THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2004 STATISTICS

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I INTRODUCTION

These statistics present basic information about the High Court's decision-making for 2004 at both an institutional and individual level, with an emphasis on constitutional cases as a subset of the total. They have been compiled using the same methodology[1] applied in respect of previous years.[2] We do not outline the detail of that approach again here.

While we clearly remain of the view that the regular presentation of empirical data on the decision-making of the High Court is a valuable means of enhancing understanding of the Court's work, it is, however, important to once again start by acknowledging the limitations that inhere in an empirical study over the short space of a year. Percentage calculations have been given in addition to raw figures for the sake of completeness and comparison, however the amount of data available, and the time-span of the study, mean that the reader should be wary in making broad generalisations about the behaviour of the Court and its justices – especially in respect of the constitutional cases. Unlike the figures produced in respect of the preceding year, the High Court's membership was stable for the duration of 2004. Consequently, all Justices may be considered on a level playing field. Significantly, these figures also encompass Justice Heydon's first full year of hearing and deciding cases as a Justice of the Court.[3]

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1 Andrew Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review* 470.

2 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.

3 The High Court of Australia, unlike the United States Supreme Court, does not conduct its business in neat terms of fixed duration. This results in a certain lag-time for individual Justices when empirical data is produced from cases made within a single calendar year. Although Justice Heydon joined the Court in February 2003, he delivered judgments in only about half of the cases for that year: Lynch and Williams, above n 2, 93–4.

II THE INSTITUTIONAL PROFILE

Table A – High Court of Australia Cases Reported for 2004

	Unanimous	By concurrence	Majority over dissent	TOTAL
All Cases Reported for Period	15 (24.59%)	15 (24.59%)	31 (50.82%)	61 (100%)
All Constitutional Cases Reported for Period	___	5 (26.32%)	14 (73.68%)	19 (100%)

From Table A it can be seen that of a total 61 matters reported in 2004,[4] 19 or roughly 31 per cent were constitutional in nature. In identifying 'constitutional cases' as a group within the total sample, the definition we adopt is:

> 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'.[5]

Additionally, we widen the net so as to include those matters that involve questions of purely state constitutional law,[6] though in 2004 there was no case which owed its inclusion solely to this aspect of classification.

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4 The data collection was done exclusively using the 64 matters available on AustLII <http://www.austlii.edu.au/> in its database for High Court decisions. Two single judge decisions of the High Court were not included in tallying for the purposes of this study and one 3:3 decision was also excluded, in accordance with rule (b) of the methodology: see Lynch, above n 1, 484. For further information about the excluded cases, see the Appendix.

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

6 Justice Kenny, in assessing the 2002 term of the High Court, made it clear that her use of the phrase 'constitutional cases' included those involving the Constitution of an Australian State: Justice Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 210.

The classification of a case's topic is made in a generous manner using the presence of constitutional descriptors or provisions in the catchwords accompanying the judgments. Obviously, the degree to which constitutional questions were central to the resolution of these cases varied, but wherever constitutional principle arose and was identified by the report editors, then regardless of the dominance of other legal questions, the case was included in the core group under analysis.[7] The employment of this more inclusive 'less stringent criteria … to characterise a case as "constitutional"'[8] avoids the drawing of further – and finer – distinctions between constitutional cases of varying weight and importance. As such, it has the advantage of being objective, transparent and replicable by other scholars.

