

THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2009 STATISTICS

ANDREW LYNCH* AND GEORGE WILLIAMS**

I INTRODUCTION

This article presents statistical information about the High Court's decision making for 2009 at both an institutional and individual level, with an emphasis on constitutional cases as a subset of the total. The results have been compiled using the same methodology¹ employed in previous years.²

Our familiar caveat as to the need for a sober reading of empirical data on the decision making of the High Court over just one year applies once more. Both the raw figures and percentage calculations, especially in respect of the smaller set of constitutional cases, need to be appreciated with this in mind. However, each year's statistics often possess interesting features – particularly when the Court has acquired a new Chief Justice (Robert French) and new Justice (Virginia Bell). An examination of the first full year of the 'French Court' might enable us to discover early signs of any impact that recent changes on the court's

* Associate Professor and Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales.

** Anthony Mason Professor and Foundation Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Australian Research Council Laureate Fellow; Barrister, New South Wales Bar. We thank Sarah Lux for her research assistance in the preparation of this paper.

1 See Andrew Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review* 470; Andrew Lynch, 'Does the High Court Disagree More Often in Constitutional Cases? A Statistical Study of Judgment Delivery 1981–2003' (2005) 33 *Federal Law Review* 485, 488–96.

2 See, eg. Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of its First Five Years' (2003) 26 *University of New South Wales Law Journal* 32; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27 *University of New South Wales Law Journal* 88; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2004 Statistics' (2005) 28 *University of New South Wales Law Journal* 14; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2005 Statistics' (2006) 29 *University of New South Wales Law Journal* 182; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2006 Statistics' (2007) 30 *University of New South Wales Law Journal* 188; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2007 Statistics' (2008) 31 *University of New South Wales Law Journal* 238; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2008 Statistics' (2009) 32 *University of New South Wales Law Journal* 181.

composition have had upon the way its seven Justices work together to decide the controversies that come before them. Efforts are made to enhance the utility of this yearly study by placing the results in context and we draw readers' attention to trends and patterns observed in earlier years where appropriate.

As always, we make no bold claims about what these results may signify. These tabular representations of the way in which the High Court and its Justices decided the cases of 2009 are no substitute for traditional legal scholarship that subjects the reasoning contained in the cases themselves to substantive analysis. Additionally, we refrain from drawing inferences as to the specific internal dynamic among the Court's members. The results here are drawn only from what may be observed from the public record of the Court's decided cases. It is, for example, neither possible, nor our goal, to answer questions about the level of influence any Justice has among his or her colleagues.

II THE INSTITUTIONAL PROFILE

Table A – High Court of Australia Matters Tallied for 2009

	Unanimous	By concurrence	Majority over dissent	TOTAL
All Matters Tallied for Period	23 (44.23%)	17 (32.69%)	12 (23.08%)	52 (100%)
All Constitutional Matters Tallied for Period	2 (20.00%)	3 (30.00%)	5 (50.00%)	10 (100%)

From Table A it can be seen that a total of 52 matters were tallied for 2009.³ It also indicates the number and percentage of these that may be described as 'constitutional law cases'. The definitional criteria that continues to determine our classification of matters as 'constitutional' remains that given by the current Commonwealth Solicitor-General, Mr Stephen Gageler SC, as:

that subset of cases decided by the High Court in the application of legal principle identified by the Court as being derived from the *Australian Constitution*. That definition is framed deliberately to take in a wider category of cases than those simply involving matters within the constitutional description of 'a matter arising under this Constitution or involving its interpretation'.⁴

3 The data was collected using the 53 cases available on AustLII <<http://www.austlii.edu.au/>> in its database for High Court decisions. One case, *Lane v Morrison* (2009) 252 ALR 605, was eliminated from the list of decisions for 2009 due to being decided by a single judge. For further information about the tallying of the 2009 matters, see the Appendix.

4 Stephen Gageler, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25 *University of New South Wales Law Journal* 194, 195.

While we also include any matters involving questions of purely state or territory constitutional law,⁵ there were no such matters decided by the Court last year. The application of these criteria is not affected by the extent to which constitutional issues are central to the resolution of the matter – an approach we have explained in an earlier study.⁶ Thus, the figures produced for ‘constitutional matters’ result from generously applied and inclusive criteria rather than one that might narrow the field based on some subjective additional criterion such as ‘significance’ or ‘importance’.

