# THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2019 STATISTICS

ANDREW LYNCH*

*This article presents data on the High Court's decision-making in 2019, examining institutional and individual levels of unanimity, concurrence and dissent. It points out distinctive features of those decisions – noting particularly the high frequency of both seven-member benches and the number of cases decided by concurrence over 2019. The latter suggests the possibility of greater judicial individualism re-emerging on the Court despite the clear endorsement of the 'collegiate approach' by Chief Justice Kiefel and its practice in the first two years of her tenure as the Chief Justice. This article is the latest instalment in a series of annual studies conducted by the authors since 2003.*

## I INTRODUCTION

This article reports the way in which the High Court as an institution and its individual judges decided the matters that came before them in 2019. It continues a series which began in 2003.[1] The High Court's decisions and the subset of constitutional matters decided in the calendar year are tallied to reveal how the institution has responded to the cases that came before it and where each individual member of the Court sits within those institutional decisions. The purpose of these articles is to provide the reader with the level of consensus, including the degree to which this is unanimous or fragmented, and dissent, and also the relative rates of joining by individual Justices in the same set of reasons for judgment. The latter can indicate the existence of regular coalitions on the bench. Commentary is offered on the tables of annual results so to place them in the context of the immediately preceding years in which the same judicial actors have featured, and also to contrast and compare with earlier patterns of decision-making and judicial

* Professor, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales. I thank Trent Ford for research assistance, Associate Professor Sean Brennan for comments and suggestions, and acknowledge the role played by my colleague Professor George Williams over many earlier annual studies in this series. I alone am responsible for any errors.

1 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27(1) *University of New South Wales Law Journal* 88. For a full list of the published annual studies, see the Appendix to this article. An earlier article, by one of the co-authors, examined a larger focus: Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years' (2003) 26(1) *University of New South Wales Law Journal* 32.

behaviour on the Court since 1998 and the start of the era under the leadership of Chief Justice Gleeson.

This article reports results that have been compiled using the same methodology as the earlier entries in the series.[2] The limitations of an empirical study of the decisions of any final court over the space of a single calendar year, particularly so in respect of the constitutional cases which comprise a small portion of the High Court's caseload have long been acknowledged. But two justifications have been made to allay any anxiety on that score. One has been to point to the same timeframe being used in other empirical studies on the decision-making in final courts, with the most famous being that commenced in respect of the United States Supreme Court in the *Harvard Law Review* in 1928.[3] Second, and more substantively, an annual review enables developments on the Court to be identified as they emerge and then tracked over time. This can complement current debates about the decisions of the Court and the way in which the Justices work with each other to fulfil the institution's function – especially when these are the subject of judicial pronouncement, as has been the case over the last decade.[4] The validity of this justification is borne out by the 2019 results presented in this article, which point to some developments in the typical size of the bench and also a higher frequency of cases decided by the Court without dissent but with separate concurring opinions.

2 See Andrew Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24(4) *Sydney Law Review* 470 ('Dissent'), with further discussion in Andrew Lynch, 'Does the High Court Disagree More Often in Constitutional Cases? A Statistical Study of Judgment Delivery 1981–2003' (2005) 33(3) *Federal Law Review* 485, 488–96.

3 For the inaugural study, see Felix Frankfurter and James M Landis, 'The Business of the Supreme Court at October Term, 1928' (1929) 43(1) *Harvard Law Review* 33.

4 See discussion in Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2017 Statistics' (2018) 41(4) *University of New South Wales Law Journal* 1134, 1135–8 ('The 2017 Statistics').

## II THE INSTITUTIONAL PROFILE

TABLE A: High Court of Australia Matters Tallied for 2019

| | Unanimous | By Concurrence | Majority over Dissent | Total |
|---|---|---|---|---|
| All Matters Tallied for Period | 6 (13.63%) | 23 (52.27%) | 15 (34.09%) | 44 (100%) |
| All Constitutional Matters Tallied for Period | 0 (0.00%) | 6 (50.00%) | 6 (50.00%) | 12 (100%) |

A total of 44 matters were tallied for 2019. Fifty cases appear on the Australasian Legal Information Institute High Court database for the year but six of these were excluded as matters decided by a single Justice and one was tallied twice in accordance with the established methodology in this series for cases comprising distinct matters that are treated differently by members of the Court.[5]

These 44 matters were decided by unanimous judgments (13.63% of matters tallied), by separate concurring opinions (52.27%), and by majority over dissent (34%). The percentage of matters decided unanimously was the lowest since 2012 and dramatically lower than in the two preceding years of the Court under Chief Justice Kiefel (in 2018, 44.07% of matters were decided unanimously – or 32.61% excluding the high number of three-member benches hearing matters on appeal from the Supreme Court of Nauru; in 2017, 35.29% of all matters were decided unanimously).