Table A indicates that disagreement in its most tangible form – opinions dissenting from the final orders reached by a majority of the Court – was far more common in constitutional matters (73.68 per cent) than in the cases taken as a whole (50.82 per cent). This is a strong reversal from the trend in the 2003 cases. In that year the percentage of constitutional cases carrying a dissenting opinion was markedly lower than for any other of the Gleeson era at just 37.50 per cent.[9] Generally, the percentage of total cases containing dissenting judgments has remained steady – since 2001 it has not wavered from 50 per cent.[10] The same cannot be said in respect of the same statistic for constitutional matters which has been far more prone to fluctuation. The percentage of such cases decided by a split court last year is on par with the result for 1999 in which 75 per cent of constitutional judgments contained a dissenting opinion.[11]

The figures in respect of unanimous judgments are also interesting. In 2004 the Court markedly increased the proportion of cases overall in which it delivered a single opinion – to roughly a quarter of all matters. That is a remarkably high figure – far higher than the level of unanimous decisions in any past year of the Gleeson Court, which has tended to produce only a slightly higher proportion of unanimous opinions than the Brennan era. One needs to return to the years of the Mason Court to find a comparable level of unanimity.[12] This result does not, however, translate to the constitutional setting at all, with no decisions resolved by unanimous judgment in 2004.

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7 Even when a majority of the Court chose to avoid a constitutional issue, the case will still be tallied as such if (a) the parties have raised one; and (b) especially when at least one Justice discusses it. See, eg, *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, which falls within the criteria of a constitutional case because of Callinan J's comments regarding the constitutionally implied freedom of political communication which had been raised by the appellant but which did not form the basis for any judge's resolution of the matter.

8 Justice Ronald Sackville, 'The High Court on Constitutional Law: The 2003 Term: The Inaccessible Constitution', (2004) 27 *University of New South Wales Law Journal* 66, 83.

9 Lynch and Williams, above n 2, 89.

10 Ibid; Lynch, above n 2, 42.

11 Lynch, above n 2, 43.

12 The observations in respect of the Brennan and Mason Courts are made on the basis of research conducted by Andrew Lynch that have yet to be published.

Table B – Constitutional Cases 2004 – How Resolved[13]

Size of bench	Number of cases	How Resolved	Frequency
7	17 (89.47%)	Unanimous	0 (0%)
		By concurrence	5 (26.32%)
		6:1	5 (26.32%)
		5:2	2 (10.53%)
		4:3	5 (26.32%)
5	2 (10.53%)	Unanimous	0 (0%)
		By concurrence	0 (0%)
		4:1	2 (10.53%)
		3:2	0 (0%)

Table B provides further detail on how the 19 constitutional cases were resolved. Lest we be tempted to explain all dissent by reference to a single individual, it should be noted that the Court split 4:3 just as often as it did 6:1. Stability of membership has avoided the determination of any constitutional matter by a bench comprised of six Justices, which had been the dominant category in 2003.

Table C – Subject Matter of Constitutional Case Reports in 2004

Topic	No of Case Reports	References to Case Reports[14] (Italics indicate repetition)
Clause 5	1	20
s 7	1	41
s 15	1	*41*
s 24	1	*41*

13 All percentages given in this table are of the total of constitutional cases (19).

14 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 '[2004] HCA'.

s 51(v)	1	19
s 51(vi)	1	44
s 51(xix)	2	43, 49
s 51 (xxi)	1	*20*
s 51 (xxii)	1	*20*
s 51(xxvii)	1	*49*
s 52	1	53
s 53	1	*53*
s 54	1	*53*
s 55	1	*53*
s 64	1	*41*
s 73	2	*20*, 61
s 74	2	*20*, *61*
s 75	2	*20*, *61*
s 76	1	*20*
s. 77	1	*20*
s 80	1	23
s. 99	1	*53*
s 107	1	*61*
s 109	1	*19*
s 118	1	*61*
s 128	1	*41*
Implied Freedom of Political Communication	2	39, *41*
Judicial power	9	
- Discrimination between federal offenders	1	8
- *Kable* principle	3	9, 45, 46
- Impartiality and independence	1	31
- Immigration Detention	3	36, 37, 38, *49*
- Military Tribunals	1	*44*
State Constitutional Law	2	
- extradition	1	10
- power to legislate for courts outside borders	1	*61*

Table C lists the provisions of the Constitution that arose for consideration in the 19 matters tallied.

