THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2005 STATISTICS

ANDREW LYNCH* AND GEORGE WILLIAMS**

I INTRODUCTION

These statistics present information about the High Court's decision-making for 2005 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 previous years.[2]

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. However, it is important to preface what follows by acknowledging the limitations that result in an empirical study over the space of only one year. The reader should be wary of making broad generalisations about the behaviour of the Court and its Justices. While percentage calculations have been given in addition to raw figures for the sake of completeness and comparison, these should obviously be treated more carefully than those produced after a significantly longer study – especially in respect of the smaller set of constitutional cases.

At the same time, and all caveats duly made, there is very real value in examining the Court's decision making on an annual basis. The following statistics show, once more, that there is much of interest to observe in looking at how the Court handles the matters it hears in a single year. While each instalment must be seen as contributing to an ongoing and larger study of trends and patterns in the behaviour of the Court and its judges over time, there is no reason not to try to follow these as they actually unfold. Indeed, to attend only

* Senior Lecturer, Faculty of Law, University of New South Wales.
** Anthony Mason Professor and Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Barrister, New South Wales Bar. We thank Anna Saulwick for her research assistance.

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; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2004 Statistics' (2005) 28 *University of New South Wales Law Journal* 14.

sporadically to empirical studies of the Court risks failing to notice subtle changes, especially when the Court begins to develop in a new direction. It is presumably for this reason that courts of last resort in other jurisdictions are similarly the subject of annual statistical analysis.[3]

Account must also be taken of the change to the Court's membership in 2005 with the retirement of Justice Michael McHugh on 31 October and the swearing in of Justice Susan Crennan on 8 November 2005. This has not had a significant impact upon these statistics since McHugh J participated in a sufficient number of matters in 2005 to enable general comparability between himself and the other Justices. And, not surprisingly, none of the cases heard by Crennan J after her appointment had been delivered by the end of the year.

II THE INSTITUTIONAL PROFILE

Table A – High Court of Australia Matters Tallied for 2005

	Unanimous	By concurrence	Majority over dissent	TOTAL
All Matters Tallied for Period	18 (21.69%)	36 (43.37%)	29 (34.94%)	83 (100%)
All Constitutional Matters Tallied for Period	____	5 (62.50%)	3 (37.50%)	8 (100%)

From Table A it can be seen that a total of 83 matters were tallied for 2005.[4] This was up from 61 in 2004, a 36% increase. Indeed, last year saw the highest

3 Some history of the *Harvard Law Review*'s compilation of statistics on the United States Supreme Court was given in Lynch, above n 2, 33–4. Yearly statistics are provided by the *South African Journal of Human Rights* on the Constitutional Court of South Africa despite that institution having a relatively small annual caseload. The Supreme Court of Canada updates its own, admittedly rather limited, statistics each year at Supreme Court of Canada – Statistics (2005) <http://www.scc-csc.gc.ca/information/statistics/index_e.asp> at 16 March 2006.

4 The data was collected exclusively using the 81 cases available on AustLII <http://www.austlii.edu.au/> in its database for High Court decisions. One single judge decision of the High Court was not included in tallying for the purposes of this study and three cases were each tallied twice due to the extent to which separate matters were differentiated by members of the Court in their judgments. For a detailed explanation of the purpose behind multiple tallying of some cases, see Lynch, above n 1, 500–02; and at the start of this series, Lynch, above n 2, 63. For further information about the cases affected, see the *Appendix – Explanatory Notes* at the conclusion of this paper.

number of matters tallied for any year of the Gleeson Court so far.[5] The rise in 2005 can most likely be attributed to the retirement of McHugh J and the need to determine all outstanding matters upon which he sat by 1 November 2005.

However, of the 83 matters only 8 (or 9.6%) were constitutional in nature.[6] This is easily the lowest percentage of constitutional cases in any full year of the Gleeson Court to date. In the year before, for example, 31% of the matters (19 of 61) decided by the High Court were constitutional in nature. In 2003, the proportion was not quite so high, but it was still approximately 22% (16 matters of 73).