The percentage of matters featuring dissent more than doubled from 15.25% in 2018 and was slightly higher than the 31.37% recorded for 2017. For the first time under Kiefel CJ, the percentage of matters decided through concurring opinions exceeded that of matters decided either unanimously or over dissent. This is significant when considered against the Chief Justice's very clear articulation of the value of 'the collegiate approach' to judging on a multi-member Court over 'the individualistic approach'.[6] At the start of the Kiefel era, my co-author and I set down her Honour's stance (noting support from other members of the Court, namely Justices Bell and Keane) to argue that 'it remains vital to look at how the High Court decides the cases that come before it' in studies of this kind, specifically so as to answer these questions:

> Does what is happening in practice accord with the views expressed by Chief Justice Kiefel? Or does it instead show that the aspiration of judicial collaboration may

5 Australasian Legal Information Institute <http://www.austlii.edu.au/>. For further information about decisions affecting the tallying of 2019 matters see the Appendix – Explanatory Notes at the conclusion of this article.

6 Chief Justice Susan Kiefel, 'Judicial Methods in the 21st Century' (Speech, Supreme Court Oration, Banco Court, Supreme Court of Queensland, 16 March 2017) 8–11. For further sources, including statements of the contrary view, and general discussion see Andrew Lynch, 'Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 156.

> nevertheless prove elusive? Is it possible that the differences between individual justices that are observable in these results reflect diverse, possibly competing, perspectives on the judicial role in a multi-member court?[7]

The performance of the High Court in 2017 and 2018 provided an essentially positive answer to the first question and a negative to the second. At the same time, it did also flag signs of a less committed fidelity, at least, to 'the collegiate approach' evidenced by some members of the bench. In contrast, the very low incidence of unanimity in 2019 and the commensurate rise of cases decided by multiple concurring opinions, points to a change that goes against, rather than with, the grain of the Chief Justice's remarks about how the Court's decisions are best made and presented to the community. Admittedly, the shift may prove fleeting, reflecting the particular features of the matters that arose over this period, but it is nonetheless discernible. The cases of 2020 will reveal whether the Court has embarked on a more solid and lasting trajectory towards greater individualism.

Twelve of the 44 matters (27.27%) tallied for 2019 featured consideration of constitutional issues. In 2018, the comparable figure was just six of 59 matters – an all-time low (tied with 2014) for the number of constitutional matters since these annual surveys began in 2003.[8] The definition that determines the classification of matters as 'constitutional' remains:

> 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* ('*Constitution*'). That definition is framed deliberately to take in a wider category of cases than those simply involving matters falling within the constitutional description of 'a matter arising under this *Constitution* or involving its interpretation'.[9]

The only amendment to this statement as a classificatory tool has been to additionally include any matters before the Court involving questions of purely state or territory constitutional law.[10] No matters in 2019 came within this additional aspect of the definition.

No Justice dissented from the Court's orders in the few constitutional matters in the preceding year, but with twice the number of constitutional cases in 2019 it is perhaps not surprising that disagreement featured once more. Half the constitutional cases of 2019 contained a minority opinion – a much more familiar result than the low level of constitutional dissent in 2017 and its total absence in 2018.[11] No constitutional matter was decided unanimously.

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7 Lynch and Williams, 'The 2017 Statistics' (n 4) 1137–8 (citations omitted).

8 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2018 Statistics' (2019) 42(4) *University of New South Wales Law Journal* 1443, 1445 ('The 2018 Statistics').

9 Stephen Gageler, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25(1) *University of New South Wales Law Journal* 194, 195 (citations omitted).

10 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2007 Statistics' (2008) 31(1) *University of New South Wales Law Journal* 238, 240.

11 Lynch and Williams, 'The 2018 Statistics' (n 8).

TABLE B(I): All Matters: Breakdown of Matters by Resolution and Number of Opinions Delivered[12]

| Size of bench | Number of cases | How Resolved | Frequency | Cases Sorted by Number of Opinions | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| 7 | 27 (61.36%) | Unanimous | 2 (4.54%) | 2 | | | | | | |
| | | By concurrence | 15 (34.09%) | | 6 | 4 | 4 | 1 | | |
| | | 6:1 | 3 (6.81%) | | | 1 | 1 | 1 | | |
| | | 5:2 | 3 (6.81%) | | | | 2 | 1 | | |
| | | 4:3 | 4 (9.09%) | | 1 | 1 | 1 | 1 | | |
| 6 | 1 (2.27%) | Unanimous | | | | | | | | |
| | | By concurrence | 1 (2.27%) | | | 1 | | | | |
| | | 5:1 | | | | | | | | |
| | | 4:2 | | | | | | | | |
| | | 3:3 | | | | | | | | |
| 5 | 16 (36.36%) | Unanimous | 4 (9.09%) | 4 | | | | | | |
| | | By concurrence | 7 (15.91%) | | 6 | | 1 | | | |
| | | 4:1 | 4 (9.09%) | | 4 | | | | | |
| | | 3:2 | 1 (2.27%) | | | 1 | | | | |