III THE INDIVIDUAL PROFILE

Table D(I) – Actions of Individual Justices: All 2004 Cases

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	50	13 (26.00%)	33 (66.00%)	4 (8.00%)
McHugh J	51	10 (19.61%)	34 (66.67%)	7 (13.73%)
Gummow J	51	13 (25.49%)	36 (70.59%)	2 (3.92%)
Kirby J	52	8 (15.38%)	24 (46.15%)	20 (38.46%)
Hayne J	46	11 (23.91%)	34 (73.91%)	1 (2.17%)
Callinan J	49	11 (22.45%)	27 (55.10%)	11 (22.45%)
Heydon J	49	12 (24.48%)	33 (67.34%)	4 (8.16%)

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2004. All members of the Court, with the exceptions of Justices McHugh and Kirby, have an individual rate of participation in unanimous opinions on par with that of the Court itself. Justice Kirby in particular, tended to sit more often on cases failing to result in unanimity. We might suspect that this was due to his higher propensity to deliver a dissenting opinion relative to his colleagues on the Court, but the information presented above is not sufficient to support the theory that Justice Kirby was destructive of unanimity, though it is certainly plausible given also his lower percentage of concurring opinions.[15]

The dissent rates have translated from 2003 fairly intact. The proportion of dissenting judgments delivered by Chief Justice Gleeson and Justices McHugh, Gummow and Kirby are, when not identical, practically the same as for the preceding year.[16] Justice Hayne, however, dissented in only one decision in 2004, while proportionately Justice Callinan delivered substantially more minority opinions (though in raw figures the increase was slight). Justice Heydon established himself in the Court with a breakdown of individual opinions closely in step with that of the Chief Justice.

Table D(II) – Actions of Individual Justices: 2004 Constitutional Cases

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	19	___	15 (78.94%)	4 (21.06%)
McHugh J	18	___	15 (83.33%)	3 (16.67%)
Gummow J	19	___	17 (89.47%)	2 (10.53%)

15 As evidence of the danger in making simplistic assumptions, in 2003, the Chief Justice had by far the lowest rate of participation in unanimous opinions yet a lower dissent rate than three other Justices.

16 Lynch and Williams, above n 2, 93.

Kirby J	19	___	9 (47.36%)	10 (52.64%)
Hayne J	17	___	17 (100%)	___
Callinan J	18	___	14 (77.78%)	4 (22.22%)
Heydon J	19	___	16 (84.21%)	3 (15.79%)

Table D(II) records the actions of individual justices in the constitutional cases of 2004. There are several striking features of this table which reveal the nature of the constitutional cases the Court dealt with last year.

First, the Court splintered much more often on constitutional matters than it has in previous years. Indeed the contrast with 2003 is striking. In that year, Justices McHugh and Callinan dissented in only one case and the other Justices (excluding Justice Kirby) delivered no dissents at all. Our comment that there was a 'remarkable level of consensus across the Court'[17] in constitutional matters cannot survive the division to which the cases of 2004 gave rise. The absence of a single unanimous judgment is, in part, indicative of the thorniness of these matters. Although the number of dissenting opinions for the Chief Justice and Justice Gummow are small, this must be considered in the context of the earlier years. Until 2004, Chief Justice Gleeson had only delivered two dissenting judgments and Justice Gummow had only delivered one.[18] Thus, they have excluded themselves from the Court's shaping of constitutional law only as a matter of very rare exception. While these two Justices still delivered a substantial level of concurring opinions and must still be seen as occupying a solid place in the Court's centre, their dissents are nevertheless notable. The two cases in which both the Chief Justice and Justice Gummow dissented concerned the Commonwealth's power to detain entrants to Australia who had been refused a visa.[19]

The suggestion in reference to the preceding table, that Justice Heydon's opinion delivery was comparable to that of the Chief Justice, is borne out in the constitutional setting. In addition to the similar figures, they reached a different result in only one case.[20] This, of course, is to consider only disagreement in its

17 Ibid 95.

18 Overall, in constitutional matters decided during the Gleeson Court, Justice Gummow remains the least in dissent (3 instances), followed by Justice Hayne (4) and Chief Justice Gleeson (6).