In 2009, there were 10 matters (19.23 per cent of the total) that raised constitutional questions. That is an increase on last year’s figure of just seven cases, which was the lowest for any year since we began tabulating these results.⁷ However, a qualification on the 2009 figure is required since two of the cases so tallied have such a strong relationship to each other that, for all practical purposes, they might be regarded as a single decision. These cases are *John Holland Pty Ltd v Victorian Workcover Authority*⁸ and *John Holland Pty Ltd v Hamilton*⁹ (‘*John Holland Cases*’). They involved a challenge to, respectively, Victorian and NSW occupational health and safety legislation as being inconsistent with the *Occupational Health and Safety Act 1991* (Cth) and thus invalid under section 109 of the *Constitution*. In the second case, the brief unanimous judgment referred to the reasons given (also unanimously) in the preceding matter, after saying that the issues in each were ‘relevantly identical’.¹⁰ However, since the two challenges nevertheless stand as distinct cases, with the different state authorities not joined as defendants, it is strictly accurate to regard them as separate decisions and to tally them as such.¹¹ Arguably, this has the effect of inflating, particularly in respect of just the subset of constitutional cases, the number of unanimous decisions in this study. However, separate tallying accords with our preferred approach of taking the material and recording it with as little subjective manipulation as possible, while also alerting readers to those factors that enable a better appreciation of the actual significance of the results.

As for the breakdown in how the 52 cases were resolved, 2009 presents us with a rather startling break from the recent past. Only 12 of the cases – just over 23 per cent – were decided by a majority judgment(s) accompanied by a dissenting opinion. This is a lower figure by far than those found in any previous study. Across the life of the Gleeson Court, the percentage of cases in which the

5 Lynch and Williams, ‘The 2007 Statistics’, above n 2, 240.

6 For arguments against using a further refinement, such as use of a qualification that the constitutional issue be ‘substantial’, see Lynch and Williams, ‘The 2004 Statistics’, above n 2, 16.

7 The issue of the number of constitutional matters decided by the Court in recent years was discussed in Lynch and Williams, ‘The 2008 Statistics’, above n 2, 183–4.

8 (2009) 239 CLR 518.

9 (2009) 260 ALR 103.

10 Ibid 104.

11 This also has the merit of consistency with earlier studies, such as the decision to view *Al-Kateb v Godwin* (2004) 219 CLR 562 and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 as distinct, though obviously inter-related matters, in Lynch and Williams, ‘The 2004 Statistics’, above n 2, 21.

bench split as to the final orders was generally pegged at about half of those decided in any given year. The exceptions to this were 2005 and 2008, where cases featuring dissent dropped to around 35 per cent, still considerably higher than the result for 2009. It is tempting to ascribe the dramatic decline of formal disagreement on the High Court over the last year to the retirement of Kirby J, whose individual dissent rate was so persistently high as to be central to his reputation.¹² Inevitably, Kirby J's presence on the Court ensured that the occurrence of dissent for the institution as a whole was also high. In that sense, a lower frequency of cases with minority opinions was perhaps only to be expected following his departure from the Court. However, in order to fully appreciate just how little dissent there was on the first year of the new French Court, one needs to consider the relevant figure alongside those of the Gibbs, Mason and Brennan Courts – which all recorded the presence of dissenting opinions in 40 per cent or higher of the total number of cases determined.¹³ Admittedly those are aggregate results across several years, but nevertheless they are a good indication that the seven Justices currently serving have spent their first full year together with a significantly lower occurrence of formal disagreement than has typically been the case over recent decades.

The extent to which 2009 represents a marked shift in the levels of consensus on the Court is even more starkly borne out by the extremely high prevalence of unanimity. The first five years of the Gleeson Court saw it deliver unanimous opinions, on average, in around 13 per cent of cases.¹⁴ In the second half of its life, unanimity in the Gleeson Court climbed up into the 20 per cent range, ending on a high of almost 28 per cent of all opinions delivered in 2008.¹⁵ In past studies, we demonstrated that it was simplistic to attribute the failure of the Court to reach more unanimous decisions solely to the propensity of Kirby J to disagree with his colleagues.¹⁶ While dissent is of course fatal to the attainment of unanimity, it is not the only obstacle to the single expression of the Court's view. For as we have observed in previous years, lower levels of formal disagreement do not necessarily translate into the delivery of more unanimous opinions.

Again, to appreciate just how dramatic the amount of unqualified consensus was on the Court last year, it is useful to consider that under the three Chief Justices before Gleeson CJ, unanimity was the highest under Sir Anthony Mason, but even then it was just a quarter of all decisions. This is not to say that was a low result – if anything, we should always presume that the odds are against seven High Court Justices speaking in unison. But it serves to underscore just how remarkable it is that the French Court delivered a unanimous opinion in 44

12 Just the title alone of the vast festschrift recently published in Justice Kirby's honour – 'Appealing to the Future' – is sufficient evidence of this fact, but so is the sobriquet regularly applied to him of 'The Great Dissenter': see Ian Freckelton and Hugh Selby (eds), *Appealing to the Future – Michael Kirby and His Legacy* (Lawbook Co, 2009) 42–44.