TABLE B(II): Constitutional Matters: Breakdown of Matters by Resolution and Number of Opinions Delivered[13]

| Size of bench | Number of cases | How Resolved | Frequency | Cases Sorted by Number of Opinions | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| 7 | 12 (100%) | Unanimous | 0 | | | | | | | |
| | | By concurrence | 6 (50.00%) | | 2 | 2 | 1 | 1 | | |
| | | 6:1 | 3 (25.00%) | | | 1 | 1 | 1 | | |
| | | 5:2 | 2 (16.67%) | | | | 1 | 1 | | |
| | | 4:3 | 1 (8.33%) | | | | 1 | | | |

Tables B(I) and (II) reveal several things about the High Court's decision-making over 2019. First, they present a breakdown of, respectively, all matters and then just constitutional matters according to the size of the bench and how frequently it split in the ways open to it. Second, the tables record the number of opinions which were produced by the Court in making these decisions. Immediately under the heading 'Cases Sorted by Number of Opinions' are the

12 All percentages given in this table are of the total number of matters tallied (44).

13 All percentages given in this table are of the total number of constitutional matters tallied (12).

numbers one to seven, which are the number of opinions possible for the Court to deliver. Where that full range is not applicable, shading is used to block off the irrelevant categories. It is important that readers appreciate that the figures given in the fields of the 'Cases Sorted by Number of Opinions' column refer, as is indicated, to the number of *matters* containing as many individual opinions as indicated in the heading bar.

These tables should be read from left to right. For example, Table B(I) reveals that of the 16 matters heard by a five-member bench, seven were decided by concurring opinions but only one had more than two judgments.

In 2019 the bench sat most often with all seven Justices – 61.36% of matters were decided by all members of the Court. This is unprecedented in the history of these annual surveys which have routinely shown that a greater number of matters are decided each year by a bench comprised of five members. Further, the dominance of cases decided through separate concurring opinions, already noted in respect of Table A, is further revealed by Table B(I), with most matters decided this way regardless of size of the bench. For seven-member benches, nine of the 15 matters decided through concurring opinions contained more than two opinions.

In 2019, there were eight matters that meet the description of a 'close call' – that is, a case decided over a minority of more than one Justice.[14] This was on par with the seven 'close calls' of 2018.[15] Of the 2019 'close calls', five came down to a single vote, with the Court deciding four matters 4:3 and one matter 3:2.

Table B(II) records the same information in respect of the subset of constitutional cases. All 12 of the cases featuring a constitutional issue were decided by all seven Justices. Three constitutional matters had no fewer than five separate opinions – one decided through concurrences,[16] one over a lone dissent,[17] and one decided 5:2.[18] *Spence v Queensland* was decided 4:3 with four opinions.[19]

14 Brice Dickson, 'Close Calls in the House of Lords' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, 2011) 283, 283.

15 Lynch and Williams, 'The 2018 Statistics' (n 8) 1447.

16 *Clubb v Edwards* (2019) 366 ALR 1.

17 *Unions NSW v New South Wales* (2019) 264 CLR 595.

18 *BMW Australia Ltd v Brewster* (2019) 374 ALR 627.

19 (2019) 367 ALR 587.

TABLE C: Subject Matter of Constitutional Cases

| Topic | No of Cases | References to Cases (Italics indicate repetition) |
|---|---|---|
| s 7 | 3 | 1, 15, 24 |
| s 9 | 1 | *15* |
| s 10 | 1 | *15* |
| s 24 | 2 | *1, 24* |
| s 29 | 1 | *15* |
| s 31 | 1 | *15* |
| s 51(xxxi) | 2 | 7, 45 |
| s 51 (xxxvi) | 1 | *15* |
| s 51(xxxix) | 1 | *15* |
| Ch III | 3 | 31, 38, *45* |
| s 109 | 4 | 2, 4, *15*, 21 |
| s 122 | 1 | *2* |
| Implied freedom of political communication | 3 | *1*, 11, 23 |
| Territory self-government | 2 | *2*, *4* |

Table C lists the provisions and other aspects of the *Constitution* that arose for consideration in the 12 constitutional law matters tallied for 2019. It is assembled by reference to the catchwords accompanying each decision.