19 *Al-Khateb v Godwin* [2004] HCA 37; *MIMA v Al Khafaji* [2004] HCA 38.

20 *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44.

most explicit form. It cannot be denied that within the various concurring judgments of all the Court's members there exists divergent reasoning. But, as noted in earlier years, the subtleties of difference within concurrences do not readily lend themselves to quantitative presentation.

Justice Hayne, who has traditionally also enjoyed a low dissent rate, managed to maintain it by filing no minority opinion in the constitutional cases across the year – this is quite remarkable given the capacity of constitutional cases for preventing consensus.

Justice Kirby retained his place at the other end of the spectrum with a dissent rate of over 50 per cent of his delivered opinions. Of course, from a group of cases over just one year, one must be wary of losing proportion overall. Nevertheless, even allowing for 2004 as a year in which Justice Kirby had a particularly high level of explicit disagreement with a majority of his colleagues, it is neither premature nor unfair to say that in the frequency of his dissent, his Honour has long since eclipsed any other Justice in the history of the Court.[21] While for the first five years of the Gleeson Court, Justice Callinan had a dissent rate not all that far off Justice Kirby's, with both hovering in the range of 26–29 per cent minority judgments in constitutional cases,[22] the latter has broken away to claim the position of outsider on the Court, one which seems unlikely to change in future years.

In discussing these results, Justice Kirby has highlighted the variables which contribute to them – 'the changing composition of the Court, the types of legislation, federal and State, that have come under scrutiny and the introduction of the universal system of special leave'.[23] He pointed to the frequency of dissenting opinions delivered by Justice Dawson in constitutional cases of an earlier era, as an example of the relational nature of disagreement on the Court and its propensity to change.[24] As such, his Honour's comments accord with our own purpose in presenting these statistics. It is not to draw simplistic conclusions about the correctness of the opinions of any individual member of the Court or the undesirability of disagreement. Rather, the amount of disagreement in the Court for any one year says much about the nature and complexity of the matters which it had to decide and the differences in outlook that exist across the bench. These differences are further illustrated by the following tables.

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21 Indeed, this is confirmed by the comprehensive study by Groves and Smyth of the judgment delivery practices across much of the High Court's history: Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' (2004) 32 *Federal Law Review* 255, 279–80.

22 Lynch, above n 2, 50.

23 Justice Michael Kirby, 'Judicial Dissent' (Speech delivered at James Cook University, Cairns, 26 February 2005) available at <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_feb05.html> at 3 April 2005. See also, Justice Michael Kirby, 'Dissent with clear conscience', *Lawyer's Weekly*, 8 April 2005, 12–13.

24 Ibid.

Table E(I) – Joint Judgment Authorship: All 2004 Cases

	Gleeson CJ	**McHugh J**	**Gummow J**	**Kirby J**	**Hayne J**	**Callinan J**	**Heydon J**
Gleeson CJ	_____	16 (32.00%)	20 (40.00%)	12 (24.00%)	22 (44.00%)	13 (26.00%)	24 (48.00%)
McHugh J	16 (31.37%)	_____	18 (35.29%)	7 (13.73%)	15 (29.41%)	11 (21.57%)	18 (35.29%)
Gummow J	20 (39.22%)	18 (35.29%)	_____	10 (19.61%)	28 (54.90%)	17 (33.33%)	30 (58.82%)
Kirby J	12 (23.08%)	7 (13.46%)	10 (19.23%)	_____	8 (15.38%)	7 (13.46%)	7 (13.46%)
Hayne J	22 (47.83%)	15 (32.61%)	28 (60.87%)	8 (17.39%)	_____	13 (28.26%)	26 (56.52%)
Callinan J	13 (26.00%)	11 (22.00%)	17 (34.00%)	7 (14.00%)	13 (26.00%)	_____	20 (40.00%)
Heydon J	24 (48.98%)	18 (36.73%)	30 (61.22%)	7 (14.29%)	26 (53.06%)	20 (40.82%)	_____