13 Lynch, 'Does the High Court Disagree', above n 1, 497.

14 Lynch, 'The Gleeson Court on Constitutional Law', above n 2, 42.

15 Lynch and Williams, 'The 2008 Statistics', above n 2, 182.

16 Ibid 187; Lynch and Williams, 'The 2007 Statistics', above n 2, 243–44.

per cent of cases last year. Whether this is an aberration – a ‘honeymoon’ period for this new grouping of Justices – before a return to more modest levels of unanimity, we will have to wait and see.

While there were clear changes in the overall business of the Court in 2009, it was very much business as usual when one considers the constitutional law cases in isolation. Although two unanimous results are recorded, readers should note that these are the essentially identical *John Holland Cases* already mentioned. Half of the total 10 cases produced dissenting opinions – a result very much in line with the norm for these cases in previous years. Across the annual studies of the Gleeson Court, the prevalence of constitutional cases decided by several opinions, none of which was dissenting, was sometimes on a par with or (more rarely) higher than those featuring outright disagreement. Regardless of any yearly vacillation between those two categories, unanimity was generally elusive. The results for the French Court’s first year of constitutional law decisions present no departure from this. If anything, it is noteworthy that a Court that proved so adept at writing generally with one voice was unable to translate that to the context of constitutional law issues.

Table B(I) All Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered¹⁷

Size of Bench	Number of Matters	How Resolved	Frequency	Cases Sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	13 (25.00%)	Unanimous	3 (5.77%)	3						
		By Concurrence	5 (9.62%)		2	2				1
		6:1	3 (5.77%)			1	1		1	
		5:2	-							
		4:3	2 (3.85%)				2			
6	4 (7.69%)	Unanimous	1 (1.92%)	1						
		By Concurrence	3 (5.77%)			1	2			
		5:1	-							
		4:2	-							
		3:3	-							
5	35 (67.31%)	Unanimous	19 36.54%	19						
		By Concurrence	9 (17.31%)		7	1		1		
		4:1	7 (13.46%)		3	2	1	1		
		3:2	-							

¹⁷ All percentages given in this table are of the total number of matters (52).

Table B(II) Constitutional Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered¹⁸

Size of Bench	Number of Matters	How Resolved	Frequency	Cases Sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	9 (90.00%)	Unanimous	2 (20.00%)	2						
		By Concurrence	2 (20.00%)		1	1				
		6:1	3 (30.00%)			1	1		1	
		5:2	-							
		4:3	2 (20.00%)				2			
6	1 (10.00%)	Unanimous								
		By Concurrence	1 (10.00%)			1				
		5:1	-							
		4:2	-							
		3:3	-							

Tables B(I) and B(II) aim to reveal several things about the High Court's decision making over 2009. First, they present a breakdown of, respectively, all matters and then just the constitutional matters according to the size of the bench and how frequently it split in the various possible ways open to it. Second, the tables record the number of opinions that were produced by the Court in making these decisions. This is indicated by the column headed 'Cases Sorted by Number of Opinions Delivered'. Immediately under that heading are the figures 1 to 7, which are the number of opinions possible for the Court to deliver. Where that full range is not applicable (essentially, when a unanimous opinion is delivered), shading is used to block off the irrelevant categories. It is important to stress that the figures given in the fields of the 'Number of Opinions Delivered' column refer to the number of cases containing as many individual opinions as indicated in the heading bar.

¹⁸ All percentages given in this table are of the total number of constitutional matters (10).

These tables should be read from left to right. For example, Table B(I) tells us that of the 13 matters heard by a seven member bench, just two produced a 4:3 split, and in both of those cases four separate opinions were delivered. That table allows us to identify the most common features of the cases in the period under examination. The profile of the ‘typical’ 2009 High Court case was a five judge decision resolved with a unanimous opinion. That is hardly unexpected given how frequently the Court spoke with one voice. In 2006, more cases were decided in that same way than in any other, but in that year the Court only decided about 20 per cent of its total caseload unanimously.

Similarly, we should not be surprised at the very low incidence of cases with as many opinions as there were judges. Only three decisions fit this profile, but in only one of them were a number of substantial opinions delivered – *R v Keenan*.¹⁹ In the other two, the High Court continued what we identified in 2008 as a recently emerged ‘tradition’ of having a new arrival on the bench deliver the lead opinion with which the other Justices, without anything more, simply express their agreement.²⁰ In *Keramianakis v Regional Publishers Pty Ltd*,²¹ the Chief Justice authored the only substantive opinion and in *Hickson v Goodman Fielder Ltd*,²² Bell J did the same. In both cases, the rest of the Court wrote individually but only to express unqualified concurrence. While in recent years, established members of the Court (for want of a better expression) have on occasion also authored sole opinions that have met with individual assent from across the rest of the Court, it is striking that all new appointments since Heydon J in 2003 have featured as the major opinion author in such a case in their first year on the bench.