The recent dominance of section 44 in the High Court's constitutional diet has abated at last – with no such matters arising. Instead, the Court's year was made up of a mix of matters dealing with section 109 (four), the implied freedom of political communication and Chapter III (three matters each).

## III THE INDIVIDUAL PROFILE

TABLE D(I): Actions of Individual Justices: All Matters

| | Number of Judgments | Participation in Unanimous Judgment | Concurrences | Dissents |
|---|---|---|---|---|
| **Kiefel CJ** | 41 | 6 (14.63%) | 33 (80.49%) | 2 (4.88%) |
| **Bell J** | 39 | 4 (10.26%) | 34 (87.18%) | 1 (2.56%) |
| **Gageler J** | 37 | 5 (13.51%) | 27 (72.97%) | 5 (13.51%) |
| **Keane J** | 39 | 5 (12.82%) | 33 (84.62%) | 1 (2.56%) |
| **Nettle J** | 39 | 5 (12.82%) | 28 (71.79%) | 6 (15.38%) |
| **Gordon J** | 41 | 5 (12.20%) | 32 (78.05%) | 4 (9.76%) |
| **Edelman J** | 39 | 4 (10.26%) | 27 (69.23%) | 8 (20.51%) |

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2019. While the Court's membership was consistent over the year, assisting in a direct comparison between Justices, it is important to note that not all judges sit on all cases and so the number of opinions differs between them. Last year, the Chief Justice and Gordon J delivered the most opinions, 41 of the full tally of 44 matters, and Gageler J delivered the least with 37. With the Justices not all sitting on the same matters, the opportunities for unanimity or disagreement inevitably varied.

In 2018, for the first time in five years, all members of the Court dissented at least once. This continued into 2019. Justice Edelman delivered the most dissents with eight of his 39 judgments (20.51%) in the minority. This is the highest individual dissent rate in a single year since 2012, in which Heydon J dissented in 40.43% of matters he decided. However, that 2012 figure might be seen as the result of a particularly idiosyncratic approach adopted by the Justice concerned.[20] For a more recent and perhaps useful comparison, the highest rate of dissent on the Court in 2018 was just 10.87% by Nettle J. Justice Nettle surpassed that figure in 2019, with his rate of dissent, the second-highest after Edelman J, rising to 15.38%.

The three Justices who dissented least – Kiefel CJ, Keane and Bell JJ – all did so in joint judgments rather than alone. The Chief Justice and Keane J joined with Nettle J in dissent in *New South Wales v Robinson*;[21] Kiefel CJ filed a dissent with Gageler J in *CNY17 v Minister for Immigration and Border Protection*;[22] and Bell J's only dissent was also with Gageler J in *R v A2*.[23]

20 See discussion in Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2011 Statistics' (2012) 35(3) *University of New South Wales Law Journal* 846, 856; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2012 Statistics' (2013) 36(2) *University of New South Wales Law Journal* 514, 529–31 ('The 2012 Statistics').

21 (2019) 374 ALR 687.

22 (2019) 375 ALR 47.

23 (2019) 373 ALR 214.

TABLE D(II): Actions of Individual Justices: Constitutional Matters

| | Number of Judgments | Participation in unanimous judgment | Concurrences | Dissents |
|---|---|---|---|---|
| **Kiefel CJ** | 12 | – | 12 (100%) | 0 (0.00%) |
| **Bell J** | 12 | – | 12 (100%) | 0 (0.00%) |
| **Gageler J** | 12 | – | 9 (75.00%) | 3 (25.00%) |
| **Keane J** | 12 | – | 12 (100%) | 0 (0.00%) |
| **Nettle J** | 12 | – | 11 (91.67%) | 1 (8.33%) |
| **Gordon J** | 12 | – | 10 (83.33%) | 2 (16.67%) |
| **Edelman J** | 12 | – | 8 (66.67%) | 4 (33.33%) |

Table D(II) records the actions of individual justices in the 12 constitutional matters tallied for 2019. The Chief Justice, Bell and Keane JJ were not in the minority in any constitutional matter.

Consistent with his being the most frequent dissenter in 2019 matters generally, Edelman J filed the most dissents for constitutional matters – at 33.33%. Again, one has to go back to Heydon J, this time in 2011, to find a rate of dissent that exceeds Edelman J's in 2019. In that year, Heydon J was in a minority of 50% of the constitutional matters he decided (four out of a total of eight).