Table E(II) – Joint Judgment Authorship: 2004 Constitutional Cases

	Gleeson CJ	**McHugh J**	**Gummow J**	**Kirby J**	**Hayne J**	**Callinan J**	**Heydon J**
Gleeson CJ	_____	4 (21.05%)	3 (15.79%)	1 (5.26%)	3 (15.79%)	2 (10.53%)	6 (31.58%)
McHugh J	4 (22.22%)	_____	5 (27.78%)	1 (5.56%)	3 (16.67%)	2 (11.11%)	6 (33.33%)
Gummow J	3 (15.79%)	5 (26.32%)	_____	2 (10.53%)	9 (47.37%)	4 (21.05%)	9 (47.37%)
Kirby J	1 (5.26%)	1 (5.26%)	2 (10.53%)	_____	2 (10.53%)	1 (5.26%)	2 (10.53%)
Hayne J	3 (17.65%)	3 (17.65%)	9 (52.94%)	2 (11.76%)	_____	3 (17.65%)	7 (41.18%)
Callinan J	2 (11.11%)	2 (11.11%)	4 (22.22%)	1 (5.56%)	3 (16.67%)	_____	5 (27.78%)
Heydon J	6 (31.58%)	6 (31.58%)	9 (47.37%)	2 (10.53%)	7 (36.84%)	5 (26.32%)	_____

Tables E(I) and E(II) indicate the number of times a Justice jointly authored an opinion with his colleagues. These tables indicate some interesting changes from those of earlier years. In particular, the arrival of Justice Heydon has provided the Court with a new Justice most preferred as co-author. In Table E(I), concerning all matters decided in 2004, Justice Heydon was the most frequent partner in joint judgment for all members of the Court except for Justices Kirby and Hayne (and Justice McHugh wrote with Justice Heydon as much as with Justice Gummow). While Justice Kirby wrote most frequently with the Chief Justice, Justice Hayne continued the pattern of many years and wrote most with Justice Gummow, joining with Justice Heydon next most often. As Justice Gummow was Justice Heydon's most common collaborator, there was a high level of synergy between those three members of the Court. It would be a mistake to assume that Justice Heydon's quickly established practice of co-authorship with these other two Justices had been at the expense of the amount of opinion delivery they did in concert with the Chief Justice. The amount of collaboration between those individuals was maintained at the levels seen in earlier years.[25] It is simply that, in 2004, Justice Heydon wrote with Justices Gummow and Hayne even more often than the Chief Justice.

The impact of Justice Heydon is seen within Table E(II)'s breakdown of co-authorship in constitutional cases. Justice Heydon was the most frequent co-author for the Chief Justice and Justices McHugh and Callinan. For Justice Gummow, he shared the position of most preferred collaborator with Justice Hayne, while Justice Kirby wrote more often with all three of those judges than with the other members of the court (admittedly his incidence of collaboration is so low as to be almost insignificant). Justice Hayne was the only member of the Court to have a higher level of joint judgment delivery with another Justice – that being Justice Gummow.