Table B(II) provides a similar breakdown of how opinions in the 10 constitutional matters for 2009 were delivered. In order to have a complete perspective, it should be recalled that the two cases decided unanimously (the *John Holland Cases*) are very strongly linked. The constitutional cases that provoked the most disagreement were *Wurridjal v Commonwealth*²³ (with only one dissent, from the departing Kirby J, but six separate opinions delivered), and *Pape v Commissioner of Taxation*²⁴ and *International Finance Trust Co Ltd v New South Wales Crime Commission*²⁵ – in both of which the Court split 4:3 and produced four opinions.

19 (2009) 236 CLR 397.

20 Lynch and Williams, ‘The 2007 Statistics’, above n 2, 243.

21 (2009) 237 CLR 268.

22 (2009) 237 CLR 130.

23 (2009) 237 CLR 309.

24 (2009) 238 CLR 1.

25 (2009) 240 CLR 319.

Table C – Subject Matter of Constitutional Cases

Topic	Number of Cases	References to Cases ²⁶ (italics indicate repetition)
s 7	1	33
s 9	1	33
s 10	1	33
s 15	1	33
s 25	1	33
s 29	1	33
s 30	1	33
s 31	1	33
s 41	1	33
s 51(i)	1	23
s 51(ii)	2	23, 33
s 51(vi)	1	29
s 51(xxiiiA)	1	3
s 51(xxxi)	2	2, 51
s 51(xxxvi)	1	<i>51</i>
s 51(xxxix)	1	23
s 61	2	23, <i>51</i>
Chapter III Judicial Power	3	4, 29, 49
s 81	1	23
s 83	1	23
s 95	1	33
s 96	1	<i>51</i>
s 107	1	33
s 108	1	33
s 109	2	45, 46
s 111	1	33
s 122	1	2
s 123	1	33
s 124	1	33
State Immunity from Commonwealth Law	1	33

26 The reference numbers given are simply a shorthand citation of the case – the medium neutral citation for each of these cases simply requires prefixing the number given with '[2009] HCA'. Full case details are given in the Appendix.

Table C lists the provisions of the *Commonwealth Constitution* that arose for consideration in the 10 constitutional law matters tallied.

III THE INDIVIDUAL PROFILE

Table D(I) – Actions of Individual Justices: All Matters

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	44	19 (43.18%)	25 (56.82%)	0 (0%)
Gummow J	43	19 (44.19%)	23 (53.49%)	1 (2.33%)
Kirby J	4	0 (0%)	2 (50.00%)	2 (50.00%)
Hayne J	43	16 (37.21%)	24 (55.81%)	3 (6.98%)
Heydon J	47	19 (40.43%)	21 (44.68%)	7 (14.89%)
Crennan J	35	15 (42.86%)	19 (54.29%)	1 (2.86%)
Kiefel J	42	17 (40.48%)	22 (52.38%)	3 (7.14%)
Bell J	32	17 (53.13%)	15 (46.88%)	0 (0%)

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2009. As Kirby J sat on just the first four matters of the year before his retirement, he is included for the sake of completeness without the need for further comment. Justices Crennan and Bell sat on slightly fewer cases than their colleagues – with the disparity of 15 cases between Bell and Heydon JJ being the largest in terms of judicial opinions given for the year. This does not necessarily prevent comparison throughout the tables in this article, but it is an important reservation to bear in mind when doing so.

Two-thousand-and-nine did not see any dramatic variations in the level of individual dissent we have grown accustomed to seeing in these annual tables. With Kirby J but a memory, Heydon J was the Justice most frequently in express disagreement with his colleagues. However, this was not to such an extent that it generates much excitement. It is not even particularly surprising as Heydon J has annually dissented in a handful of cases. His Honour's result for 2009 approaches his highest rate of dissent to date – just over 15 per cent of the opinions he wrote in 2006.²⁷ Not only are such results modest by comparison to Kirby J, they are also significantly lower than the rates of dissent regularly reached by McHugh and Callinan JJ as members of the Gleeson Court.

With no other Justice dissenting more than three times in 2009, dissent has probably not been rarer in living memory. Indeed, the newest members of the High Court, the Chief Justice and Bell J, did not find themselves in dissent at all.