In two of the 2019 matters, Edelman J was in lone dissent,[24] while in the others his minority judgment sat alongside that of other Justices.[25] Justice Gageler filed three dissents; only for one was he alone in the minority.[26]

24 *Unions NSW v New South Wales* (2019) 264 CLR 595; *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 363 ALR 188.

25 *Spence v Queensland* (2019) 367 ALR 587 (Nettle and Gordon JJ also separately dissenting); *BMW Australia Ltd v Brewster* (2019) 374 ALR 627 (Gageler J also separately dissenting).

26 *Williams v Wreck Bay Aboriginal Community Council* (2019) 363 ALR 631.

TABLE E(I): Joint Judgment Authorship: All Matters

| | Kiefel CJ | Bell J | Gageler J | Keane J | Nettle J | Gordon J | Edelman J |
|---|---|---|---|---|---|---|---|
| **Kiefel CJ** | – | 27 (65.85%) | 13 (31.71%) | 33 (80.49%) | 17 (41.46%) | 18 (43.90%) | 10 (24.39%) |
| **Bell J** | 27 (69.23%) | – | 16 (41.03%) | 28 (71.79%) | 16 (41.03%) | 20 (51.28%) | 11 (28.21%) |
| **Gageler J** | 13 (35.14%) | 16 (43.24%) | – | 10 (27.03%) | 9 (24.32%) | 11 (29.73%) | 6 (16.22%) |
| **Keane J** | 33 (84.62%) | 28 (71.79%) | 10 (25.64%) | – | 17 (43.59%) | 17 (43.59%) | 11 (28.21%) |
| **Nettle J** | 17 (43.59%) | 16 (41.03%) | 9 (23.08%) | 17 (43.59%) | – | 21 (53.85%) | 10 (25.64%) |
| **Gordon J** | 18 (43.90%) | 20 (48.78%) | 11 (26.83%) | 17 (41.46%) | 21 (51.22%) | – | 10 (24.39%) |
| **Edelman J** | 10 (25.64%) | 11 (28.21%) | 6 (15.38%) | 11 (28.21%) | 10 (25.64%) | 10 (25.64%) | – |

TABLE E(II): Joint Judgment Authorship: Constitutional Matters

| | Kiefel CJ | Bell J | Gageler J | Keane J | Nettle J | Gordon J | Edelman J |
|---|---|---|---|---|---|---|---|
| **Kiefel CJ** | – | 10 (83.33%) | 2 (16.67%) | 11 (91.67%) | 7 (58.33%) | 6 (50.00%) | 1 (8.33%) |
| **Bell J** | 10 (83.33%) | – | 2 (16.67%) | 11 (91.67%) | 7 (58.33%) | 5 (41.67%) | 2 (16.67%) |
| **Gageler J** | 2 (16.67%) | 2 (16.67%) | – | 2 (16.67%) | 1 (8.33%) | 1 (8.33%) | 0 (0%) |
| **Keane J** | 11 (91.67%) | 11 (91.67%) | 2 (16.67%) | – | 8 (66.67%) | 6 (50.00%) | 2 (16.67%) |
| **Nettle J** | 7 (58.33%) | 7 (58.33%) | 1 (8.33%) | 8 (66.67%) | – | 6 (50.00%) | 2 (16.67%) |
| **Gordon J** | 6 (50.00%) | 5 (41.67%) | 1 (8.33%) | 6 (50.00%) | 6 (50.00%) | – | 1 (8.33%) |
| **Edelman J** | 1 (8.33%) | 2 (16.67%) | 0 (0%) | 2 (16.67%) | 2 (16.67%) | 1 (8.33%) | – |

Tables E(I) and E(II) indicate the number of times a Justice joined in an opinion with his or her colleagues. These tables should be read horizontally as the percentage results vary depending on the number of judgments each member of the Court delivered over the year. As mentioned earlier, because Justices do not sit with each other on an equal number of occasions the opportunities for some to join with each other are less than others have. Those caveats duly made, it remains clear that Gageler and Edelman JJ joined less in opinions relative to the joining of other colleagues.

The highest incidence of joining in judgment across all cases of 2019 was that of Kiefel CJ and Keane J. They joined with each other in over 80% of the matters that both decided. While in 2018 Bell J had joined with Kiefel CJ just as often as did Keane J, in 2019 she did so slightly less often. However, she was still the member of the Court that Kiefel CJ and Keane J joined most after each other. The strong rate of joining between these three Justices, and their ability to operate as a bloc in shaping majority opinion on the Court, led Professor Jeremy Gans to describe them in 2018 as 'a trio of … Great Assenters'.[27]

That appellation, which Gans identified as having been used in respect of Justice Van Devanter of the United States Supreme Court, is somewhat problematic in its presumed quality of judicial passivity. It may explain an individual judge's behaviour, but is not, I think, the best explanation for a collective phenomenon of consensus. This is true for the current 'troika' of Kiefel CJ, Bell and Keane JJ, and also earlier coalitions that have been central to majority opinion on the Court (the best example of which may be the partnership of Gummow and Hayne JJ).[28] There is more than simple assent occurring in each instance. But Gans' portrayal does have a fundamental accuracy – this is a group who agree with each other a very substantial amount of the time and in doing so they wield significant influence over the orders reached by the Court as an institution.