What is more, in some of the eight matters, it should be noted that the constitutional questions were only peripheral.[7] As usual, in identifying 'constitutional cases' as a group within the total sample, we err on the side of generous application of the following definition:

> 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'.[8]

Additionally, we widen the net so as to include those matters that involve questions of purely state constitutional law,[9] though in 2005, as in the year before, there was no case which owed its inclusion solely to this aspect of classification.

Table A indicates the level of disagreement on the High Court in 2005 – in the form of opinions dissenting from the final orders reached by a majority of the Court. The table demonstrates that 2005 was marked by a remarkable absence of disagreement compared to recent years. Overall, there was disagreement in just 34.94% of cases. Generally, the percentage of total cases containing dissenting

---

5 It should be pointed out that this is best determined simply by a review of the listings of cases available by year on the AustLII website. The methodology used to compile statistics on the Court's first five years (see Lynch, above n 2) employed the Australian Law Reports and, while the trends are certainly consistent between the two, the precise figures are not since the Law Reports did not report all matters listed on AustLII. We aim to remedy the disparity between the data source used in that initial study and our subsequent annual ones with the release of consolidated figures at the conclusion of the Gleeson era in 2008.

6 These are listed by name in the Appendix to this paper.

7 Of which good examples are *Chief Executive Officer of Customs v El Hajje* [2005] HCA 35 (McHugh, Gummow, Kirby, Hayne and Heydon JJ), wherein Kirby J discussed in a separate concurrence the relevance of the Commonwealth Constitution in interpreting statutes when not raised by any party; and *Jarratt v Commissioner of Police for New South Wales* [2005] HCA 50 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), where the court considered (and rejected) the applicability of prerogatives of the Crown to dismiss its servants.

8 Stephen Gageler, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25 *University of New South Wales Law Journal* 194, 195. The justification against using a further refinement, such as use of a qualification that the constitutional issue be 'substantial', was made in last year's article: see Lynch and Williams (2005) above n 2, 16.

9 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.

judgments has remained steady – since 2001 it has not wavered from 50%.[10] This sizeable drop in the share of matters decided with a minority is a striking feature of these figures for 2005.

The annual rate of split benches on the Gleeson Court in constitutional cases has been more volatile. In 2003, only 37.50% of such matters featured minority opinions, but in 2004 formal disagreement was found in 73.68% of constitutional cases. Both those years, as mentioned above, saw a reasonable proportion of constitutional cases from which to draw those figures. The number of such cases decided with dissent in 2005 has dropped once more – to 37.50% – but with such a small subset, it is hard to say that this represents very much. We are on safer ground simply to acknowledge that both overall, and as reflected in the few constitutional cases of the year, 2005 saw a clear drop in the occasions whereby members of the court formally disagreed with each other.

Of course, real disagreement may still be found amongst a series of opinions which do not formally dissent as to the result. The percentage of matters overall which were decided by concurrence in the final orders has unsurprisingly climbed much higher with the drop in dissent, but the rate of unanimity remains sufficiently high for us to conclude that this is a Court which was adept at finding consensus in the cases of last year. 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. The figure for 2005 (albeit slightly reduced at 21.69%) suggests that was not a one-off and the last two years may signal a break from the recent past by ushering in a period of notably higher levels of express agreement through delivery of a single judgment. In this context, it is important, however, to note the Chief Justice's assurance that while the court as an institution is managed, individual judges are not.[11]

Of course, whether this continues will depend on the cases which come before the court in 2006 and beyond, as well as the decision-making style and views of Crennan J. One in four cases being decided by unanimity is a remarkably high figure – far higher than the level of unanimous decisions in any past year of the Gleeson era, which has tended to produce only a slightly higher proportion of unanimous opinions than the Brennan Court. One needs to return to the years of the Mason Court to find a comparable level of unanimity.[12]

This move towards greater consensus overall has, as was the case last year, failed to translate to the constitutional setting at all, with no such decision resolved by unanimous judgment since 2003.