27 Lynch and Williams, 'The 2006 Statistics', above n 2, 196.

But there can still be surprises – Gummow J, whose number of dissenting judgments has been remarkably low throughout his tenure, found himself in the especially unfamiliar position of lone dissent against a joint opinion authored by the rest of the Court (Heydon, Crennan, Kiefel and Bell JJ) in *Visser v Honourable President Justice Giudice*.²⁸

The real story in Table D(I) concerns the individual rates of participation in the delivery of unanimous opinions. Of course, these are reflective of the very high level of unanimity in Table A for the institution as a whole. The soar in unanimity is clearly the signature change in the first year of the French Court from that of its predecessor. To be sure, the departure of a serial dissenter such as Kirby J must make a difference, but it is not the only difference. The Gleeson Court, as these studies have shown, did not invariably determine cases by a six or four judge joint opinion accompanied by a solo concurrence or over a lone dissent penned by Kirby J. There was far greater fragmentation of opinion than that. It is important to keep this in mind when regarding the Court's new found ability to write more frequently with each other. Any change in composition, quite aside from the nature of the matters to be decided in any one year, may play a part in such a shift, but it seems not unreasonable to suggest that the new Chief Justice is a major factor. This may be through conscious efforts at increasing the rate of unanimous or joint opinions on his part or a greater willingness to exchange and collaborate on behalf of the rest of the Court due to the change in leadership itself or some other difference from previous years. In 2008, we said that inevitably any outsider's 'understanding of the ability of Chief Justices to shape consensus is far from well developed', but suggested that, depending on the individual, the office itself appears to provide a number of ways through which change might be effected.²⁹ In trying to understand the clear break that the results for 2009 have with those from the immediate past, the fact that this is now the French Court is likely to be at least of some significance.

28 (2009) 239 CLR 361.

29 Lynch and Williams, 'The 2007 Statistics', above n 2, 254–5.

Table D(II) – Actions of Individual Justices: Constitutional Matters

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	10	2 (20.00%)	8 (80.00%)	0 (0%)
Gummow J	10	2 (20.00%)	8 (80.00%)	0 (0%)
Kirby J	3	0 (0%)	2 (66.67%)	1 (33.33%)
Hayne J	10	2 (20.00%)	6 (60.00%)	2 (20.00%)
Heydon J	10	2 (20.00%)	5 (50.00%)	3 (30.00%)
Crennan J	9	2 (20.00%)	6 (66.67%)	1 (11.11%)
Kiefel J	10	2 (20.00%)	6 (60.00%)	2 (20.00%)
Bell J	7	2 (20.00%)	5 (71.43%)	0 (0%)

Table D(II) records the actions of individual justices in the constitutional cases of 2009. Two-thousand-and-eight, which had the fewest number of constitutional cases of any year we have studied, saw dissent limited to Kirby J. Two-thousand-and-nine featured a number of major and difficult constitutional matters and this is reflected in the broader occurrence of dissenting opinions – with Hayne, Heydon, Crennan and Kiefel JJ all delivering at least one minority judgment. For both Crennan and Kiefel JJ, these were their first dissenting opinions in a constitutional case since joining the Court.³⁰ The new Chief Justice and Gummow J sat on all 10 constitutional matters and dissented in none of them.

Table E(I) – Joint Judgment Authorship: All Matters

	French CJ	Gummow J	Kirby J	Hayne J	Heydon J	Crennan J	Kiefel J	Bell J
French CJ	-	25 (56.82%)	0 (0%)	16 (36.36%)	17 (38.64%)	18 (40.91%)	19 (43.18%)	20 (45.45%)
Gummow J	25 (58.14%)	-	0 (0%)	27 (62.79%)	22 (51.16%)	19 (44.19%)	21 (48.84%)	20 (46.51%)
Kirby J	0 (0%)	0 (0%)	-	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Hayne J	16 (37.21%)	27 (62.79%)	0 (0%)	-	23 (53.49%)	17 (39.53%)	24 (55.81%)	18 (41.86%)
Heydon J	17 (36.17%)	22 (46.81%)	0 (0%)	23 (48.94%)	-	18 (38.30%)	22 (46.81%)	19 (40.43%)

30 They authored a minority opinion with Hayne J in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 and Kiefel J was additionally in dissent (again with Hayne J) in *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

Crennan J	18 (51.43%)	19 (54.29%)	0 (0%)	17 (48.57%)	18 (51.43%)	-	23 (65.71%)	17 (48.57%)
Kiefel J	19 (45.24%)	21 (50.00%)	0 (0%)	24 (57.14%)	22 (52.38%)	23 (54.76%)	-	20 (47.62%)
Bell J	20 (62.5%)	20 (62.5%)	0 (0%)	18 (56.25%)	19 (59.38%)	17 (53.13%)	20 (62.5%)	-