Unusually, the identification of a single member of the Court whom all (or even a majority) of Justices joined with most is not possible. No fewer than five Justices were the member most frequently joined by another. Conversely, Edelman J was the member that four Justices joined least often, and Gageler J was joined with least by the other three.

The incidence of joining in constitutional matters shows marked disparity across the Court. Unsurprisingly, Chief Justice Kiefel, Bell and Keane JJ joined each other in the great majority of constitutional matters, while Gageler and Edelman JJ each joined never more than twice with another member of the Court. Justices Nettle and Gordon occupy the middle ground in this respect, but atypically given past performance they did not, in 2019, join more with each other than they did with some other Justices in constitutional matters.

27 Jeremy Gans, 'The Great Assenters', *Inside Story* (Web Page, 1 May 2018) <https://insidestory.org.au/the-great-assenters>.

28 For discussion regarding this earlier significant partnership, see Lynch and Williams, 'The 2012 Statistics' (n 20) 528–9.

TABLE F(I): Joint Judgment Authorship: All Matters: Rankings

| | Kiefel CJ | Bell J | Gageler J | Keane J | Nettle J | Gordon J | Edelman J |
|---|---|---|---|---|---|---|---|
| **Kiefel J** | – | 2 | 5 | 1 | 4 | 3 | 6 |
| **Bell J** | 2 | – | 4 | 1 | 4 | 3 | 5 |
| **Gageler J** | 2 | 1 | – | 4 | 5 | 3 | 6 |
| **Keane J** | 1 | 2 | 5 | – | 3 | 3 | 4 |
| **Nettle J** | 2 | 3 | 5 | 2 | – | 1 | 4 |
| **Gordon J** | 3 | 2 | 5 | 4 | 1 | – | 6 |
| **Edelman J** | 2 | 1 | 3 | 1 | 2 | 2 | – |

TABLE F(II): Joint Judgment Authorship: Constitutional Matters: Rankings

| | Kiefel CJ | Bell J | Gageler J | Keane J | Nettle J | Gordon J | Edelman J |
|---|---|---|---|---|---|---|---|
| **Kiefel CJ** | – | 2 | 5 | 1 | 3 | 4 | 6 |
| **Bell J** | 2 | – | 5 | 1 | 3 | 4 | 5 |
| **Gageler J** | 1 | 1 | – | 1 | 2 | 2 | n/a |
| **Keane J** | 1 | 1 | 4 | – | 2 | 3 | 4 |
| **Nettle J** | 2 | 2 | 5 | 1 | – | 3 | 4 |
| **Gordon J** | 1 | 2 | 3 | 1 | 1 | – | 3 |
| **Edelman J** | 2 | 1 | n/a | 1 | 1 | 2 | – |

The rankings of joining between the Justices that are the subject of tables F(I) and (II) are drawn from the data in tables E(I) and (II). It is important to appreciate that in some instances the difference between how frequently a member of the

Court wrote with one colleague ahead of another may be slight – so having reference to tables E(I) and (II) will assist in keeping the simple rankings in some perspective.

## IV CONCLUSION

In the conclusion of the article reporting the statistics on High Court decisions of 2018, the focus was on trying to understand the remarkable absence of dissent in any constitutional law case. The factors that were considered included the perennial observation that the relevant cases are, of course, different year by year; the value of speaking with a unanimous institutional voice in politically-charged matters, such as those involving challenges to the eligibility of parliamentarians due to their holding dual citizenship; and the homogeneity of professional background in a court largely comprised of persons appointed with prior judicial experience. The latter was tied to a fourth consideration – the possible influence of the Chief Justice in driving an institutional norm consistent with her several pronouncements on the topic of collegiate judicial decision-making.

The results for 2019 prompt a reappraisal as to which of those considerations holds. With unanimity very scarce last year and over half of all cases decided by a number of concurring opinions, then even allowing for the unique qualities of the matters decided, the importance of speaking with a clear institutional voice was arguably diminished as a collective endeavour across the Court. Accordingly, conjecture about the cohesiveness of the Court in preceding years that looked to some essentially common previous professional experience or temperament assumes a lesser value. On the other hand, the role of leadership and deliberate adoption of institutional decision-making practices that aim to produce joint opinions remains relevant – but may be seen to waver.