---

10 Even before then, it had merely dipped to 46% in 2000, having been even higher (58.8%) in 1999: Lynch, above n 2, 42.

11 Marcus Priest, 'The Smiler' *The Australian Financial Review Magazine*, May 2006, 68, 73.

12 See Andrew Lynch, 'Does the High Court Disagree More Often in Constitutional Cases? A Statistical Study of Judgment Delivery' (2005) 33 *Federal Law Review* 485, 497. At 20.05%, the rate of unanimity overall in the Gibbs Court was not as high, but still far more than under the post-Mason courts.

Table B (I) All Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[13]

Size of bench	Number of matters	How Resolved	Frequency	Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	20 (24.10%)	Unanimous	0 (0%)	0						
		By concurrence	9 (10.84%)		2	3	2	2		
		6:1	3 (3.61%)				2	1		
		5:2	5 (6.02%)				2	1	2	
		4:3	3 (3.61%)					2	1	
6	11 (13.25%)	Unanimous	4 (4.82%)	4						
		By concurrence	5 (6.02%)		1	2	1	1		
		5:1	1 (1.2%)				1			
		4:2	1 (1.2%)					1		
		3:3	0 (0%)							
5	51 (61.45%)	Unanimous	14 (16.87%)	14						
		By concurrence	21 (25.30%)		10	6	5			
		4:1	7 (8.43%)		4	1	2			
		3:2	9 (10.84%)		2	1	4	2		
4	1 (1.2%)	Unanimous	0 (0%)	0						
		By concurrence	1 (1.2%)		1					
		3:1	0 (0%)							
		2:2	0 (0%)							

13 All percentages given in this table are of the total number of matters (83).

Table B (II) Constitutional Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered [14]

Size of bench	Number of matters	How Resolved	Frequency	Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	5 (62.5%)	Unanimous	0 (0%)	0						
		By concurrence	2 (25%)		1	1				
		6:1	0 (0%)							
		5:2	3 (37.5%)				1	1	1	
		4:3	0 (0%)							
6	2 (25.00%)	Unanimous	0 (0%)							
		By concurrence	2 (25.00%)				1	1		
		5:1	0 (0%)							
		4:2	0 (0%)							
		3:3	0 (0%)							
5	1 (12.5%)	Unanimous	0 (0%)							
		By concurrence	1 (12.5%)		1					
		4:1	0 (0%)							
		3:2	0 (0%)							

Tables B(I) and (II) have not appeared in this form in our earlier studies and so merit some explanation. In previous years we presented a table breaking down the constitutional matters according to the size of the bench and how frequently it split in the various possible ways of resolving the matters it faced. The decision was made to also record complementary information in respect of the entire group of cases for the year. So Table B of previous years was the precursor of Table B(II) above, while the newly created Table B(I) has no antecedent.

14 All percentages given in this table are of the total of constitutional cases (8).

Additionally, we felt that the function of these tables could be enhanced by indicating also the number of opinions which were produced by the Court in making those decisions. This has been a source of concern and interest in the past,[15] and so seems worth charting through the inclusion in both tables of a column headed 'Number of Opinions Delivered'. Immediately under that heading are the figures 1 to 7, which is, of course, the number of opinions which it is possible for the Court to deliver. Where that full range is clearly not a possibility, shading is used to block off the irrelevant categories.

Ideally, these tables should be read from left to right. For example, Table B(I) tells us that of the 51 matters heard by a five member panel, nine of those were resolved by a 3:2 split, but only two contained a separate written opinion from each member of the Court. 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.

There are a few features in these tables worthy of comment. For instance, although Table A demonstrated a high level of unanimity in 2005, Table B(I) shows that not one of the matters in 2005 decided by the full complement of seven judges was a unanimous result, suggesting that the more important the matter (as might often be signified by the court sitting its full complement), the harder it is to secure consensus. The bulk of the cases decided unanimously had only five Justices sitting.

