicial choice. On the scenario just described, a judge who intended to follow Paradigm II and retire at age 60 would now have to postpone retirement to age 67 to access the same benefits. This might deter some potential appointees from accepting judicial office in the first place. With a reduced pool of candidates, it is possible that the quality of appointees might fall. More research is needed on possible supply side effects. However, these effects are likely to be small given the substantial size of the potential labour pool (at 30 June 2008 there were 3869 barristers in Australia, including 656

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103 *Constitution Act 1975* (Vic) s 83(1). The pension is also payable at any age after 20 years of service.

104 *Invalid and Old-Aged Pensions Act 1908* (Cth) s 15. The Act stipulated a qualifying age of 65 years for all persons, but allowed a lower age of 60 years to be set for women by proclamation. The proclamation was made on 19 November 1910. See also Australian Bureau of Statistics, *Year Book Australia 1988*, Cat No 1301.0 (Australian Bureau of Statistics, 1988), 379–83.

105 Treasury (Cth), 'Budget Measures 2009–10' (Budget Paper No 2, Parliament of Australia, 2009), 241.

106 Ibid.

Senior Counsel)[107] and the non-financial incentives, such as social status, that attract lawyers to the bench.

The extent of the cost savings to be derived from later retirement has already been illustrated in Figure 6 above. The highest contour (dotted line) shows how one measure of cost — the ARE — declines with increasing termination age for a male judge who is appointed at age 50. If the judge retires at age 60 (Paradigm II), the annual salary equivalent is 399, or four times the judge's starting salary. With every year that retirement is delayed, the ARE improves by 3–5 per cent. If retirement is delayed until age 67, for example because the qualifying age has been increased, the ARE falls to 242 — a 26 per cent improvement overall. These are significant savings, suggesting that the qualifying age is a robust parameter affecting the cost of judicial appointments.

Increasing the minimum length of service

A third way of addressing the balance between salary costs and pension costs is to increase the minimum number of years that a judge must serve to draw a judicial pension. Currently, federal judges must serve at least 10 years to draw a full pension, but lesser benefits are available on a pro rata basis to a judge who has served 6–10 years. As described in Part 2, similar arrangements prevail in the states, where 10 years is also the minimum qualifying period. Victoria and South Australia have additional criteria that reward length of service irrespective of the age of the judge. In Victoria, the judicial pension is payable after 20 years of service whatever the judge's age,[108] and in South Australia a judge who has served for 15 years but retires before reaching age 60 is entitled to a full judicial pension when he or she reaches age 60. Both these provisions address the disincentive to early appointment that is embodied in the federal scheme, which requires judicial service to age 60 regardless of the length of service.

Increasing the minimum length of service for the judicial pension raises similar questions to those discussed above: how many judges would be affected by increasing the required length of service; would such a measure have negative supply-side effects by making judicial office less attractive than other professional alternatives; and how large would the cost saving be?

The Federal Court data again provide a useful guide to the first question. Of the 80 Federal Court appointees who no longer hold office, 21 per cent served 0–5 years; 21 per cent served 5–10 years; 35 per cent served 10–15 years; 14 per cent served 15–20 years; and the remaining 9 per cent served more than 20 years. It is the third group — the 35 per cent (28 judges) who completed 10–15 years of service — that would be most directly affected by an extension of the qualifying period of service from, say, 10 years to 15 years. It is initially surprising that a large proportion of the 80 judges (42 per cent) terminated their appointments before reaching the qualifying period of 10 years service. However, an examination of those individuals indicates that very few terminated in circumstances in which their judicial pension was foregone — most of the 'premature' terminations are accounted for by ill health, death in office, or appointment to another court, all of which preserve pension entitlements.

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107 Law Council of Australia, *LCA Brief: Snapshot of the Legal Profession* (Fact Sheet, Law Council of Australia, September 2009).

108 *Constitution Act 1975* (Vic) s 83(1).