In this regard, it is interesting to consider the strong parallels between the first two years of the Court under Kiefel CJ with the same period under her predecessor, French CJ. In 2009, the French Court decided 44.23% of all matters unanimously, relative to 32.69% of matters decided through concurring opinions; in 2010 an astonishing half of all matters were decided unanimously, while those decided by separate concurring judgments was slightly reduced to 31.25%. Then, in 2011, unanimity crashed to 16.67% and never again climbed as high for the remainder of French CJ's tenure. This did not see an immediate increase in cases decided by concurrence – which were 33.33% of all matters in 2011; instead, cases decided over a dissent accounted for 50% of matters decided in that year.

Compare this to 2017–19 under Kiefel CJ, and some similarities can be seen. In 2017, unanimity, although not as high as under French CJ, was still a solid 35.29%, and just ahead of the rate for cases decided by concurrence (33.33%). In 2018 a total of 44.07% of cases were decided unanimously, or 32.61% if we exclude the unusually high number of three-member benches; this was relative to 40.68% of cases decided through concurrences. But, as we have seen, in 2019, these substantial rates of unanimity fell to just 13.63%, while the number of

matters containing separate concurring opinions yet no dissents rose to over half of the total.

In short, in the third year of both Chief Justices, the strong institutional performance in collectively voicing agreement was dramatically reduced. It is tempting to see the first two years under each as akin to a 'honeymoon' period, in which the Court performed responsively to its new leader, and perhaps to specific institutional processes they might have established or to the emphasis they gave – whether publicly or internally – to their priorities for institutional decision-making. That hypothesis warrants much more detailed examination. It would be fascinating to see whether the experience under the High Court's two most recent Chief Justices resonates more broadly. This is beyond the scope of this article but work for a future occasion.

Even if there is something in that line of inquiry, we know that the factors bringing about the end of pronounced rates of unanimity under new Chief Justices are likely to be distinct. The contrast in this regard between Chief Justices French and Kiefel is stark. The signature development in Year Three of the French Court was Heydon J's withdrawal from institutional decision-making processes, if not collegial engagement more generally, and which was accompanied by his pungent criticism of such processes as an attack on individual judicial independence.[29] At the time, the articles in this series simply described this as the 'Heydon effect'.[30]

The change in Year Three of the Kiefel Court is much more subtle and diffuse, not at all attributable to a single individual breaking away from the rest of the court with a searing declaration of iconoclasm. As such it may present the greater challenge to the question of how the Court should decide, and what responsibility its members have to pursue institutional collaboration leading to fewer individual judgments, in the way that the current Chief Justice has sought to encourage.

Such individualism was especially visible in the way the constitutional cases of 2019 were determined. This is, of course, the normal run of things after the aberration of the preceding year when constitutional matters were both few in number and devoid of dissent. It is not so striking that explicit disagreement returned in the constitutional cases of 2019, with three of the 12 matters being a 'close call', but it was still notable how the Justices teased out their differences through separate opinions. As Table B(II) shows, in no case was the least number of opinions possible delivered. In three of the constitutional cases there were as many as five separate opinions, while over half had four or more opinions – two of those cases consisting only of concurrences and no formal dissent.

This is not necessarily a criticism or complaint – the necessity of each separate judgment must be appraised on its own merits and in the context of the case in question. But it is simply to observe that the tension between judicial emphasis on the institution on one hand and the individual on the other in the process of decision-making remains ongoing and variable in the practice of the Court.

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29 John Dyson Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 (April) *Law Quarterly Review* 205.

30 See above n 20.

It will be interesting to see what direction this moves in from here as the Kiefel era progresses, and especially as the Court heads into a period of departures and new appointments.

## 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'.[31]

### A Matters Identified as Constitutional

- *Unions NSW v New South Wales* (2019) 264 CLR 595.
- *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 363 ALR 188.
- *Williams v Wreck Bay Aboriginal Community Council* (2019) 363 ALR 631.
- *Northern Territory v Griffiths (deceased)* (2019) 364 ALR 208.
- *Clubb v Edwards; Preston v Avery* (2019) 366 ALR 1.
- *Spence v Queensland* (2019) 367 ALR 587.
- *Masson v Parsons* (2019) 368 ALR 583.
- *Comcare v Banerji* (2019) 372 ALR 42.
- *Palmer v Australian Electoral Commission* (2019) 372 ALR 102.
- *Minogue v Victoria* (2019) 372 ALR 623.
- *Vella v Commissioner of Police (NSW)* (2019) 374 ALR 1.
- *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 374 ALR 627.