What is also revealed in these tables is a little more about the form of dissent beyond the bare total given in Table A. It is interesting that while unanimity proved elusive for a bench of seven judges, the proportion of cases it decided over minority opinion is not commensurately high – indeed fewer cases with dissent were produced by the seven judges sitting together than when there were only five involved. Of course, the High Court sat much more often with only five members than not, but the benefit of these tables is their ability to reveal more to the casual observer as to how the court really works. The picture of a full bench which splits on a knife-edge of 4:3 votes or the romanticised image of a solo dissenter against six of his or her colleagues breaks down under this kind of scrutiny.

Similarly, and looking to the new field aiming to indicate the amount of opinions written, it is notable that the classic irritation of as many opinions delivered as there are judges did not occur once last year in respect of a bench of any size. The existence on the present Court of one or two regular partnerships for joint judgment has rendered this less likely. Scanning over Table B(I) as a whole, it hardly seems as though there is a regular profusion of individual opinions merely for their own sake.

The sample size in respect of constitutional law cases renders Table B(II) of little use for any detailed analysis. It does, however, record how opinions in those few matters of 2005 were delivered.

---

15 See particularly 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, 266–8; and Mirko Bagaric and James McConvill, 'Illusions of Disunity: Dispelling Perceptions of Division in High Court Decision Making' (2004) 78 *Law Institute Journal* 36.

Table C – Subject Matter of Constitutional Cases

Topic	No of Cases	References to Cases[16] (Italics indicate repetition)
s 51(xix)	1	36
s 51(xxix)	1	42
s 51(xxx)	1	*42*
s 53	1	61
s 54	1	*61*
s 56	1	*61*
s 73	2	34, *42*
s 75	1	*42*
s 76	2	38, *42*
s 81	1	*61*
s 83	1	*61*
s 92	1	44
s 94	1	*61*
s 97	1	*61*
s 109	2	*38*, *44*
s 122	1	*36*
Implied Freedom of Political Communication		*44*
Judicial power	4	*34*, 35, *42*, *44*
Relevance of the Constitution in the interpretation of federal statutes when not raised by the parties	1	*35*
Extraterritorial power of NSW laws	1	*44*
Crown Prerogatives to dismiss servants	1	50

Table C lists the provisions of the Constitution that arose for consideration in the 8 matters tallied. As in previous years, judicial power remains the most litigated aspect of the Constitution.

16 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 '[2005] HCA'. Full case details are given in the Appendix.

III THE INDIVIDUAL PROFILE

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	72	16 (22.22%)	51 (70.83%)	5 (6.94%)
McHugh J	61	11 (18.03%)	38 (62.3%)	12 (19.67%)
Gummow J	69	15 (21.74%)	52 (75.36%)	2 (2.90%)
Kirby J	58	8 (13.79%)	35 (60.34%)	15 (25.86%)
Hayne J	67	14 (20.9%)	49 (73.13%)	4 (5.97%)
Callinan J	66	14 (21.21%)	46 (69.7%)	6 (9.09%)
Heydon J	72	16 (22.22%)	50 (69.44%)	6 (8.33%)

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2005. As with the 2004 statistics, all members of the Court, with the exceptions of McHugh and Kirby JJ, have an individual rate of participation in unanimous opinions roughly on par with that of the Court itself. In respect of McHugh J, his departure before the conclusion of the Court's business for the year means that the reader should be wary of this figure – especially when it is considered that seven unanimous opinions were handed down after his retirement date. On the other hand, it remains straightforward to conclude that Justice Kirby tended to sit more often on cases failing to result in unanimity than his colleagues.

While those who have followed the annual release of these statistics will instantly appreciate that the above data conforms solidly to the trends of earlier years, it is worth stressing just how *very* consistent the 2005 results for each Justice are with his individual breakdown for 2004. This is even more so than in earlier years. Undoubtedly, this is a product of the already acknowledged higher unanimity rate in the last two years, but it is still quite striking.