Table E(II) – Joint Judgment Authorship: Constitutional Matters

	French CJ	Gummow J	Kirby J	Hayne J	Heydon J	Crennan J	Kiefel J	Bell J
French CJ	-	4 (40.00%)	0 (0%)	2 (20.00%)	2 (20.00%)	3 (30.00%)	2 (20.00%)	2 (20.00%)
Gummow J	4 (40.00%)	-	0 (0%)	4 (40.00%)	4 (40.00%)	5 (50.00%)	4 (40.00%)	5 (50.00%)
Kirby J	0 (0%)	0 (0%)	-	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Hayne J	2 (20.00%)	4 (40.00%)	0 (0%)	-	4 (40.00%)	6 (60.00%)	8 (80.00%)	4 (40.00%)
Heydon J	2 (20.00%)	4 (40.00%)	0 (0%)	4 (40.00%)	-	4 (40.00%)	5 (50.00%)	4 (40.00%)
Crennan J	3 (33.33%)	5 (55.55%)	0 (0%)	6 (66.67%)	4 (44.44%)	-	6 (66.67%)	4 (44.44%)
Kiefel J	2 (20.00%)	4 (40.00%)	0 (0%)	8 (80.00%)	5 (50.00%)	6 (60.00%)	-	5 (50.00%)
Bell J	2 (28.57%)	5 (71.43%)	0 (0%)	4 (57.14%)	4 (57.14%)	4 (57.14%)	5 (71.43%)	-

Tables E(I) and E(II) indicate the number of times a Justice jointly authored an opinion with his or her colleagues. It should be noted that the results for Crennan and Bell JJ in these tables and the rankings that follow in Tables F(I) and (II) are affected by the fewer number of cases that each sat on relative to the other members of the Court. As Kirby J wrote with no-one in his final four cases, he may be set aside completely. The tables should be read horizontally as the percentage results vary depending on the number of cases each member of the Court actually sat on.

As ever, it must be stressed that a high incidence of joint judgment delivery for one Justice across the other members of the Court cannot be simply equated with influence. Without knowing more about the internal dynamic of the Court's members, these figures do not enable us to assess the division of labour nor to distinguish between the driving intellectual force and the 'joiners' who might come together in a coalition of Justices in any particular decision.

The results for 2009 are rather more complex than for similar tables over the life of the Gleeson Court. Those years were invariably marked by the strong dominance of the Gummow-Hayne partnership and the frequency with which

other Justices wrote with both, particularly Gummow J.³¹ Justices Gummow and Hayne last year were still each other's most regular co-author than any other Justice, but the degree to which their colleagues joined with them displayed greater differentiation than in the past. To take a clear example, the Chief Justice wrote both more often with Gummow J and least often with Hayne J than any of the other judges he joined with. Justice Kiefel wrote mostly with Hayne J, but then with Crennan and Heydon JJ before Gummow J. Justice Crennan collaborated with Kiefel J more than she did with anyone else, but then Gummow, Heydon and Hayne JJ, in that order, though admittedly very close together. In 2007, we found that Crennan J was the 'most consistently preferred collaborator across the Court',³² with Gummow and Hayne JJ writing with her Honour more than any other member of the Court, barring each other, by a significant margin. While the fact that Crennan J sat on fewer cases in 2009 undoubtedly contributed to her reduced rate of collaboration in Table E(I), it is still interesting, given their earlier frequency of joint judgment delivery, that last year she was only Hayne J's fifth most frequent collaborator and was actually the Justice with whom Gummow J wrote the least.

Perhaps the most intriguing results in Table E(I) are those for French CJ. The suggestion was made above that the sharp rise in unanimous decisions last year likely owed something to his new leadership of the Court. We do not discount that here, but these results suggest that more may be occurring than the Chief Justice personally forging judicial coalitions. Justice Bell wrote with French CJ as much as she did with Gummow and Kiefel JJ, which was slightly more than she wrote with the remaining three members of the Court. Justice Gummow joined the opinions of his Chief Justice almost as frequently as he wrote with Hayne J, but the other Justices were generally less likely to join with French CJ than they were with most of their other colleagues. However, the difference is rarely more than one or two cases and should not be too heavily stressed. Additionally, we should be clear that the fact that the Chief Justice was not the most frequent co-author of all the Justices on the Court does not say anything about the strength of his influence. We would also note that the former Chief Justice, Gleeson CJ, also tended to write with other judges less than several of them did with each other.

The striking feature of E(II) is the emergence of Kiefel J as the most regular co-author of opinions for no fewer than four of her colleagues – Hayne and Heydon JJ plus Bell J (who wrote just as much with Gummow J) and Crennan J (who did so with Hayne J). The most frequent joining in constitutional cases was between Hayne and Kiefel JJ who wrote together in eight out of the 10 matters,

31 Some insight into Gummow J's talent for coalition building was provided by remarks from the Hon Michael McHugh, quoted in last year's study: Lynch and Williams, 'The 2008 Statistics', above n 2, 191. See also Leslie Zines, 'Chief Justice Gleeson and the Constitution' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2010) 269, 282.