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

25 Lynch, above n 2, 57; Lynch and Williams, above n 2, 96.

Table F(I) –Joint Judgment Authorship: All 2004 Cases: Rankings

	Gleeson CJ	**McHugh J**	**Gummow J**	**Kirby J**	**Hayne J**	**Callinan J**	**Heydon J**
Gleeson CJ	___	4	3	6	2	5	1
McHugh J	2	___	1	5	3	4	1
Gummow J	3	4	___	6	2	5	1
Kirby J	1	4	2	___	3	4	4
Hayne J	3	4	1	6	___	5	2
Callinan J	3	4	2	5	3	___	1
Heydon J	3	5	1	6	2	4	___

Table F(II) –Joint Judgment Authorship: 2004 Constitutional Cases: Rankings

	Gleeson CJ	McHugh J	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J
Gleeson CJ	___	2	3	5	3	4	1
McHugh J	3	___	2	6	4	5	1
Gummow J	4	2	___	5	1	3	1
Kirby J	2	2	1	___	1	2	1
Hayne J	3	3	1	4	___	3	2
Callinan J	4	4	2	5	3	___	1
Heydon J	3	3	1	5	2	4	___

As in the past, we are careful to point out that a high incidence of joint judgment delivery for one Justice cannot simply be equated with influence. An equally likely explanation is that the Justice concerned is a great 'joiner' without necessarily being the Court's intellectual leader. Alternately, it may be that some Justices have a greater like of, and aptitude for, co-operative work. In saying that Justice Heydon is more likely to be a party to the opinion of most other Justices on the Court than any other, and that he has a modest rate of dissent, we are simply recording those facts. Only through examination of the specific judgments

concerned, can any attempt be made to appreciate the levels of a particular member's influence within the Court.

IV CONCLUSION

This statistical presentation of the opinion delivery practices of the High Court for the calendar year of 2004 indicates both continuity and change. Overall, the dramatic development was the high number of unanimous decisions handed down. The proportion of cases that formally split the Court remained, however, at roughly half. Indeed, compared to the preceding year, individual dissent rates were effectively static for a majority of the Justices. From this we may conclude that while levels of genuine disagreement have stayed constant, the amount of unnecessary duplication through separate concurrences has been dramatically reduced.

By contrast, the subset of constitutional cases was the locus of some turbulence in 2004. Roughly, three in every four cases produced dissent – though never from Justice Hayne and most often from Justice Kirby. Justice Heydon's first full year as a Justice changed some aspects but solidified others – including, so far as is possible, the 'centre' of the High Court in constitutional law. Justice Hayne spoke with the Court in all such cases last year, and while the Chief Justice and Justice Gummow found themselves in rare opposition to the institutional position, on the whole, they may still be said to be solid members of the core.

While we stress that this is not predominantly a predictive exercise, the suggestion made in early 2003 that Justice Heydon was likely to add to the dominance of the trio of the Chief Justice and Justices Gummow and Hayne[26] has clearly been borne out. Likewise, last year's observation that Justice Kirby was 'really running his own race' is truer than ever before. Justices McHugh and Callinan remain the members of the bench who most definitely elude easy classification based upon mere statistics.

26 Lynch, above n 2, 62.

APPENDIX – EXPLANATORY NOTES

These notes identify when and how discretion has been exercised in compiling the statistical tables in this article. As the Harvard Law Review editors stated, when 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'.[27]

A Case reports not tallied

There was a total of 64 cases reported for the period, the last of which was *Anikin v Sierra* [2004] HCA 64. From this total, three cases were excluded. These were:

- *Milat v The Queen* [2004] HCA 17 (McHugh J);
- *Re Minister for Immigration and Multicultural Affairs; Ex Parte Goldie* [2004] HCA 24 (Gummow J); and
- *Alexander v Perpetual Trustees WA Limited* [2004] HCA 7.

The first two were excluded because they were single judge 'practice and procedure' decisions, the last was excluded as a 3:3 split decision, under the qualification attaching to tallying rule (b).

B Case reports involving a number of matters – how tallied

No reports were tallied multiple times in this study.[28]

C Tallying decisions warranting explanation

Gattellaro v Westpac Banking Corporation [2003] HCA 6 – in which Justice Kirby concurred in the substance of the order of the court but dissented as to costs. This has been tallied as a concurring judgment.

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

28 The purpose behind multiple tallying in such circumstances – and the competing arguments – are considered at length in Lynch, above n 1, 500–2.