There are, however, some differences worth noting. In 2004, Gummow J was displaced as the least frequent dissenter for the first time by Hayne J. Although

with dissent rates as low as these one is inevitably drawing a very fine distinction, it should be recognised that Gummow J last year regained his position as the member of the Court who delivered the fewest minority opinions. The other comment worth making is that, unsurprisingly given what was observed in Table A for the Court as a whole, individual dissent rates for most Justices either dropped or rose just marginally. But the picture in this respect was far more striking in the case of two Justices who have generally been outsiders on the Gleeson Court. The evidence that the Court shared a greater cohesion of outlook in 2005 than we have seen for some time is strengthened by the real reductions in the dissent rates of Kirby and Callinan JJ. In 2004, they respectively delivered 38.46% and 22.45% of their opinions in the minority. That result was pretty standard for Kirby J, while representing something of a peak for Callinan J, though not by any means an aberration from his rate in preceding years. But last year, the dissent rates for those two Justices dropped markedly – to 25.86% and 9.09%. For both, the decline fed into higher rates of concurring judgments rather than participation in unanimous opinions, the latter results barely wavering for each Justice.

The quarter of his decisions which are in the minority might suggest that Kirby J remained an unusually high dissenter in 2005. Of course that is true relative to his colleagues, and it is still a high figure, but it should be recognised that it is not so much greater than some of those seen in earlier eras. Some members of the Gibbs and Mason Courts, had dissent rates which were not so far off Justice Kirby's dissent record.[17] In 2005, Callinan J was much more often in step with the majority than at any earlier point in his time on the Court.

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	7	-	7 (100%)	0 (0%)
McHugh J	8	-	6 (75.00%)	2 (25.00%)
Gummow J	8	-	8 (100%)	0 (0%)
Kirby J	7	-	5 (71.43%)	2 (28.57%)
Hayne J	8	-	8 (100%)	0 (0%)
Callinan J	6	-	5 (83.33%)	1 (16.67%)
Heydon J	8	-	7 (87.50%)	1 (12.50%)

17 Lynch, above n 12, 503–07.

Table D(II) records the actions of individual justices in the constitutional cases of 2005. The unusually small size of the sample means the scope for analysis is particularly restricted, but the following may be briefly noted. First, three of the members of the Court, Gleeson CJ and Gummow and Hayne JJ, were in the majority in every case. Thus the 2005 statistics confirm their ongoing centrality in the Court's resolution of constitutional matters. These Justices have only dissented in respectively 6, 3 and 4 of the 105 constitutional matters tallied under this study since the Gleeson era began.

Second, it may be of interest to note that in 2005 McHugh and Kirby JJ disagreed from the majority in the same two cases – the 'big' ones for the year, *APLA Limited v Legal Services Commissioner (NSW)*[18] and *Combet v Commonwealth*,[19] although they did not deliver joint judgments. In contrast, Callinan and Heydon JJ shared their single dissent in a joint opinion in *Ruhani v Director of Police*.[20]

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

	Gleeson CJ	McHugh J	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J
Gleeson CJ	_____	20 (27.78%)	34 (47.22%)	11 (15.28%)	30 (41.67%)	21 (29.17%)	35 (48.61%)
McHugh J	20 (32.79%)	_____	23 (37.70%)	3 (4.92%)	18 (29.51%)	11 (18.03%)	21 (34.43%)
Gummow J	34 (49.28%)	23 (33.33%)	_____	10 (14.49%)	45 (65.22%)	26 (37.68%)	42 (60.87%)
Kirby J	11 (18.97%)	3 (5.17%)	10 (17.24%)	_____	9 (15.52%)	7 (12.07%)	7 (12.07%)
Hayne J	30 (44.78%)	18 (26.87%)	45 (67.16%)	9 (13.43%)	_____	20 (29.85%)	37 (55.22%)
Callinan J	21 (31.82%)	11 (16.67%)	26 (39.39%)	7 (10.61%)	20 (30.30%)	_____	35 (53.03%)
Heydon J	35 (48.61%)	21 (29.17%)	42 (58.33%)	7 (9.72%)	37 (51.39%)	35 (48.61%)	_____

18 [2005] HCA 44.
19 [2005] HCA 61.
20 [2005] HCA 42.