32 Lynch and Williams, 'The 2007 Statistics', above n 2, 250.

twice as much as either did with Gummow J. In two of those cases, Hayne and Kiefel JJ were in the minority.³³

For the sake of clarity, the rankings of co-authorship indicated by Tables E(I) and E(II) are the subject of the tables below:

Table F(I) – Joint Judgment Authorship: All Matters: Rankings

	Fr'ch	Gu'w	Kirby	Hayne	Hey'n	Cren'n	Kief'l	Bell
Fr'ch	-	1	n/a	6	5	4	3	2
Gu'w	2	-	n/a	1	3	6	4	5
Kirby	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Hayne	6	1	n/a	-	3	5	2	4
Hey'n	5	2	n/a	1	-	4	2	3
Cren'n	3	2	n/a	4	3	-	1	4
Kief'l	6	4	n/a	1	3	2	-	5
Bell	1	1	n/a	3	2	4	1	-

Table F(II) – Joint Judgment Authorship: Constitutional Matters: Rankings

	Fr'ch	Gu'w	Kirby	Hayne	Hey'n	Cren'n	Kief'l	Bell
Fr'ch	-	1	n/a	3	3	2	3	3
Gu'w	2	-	n/a	2	2	1	2	1
Kirby	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Hayne	4	3	n/a	-	3	2	1	3
Hey'n	3	2	n/a	2	-	2	1	2
Cren'n	4	2	n/a	1	3	-	1	3
Kief'l	5	4	n/a	1	3	2	-	3
Bell	3	1	n/a	2	2	2	1	-

33 *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (with Crennan J).

IV CONCLUSION

Two-thousand-and-nine was a year of remarkable change for the High Court. It saw the first full year of only its twelfth Chief Justice, French CJ, as well as the retirement of its 'great dissenter', Kirby J. The latter's replacement by Bell J brought the number of female justices on the court to three: one short of a majority. Given only four female justices (out of a total of 48) have ever been appointed to the High Court, this speaks strongly both of past failures to appoint women and a new willingness to do so.

It is useful to reflect on changes in the composition of the Court, because something (perhaps new personnel, perhaps a different style of leadership by a new Chief Justice or just a change in the Court's internal dynamic due to a combination of these and other factors) must explain the seismic shift in decision making in 2009. It was not just a year when the Justices agreed with each other more often than in the past – it was a year when unanimity broke out contrary to all of the statistical evidence of recent decades. The achievement of consensus on the High Court has always proved difficult, yet in 2009 this was the defining feature of the new French Court.

The introduction of two new Justices and the rise in agreement has also produced significant shifts in the patterns of joint decision making across the Court. The picture is a complex one, and long-term trends are yet to emerge. However, in constitutional cases, the longstanding partnership between Gummow and Hayne JJ was overshadowed in 2009 by a new and dominant collaborative relationship between Hayne and Kiefel JJ, who wrote together in eight out of the 10 matters. It is important to note that Hayne and Kiefel JJ only wrote exclusively with each other in one case, while in the other seven they were also joined by others. Nevertheless, the high percentage of joint judgments they shared, while Hayne J explicitly agreed with Gummow J in only half as many, is notable given that the co-authorship of the latter pair, particularly in constitutional law cases, had been a consistently strong feature of the Gleeson Court. In constitutional matters, the Gummow-Hayne partnership has previously only ever broken down on those very rare occasions when one Justice found himself in dissent from a majority of which the other was a member. It will be interesting to see if 2009 marks a lasting break from the high regularity of Gummow-Hayne co-authorship, or whether their strong consistency of judicial outlook will reassert itself in future years. One gets the sense that decision making on the High Court is in a state of flux, and that it is too early to know whether significant new developments like that towards unanimity will be maintained, or whether old patterns will re-emerge or yet new ones be formed.

While this article has a clear focus on presenting the statistics of High Court decision making in 2009, it would be remiss not to make observations about the substantive work of the Court. In 2008, we lamented what we saw as the often overly cautious approach to the development of constitutional doctrine by the Gleeson Court, and the frequent use by its Justices of the techniques of constitutional avoidance, particularly statutory construction. We saw this as a

reason why the Gleeson Court is unlikely to be remembered as a leading era in the development of Australian constitutional jurisprudence.

These comments can certainly not be repeated in regard to the constitutional decisions of the first full year of the French Court. Two-thousand-and-nine marks an historically significant year in the development of constitutional doctrine by the Court. The landmark decision in *Pape v Commissioner of Taxation*³⁴ surprised many in asserting limits upon the Commonwealth's power of appropriation in section 81 of the *Commonwealth Constitution*, while several other cases dealt with important matters of federalism or the separation of judicial power. The significance of these cases meant that the consensus that appeared so often in 2009 failed to manifest when it came to matters of constitutional law. That comes as no surprise. Unanimity has its place, but so too does dissent, especially in cases that raise unresolved, indeterminate questions of governance and public law.