### B Matters Not Tallied

- *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202 – Nettle J sitting alone.
- *Northern Territory v Griffiths (deceased) [No 2]* (2019) 368 ALR 77 – Nettle J sitting alone.
- *Bosanac v Commissioner of Taxation* (2019) 374 ALR 425 – Nettle J sitting alone.
- *Plaintiff S53/2019 v Minister for Immigration, Citizenship and Multicultural Affairs* (2019) 374 ALR 438 – Gageler J sitting alone.
- *AWI16 v Minister for Immigration, Citizenship and Multicultural Affairs* (2019) 374 ALR 441 – Gageler J sitting alone.

31 Louis Henkin, 'The Supreme Court 1967 Term' (1968) 82(1) *Harvard Law Review* 63, 301–2.

- *EBT16 v Minister for Home Affairs* (2019) 374 ALR 443 – Gageler J sitting alone.
- *DBE17 v Commonwealth* (2019) 266 CLR 156 – Nettle J sitting alone.

### C Cases 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 common questions:

- *Minister for Immigration and Border Protection v SZMTA; CQZ15 v Minister for Immigration and Border Protection; BEG15 v Minister for Immigration and Border Protection* (2019) 264 CLR 421.
- *Northern Territory v Griffiths (deceased)* (2019) 364 ALR 208.
- *Clubb v Edwards; Preston v Avery* (2019) 366 ALR 1.
- *Tjungarrayi v Western Australia; KN (deceased) v Western Australia* (2019) 366 ALR 603.
- *Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart* (2019) 366 ALR 635.
- *Lee v Lee; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited* (2019) 266 CLR 129.
- *R v A2; R v Magennis; R v Vaziri* (2019) 373 ALR 214.
- *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 373 ALR 214.

### D Cases Tallied as a Multiple Number of Matters[32]

- *Lordianto v Commissioner of the Australian Federal Police; Kalimuthu v Commissioner of the Australian Federal Police* (2019) 266 CLR 273 – two similar matters on appeal from different States, but tallied separately in order to record Edelman J's partial dissent in respect of one matter and his concurrence in the other.

### E Tallying Decisions Warranting Explanation

The following matter was tallied as constitutional:

- *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 373 ALR 214 – although no constitutional provisions are included in the catchwords, the applicants raised section 51(xxxi) and Chapter III arguments that were examined by both Gageler and Nettle JJ in their dissents. Although the majority found it unnecessary to consider these arguments, the fact they were raised and received attention, albeit brief, from the minority supports classification as raising constitutional issues.

32 The purpose behind multiple tallying in some cases – and the competing arguments – are considered in Lynch, 'Dissent' (n 2) 500–2.

The following matter was not tallied as constitutional:

- *CNY17 v Minister for Immigration and Border Protection* (2019) 375 ALR 47 – although containing a reference to section 75(v) of the *Constitution* in the catchwords, this provision is mentioned simply in respect of relief available upon a finding of bias. A question about the validity of legislative provisions for consistency with the 'constitutional assumption of the rule of law' was found unnecessary to answer and received no substantive discussion from the Court.

## F Complete List of Earlier Annual Studies

- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27(1) *University of New South Wales Law Journal* 88.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2004 Statistics' (2005) 28(1) *University of New South Wales Law Journal* 14.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2005 Statistics' (2006) 29(2) *University of New South Wales Law Journal* 182.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2006 Statistics' (2007) 30(1) *University of New South Wales Law Journal* 188.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2007 Statistics' (2008) 31(1) *University of New South Wales Law Journal* 238.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2008 Statistics' (2009) 32(1) *University of New South Wales Law Journal* 181.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2009 Statistics' (2010) 33(2) *University of New South Wales Law Journal* 267.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2010 Statistics' (2011) 34(3) *University of New South Wales Law Journal* 1030.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2011 Statistics' (2012) 35(3) *University of New South Wales Law Journal* 846.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2012 Statistics' (2013) 36(2) *University of New South Wales Law Journal* 514.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2013 Statistics' (2014) 37(2) *University of New South Wales Law Journal* 544.

- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2014 Statistics' (2015) 38(3) *University of New South Wales Law Journal* 1078.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2015 Statistics' (2016) 39(3) *University of New South Wales Law Journal* 1161.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2016 and French Court Statistics' (2017) 40(4) *University of New South Wales Law Journal* 1468.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2017 Statistics' (2018) 41(4) *University of New South Wales Law Journal* 1134.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2018 Statistics' (2019) 42(4) *University of New South Wales Law Journal* 1443.