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

	Gleeson CJ	McHugh J	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J
Gleeson CJ	_____	2 (28.57%)	2 (28.57%)	0 (0%)	2 (28.57%)	1 (14.29%)	3 (42.86%)
McHugh J	2 (25.00%)	_____	4 (50.00%)	0 (0%)	4 (50.00%)	1 (12.50%)	3 (37.50%)
Gummow J	2 (25.00%)	4 (50.00%)	_____	0 (0%)	6 (75.00%)	2 (25.00%)	5 (62.50%)
Kirby J	0 (0%)	0 (0%)	0 (0%)	_____	0 (0%)	0 (0%)	0 (0%)
Hayne J	2 (25.00%)	4 (50.00%)	6 (75.00%)	0 (0%)	_____	2 (25.00%)	4 (50.00%)
Callinan J	1 (16.67%)	1 (16.67%)	2 (33.33%)	0 (0%)	2 (33.33%)	_____	3 (50.00%)
Heydon J	3 (37.50%)	3 (37.50%)	5 (62.50%)	0 (0%)	4 (50.00%)	3 (37.50%)	_____

Tables E(I) and E(II) indicate the number of times a justice jointly authored an opinion with his colleagues. One needs to acknowledge that the results for McHugh J in these tables and the rankings which follow are obviously affected by his retirement prior to the completion of the period under study. So while the results revealing his Honour's incidences of co-authorship are useful in understanding his individual work in his final year, they do not bear sustained comparison across the table relative to the rates of other Justices.

The arrival of Heydon J in 2003 provided the Court with a new member who wrote with the majority of his colleagues most often.[21] But his Honour's position as preferred co-author was less clear in 2005 both for all matters and the constitutional subset. While Heydon J was the first or second most frequent partner in joint judgment for all other members of the Court (with the exception of Kirby J), this was equally true for Gummow J. The latter continued the pattern of previous years in writing most often with Hayne J. This duo remains the Court's strongest partnership as evidenced by the high results in both tables. Significantly, their next most frequent co-author for a joint judgment was Heydon J.

21 Lynch and Williams (2005), above n 2, 25–8.

To the extent that it reveals anything, we can say that Table E(II) follows a similar pattern, though it is the first time there has been no entry for Kirby J in this table: his Honour not co-authoring a joint judgment with any other Justice of the Court in constitutional matters in 2005.

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

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

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

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

	Gleeson CJ	McHugh J	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J
Gleeson CJ	___	2	2	n/a	2	3	1
McHugh J	3	___	1	n/a	1	4	2
Gummow J	4	3	___	n/a	1	4	2
Kirby J	n/a	n/a	n/a	___	n/a	n/a	n/a
Hayne J	3	2	1	n/a	___	3	2
Callinan J	3	3	2	n/a	2	___	1
Heydon J	3	3	1	n/a	2	3	___

It must be noted that a high incidence of joint judgment delivery for one Justice across the other members of the Court cannot be simply equated with influence. A just as likely explanation is that the Justice concerned is a great 'joiner' and not necessarily the Court's intellectual leader. Alternatively, it may be that some Justices have a greater like of, and aptitude for, co-operative work.

IV CONCLUSION

This statistical presentation of the High Court's opinion delivery practices shows that the dominant features of the preceding year have continued strongly. In the body of cases overall, the dramatic feature remained the high number of unanimous decisions handed down – a development in 2004 which has been sustained. However, it was notable that none of these matters was a case in which

all seven of the judges sat and thus unanimity is still difficult to secure on the most important cases before the Court. But this cannot obscure the fact that the percentage of cases formally splitting the Court was much lower than in previous years – from roughly one in two to just over one in three matters, both overall and in the subset of constitutional cases. Ultimately, the Gleeson Court experienced a highly cohesive year, which harked back to earlier eras, while managing at the same time to maintain its distinctively low dissent rates for several of its members.