APPENDIX – EXPLANATORY NOTES

The notes identify when and how discretion has been exercised in compiling the statistical tables in this article. As the *Harvard Law Review* editors once stated in explaining their own methodology, 'the nature of the errors likely to be committed in constructing the tables should be indicated so that the reader might assess for himself the accuracy and value of the information conveyed'.³⁵

A Case Reports Identified as Constitutional

- *Wurridjal v Commonwealth*³⁶
- *Wong v Commonwealth; Selim v Lele, Tan and Rivett constituting the Professional Services Review Committee No 309*³⁷
- *K-Generation Pty Ltd v Liquor Licensing Court*³⁸
- *Pape v Commissioner of Taxation*³⁹
- *Lane v Morrison*⁴⁰
- *Clarke v Commissioner of Taxation*⁴¹
- *John Holland Pty Ltd v Victorian Workcover Authority*⁴²
- *John Holland Pty Ltd v Hamilton*⁴³

34 (2009) 238 CLR 1.

35 Louis Henkin, 'The Supreme Court, 1967 Term' (1968) 82 *Harvard Law Review* 63, 301.

36 (2009) 237 CLR 309.

37 (2009) 236 CLR 573.

38 (2009) 237 CLR 501.

39 (2009) 238 CLR 1.

40 (2009) 239 CLR 230.

41 (2009) 240 CLR 272.

42 (2009) 239 CLR 518.

- *International Finance Trust Co Ltd v New South Wales Crime Commission*⁴⁴
- *ICM Agriculture Pty Ltd v Commonwealth*.⁴⁵

Not tallied as constitutional cases, but perhaps meriting some brief acknowledgement, were *Keramianakis v Regional Publishers Pty Ltd*⁴⁶ (in which cases on section 73 of the *Constitution* were deemed of no relevance to determining the scope of a statutory jurisdiction conferred upon a State Court of Appeal) and *Bakewell v The Queen*⁴⁷ (in which a claim under the doctrine from *Kable v Director of Public Prosecutions for New South Wales*⁴⁸ was ruled unnecessary to answer after construction of the statute).

B Case Reports Not Tallied

Only one matter on the AustLII database for 2009 was excluded from tallying as it was decided by a single justice alone: *Lane v Morrison* (2009) 252 ALR 605.

C Case Reports Involving a Number of Matters – How Tallied

The following cases involved a number of matters but were tallied singly due to the presence of a common factual basis or questions:

- *Wong v Commonwealth; Selim v Lele, Tan and Rivett constituting the Professional Services Review Committee No 309*⁴⁹
- *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*⁵⁰
- *Minister for Immigration and Citizenship v SZJGV; Minister for Immigration and Citizenship v SZJXO*⁵¹
- *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd; Jeffery & Katauskas Pty Ltd v Rickard Constructions Pty Ltd (subject to Deed of Company Arrangement)*⁵²
- *John Holland Pty Ltd v Hamilton*⁵³

43 (2009) 260 ALR 103.

44 (2009) 240 CLR 319.

45 (2009) 240 CLR 140.

46 (2009) 237 CLR 268.

47 (2009) 238 CLR 287.

48 (1996) 189 CLR 51.

49 (2009) 236 CLR 573.

50 (2009) 237 CLR 603.

51 (2009) 238 CLR 642.

52 (2009) 239 CLR 75.

53 (2009) 260 ALR 103.

- *CAL No 14 Pty Ltd v Motor Accidents Insurance Board; CAL No 14 Pty Ltd v Scott*⁵⁴
- *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem*.⁵⁵

No case was tallied as a multiple number of matters in this study.⁵⁶

D Tallying Decisions Warranting Explanation

- *Pape v Commissioner of Taxation*⁵⁷ – although concurring in part, the joint judgment of Hayne and Kiefel JJ is tallied as dissenting; and
- *Campbell v Backoffice Investments Pty Ltd [No 2]*⁵⁸ – this matter is a determination upon further submissions as to costs by the parties in *Campbell v Backoffice Investments Pty Ltd*,⁵⁹ nevertheless it is tallied separately.

54 (2009) 239 CLR 390.

55 (2009) 239 CLR 420.

56 The purpose behind multiple tallying in some cases – and the competing arguments – are considered in Lynch, ‘Dissent’, above n 1, 500–2.

57 (2009) 238 CLR 1.

58 (2009) 259 ALR 402.

59 (2009) 238 CLR 304.