The potential supply-side effects of increasing the qualifying period of service are similar to those considered above in relation to increasing the qualifying age because this change also reduces judicial choice. For example, a judge who was appointed at age 50 and intends to retire at age 60 would now have to postpone retirement until he or she had completed 15 years service at age 65 to access the same benefits. Further research is needed on possible supply side effects but they are unlikely to be substantial. Some individuals may be dissuaded from accepting a judicial appointment by reason of the increased period of service, but the size of the labour pool again suggests that alternative appointees, with appropriate judicial attributes, would be available to take the places of those who decline.

The extent of the gains to be derived from increasing the qualifying period of service depends on the interrelationship with other variables, namely, the age of appointment and the qualifying age. For example, if a qualifying age of 60 years is retained, an extension of the qualifying period from 10 to 15 years will not affect a federal judge who has been appointed under the age of 45 years. This is because the qualifying age would in any case require that judge to serve until age 60 to obtain a judicial pension. By contrast, a judge who is 46 years at appointment would be affected because, after reaching the qualifying age of 60 years, he or she would have to serve one extra year to meet the new 15 year duration requirement. The older the age at appointment, the more significant this effect.

6 CONCLUSION

The importance of the judiciary to the proper functioning of a liberal democracy cannot be gainsaid. Beyond quelling disputes by interpreting and applying the law, the judiciary plays a critical role in upholding the rule of law. For that purpose, its independence and status need to be assured. But the judiciary has also made much in recent years of the importance of maintaining 'public confidence' in the judicial system as a foundation of the rule of law.[109] There is little doubt that public perceptions of the judiciary could be adversely affected if remuneration of judges were seen to be significantly out of kilter with prevailing community norms. Although the public is unlikely to have a deep appreciation of the current system for remunerating judges — an unfamiliarity that is shared by many in the legal profession — it is far better that the issue be aired and addressed pre-emptively than changed in haste in response to sensational adverse publicity.

This article has identified two main challenges that arise from the current arrangements for remunerating judges through salaries and pensions. The first challenge is that some patterns of appointment and termination impose significantly greater costs than others because pension entitlements are uniform for all appointees, once the qualifying conditions of age and duration of service have been met. The second challenge is that steadily rising longevity will impose significantly greater costs on the community as judges and their spouses are supported over longer periods of retirement, while the period of active judicial service remains unchanged.

This article has advocated three possible reforms that address these challenges, namely, increasing the maximum retirement age of judges; increasing the minimum age at which judges qualify for the judicial pension; and increasing the minimum years

109 See, eg, *Grollo v Palmer* (1995) 184 CLR 348.

of service required to qualify for the judicial pension. The objective of these changes is not to diminish the benefits payable to judges but to design a cost-effective and sustainable system of judicial remuneration by converting costs that are directly associated with a judge's retirement and death into costs that are directly associated with a judge's active judicial service. In this way the proposals seek to strike a balance between the interests and expectations of the judiciary and the community, in the face of powerful changes in the demographics of Australia's population.

Any change to the arrangements for remunerating judges should be undertaken with several core values in mind: maintaining a judiciary of the highest quality; preserving judicial independence; observing legal and conventional norms; honouring the principle of non-retrospectivity; avoiding abrupt changes in judicial behaviour that might result from large discontinuities in pension parameters; and engaging with stakeholders whose interests are specially affected.

In suggesting these reforms, this article has utilised simulations based on the life course of individual judges in hypothetical or paradigmatic situations. Thus, Part 3 examined the young male appointee who enjoys a long judicial career (Paradigm I), a mid-life male appointee who takes early retirement (Paradigm II), and a young female appointee who outlives her spouse (Paradigm III). However, the effect of changes to salary and pension parameters must be seen not only in the context of the experience of individual judges, but of the whole population of judges who comprise a court or an entire judiciary at a point in time, and over time. Part 5 began to explore these population features using the example of Federal Court judges appointed between 1976 and 30 June 2010. This allowed broad estimates to be made of how many judges might work beyond age 70 if permitted to do so; how many judges might work beyond age 60 if the qualifying age were increased; and how many judges might work beyond 10 years if the qualifying period were increased. Further empirical research is needed to explore the impact of changing salary and pension parameters on patterns of appointment and termination, taking into account spatial, temporal, material, and hierarchical features of the Australian judicial system.