After 2006 we will be in a position to determine the initial contribution made by Crennan J on High Court decision-making. However, as the 2005 statistics and those of earlier years show, it will be unlikely that her presence alone will shift the Court in a different direction, at least on constitutional matters. Unlike the frequent identification of the 'swing' vote of Justice Sandra Day O'Connor on the United States Supreme Court, there is no such vote recognisable on the High Court. Instead, the Court is characterised by a remarkable stability and consistency of view among Gleeson CJ and Gummow and Hayne JJ, usually complemented, since 2003, by Heydon J. There are strong indications that Callinan J is, after many years of a more individualised outlook, coming into this fold. Significantly, Crennan J is not replacing one of these judges but McHugh J, a judge who since the beginning of the Gleeson Court in 1998 tended to strike out on his own rather more than most and contributed a dissent rate in the mid- to upper-teens.

In light of this existing solidity, there are thus few areas in current High Court jurisprudence where the new voice of Crennan J might make an immediate impact. An exception may be in the area of detention under the *Constitution*, where, for example, the 2004 matter of *Al-Kateb v Godwin*[22] was decided by a majority of 4:3, with Gleeson CJ and Gummow J in very rare dissent. This field of constitutional law may be revisited if the Commonwealth's new anti-terrorism laws,[23] providing for preventative detention and control orders, are challenged in the High Court. Otherwise, it may be that the new Justice may be tested, along with her colleagues, in the litigation of issues that have not yet been considered by the Gleeson Court and which in earlier times had been decided by inconclusive or narrow majorities. Examples include the scope of the Commonwealth's corporations power in the field of industrial relations[24] and the Commonwealth's exclusive power of 'excise' under s 90 of the Constitution.[25] Such issues may once again confirm the current stability of the court or lead to an unexpected fracturing of opinion that has been rare indeed over the last seven years.

22 (2004) 219 CLR 562.
23 *Anti-Terrorism Act (No 2) 2005* (Cth).
24 See, eg, *Dingjan, Re; Ex parte Wagner* (1995) 183 CLR 323.
25 See, eg, *Ha v New South Wales* (1997) 189 CLR 465.

V APPENDIX – EXPLANATORY NOTES

These 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'.[26]

A Case reports identified as constitutional

- *Fingleton v The Queen* [2005] HCA 34
- *Chief Executive Officer of Customs v El Hajje* [2005] HCA 35
- *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Ame* [2005] HCA 36
- *Agtrack (NT) Pty Limited v Hatfield* [2005] HCA 38
- *Ruhani v Director of Police* [2005] HCA 42
- *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44
- *Jarratt v Commissioner of Police for New South Wales* [2005] HCA 50
- *Combet v Commonwealth of Australia* [2005] HCA 61

B Case reports not tallied

There were a total of 81 cases listed for the period, the last of which was *Weiss v The Queen* [2005] HCA 81. From this total, one case was excluded as a single judge decision:

- *Hwang v The Commonwealth; Fu v The Commonwealth* [2005] HCA 66 (McHugh J).

C Case reports involving a number of matters – how they were tallied[27]

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

- *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [No 2]; *Equuscorp Pty Ltd v Codd* [No 2] [2005] HCA 5
- *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6
- *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd; Gribbles* [2005] HCA 9
- *Amcor Limited v Construction, Forestry, Mining and Energy Union; Minister for Employment* [2005] HCA 10

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

27 The purpose behind multiple tallying in such circumstances – and the competing arguments – are considered at length in Lynch, above n 1, 500–02.

- *Rich v CGU Insurance Limited; Silbermann v CGU Insurance Limited* [2005] HCA 16
- *In the Matter of an Application by the Chief Commissioner of Police (Vic)* [2005] HCA 18
- *Air Link Pty Limited v Paterson* [2005] HCA 39

Three cases were tallied multiple times in this study. The cases were:

- *Nicholls v The Queen; Coates v The Queen* [2005] HCA 1(in which two matters arising from a common set of facts raise different issues prompting the Court to concur in one appeal and split in the other);
- *Ruhani v Director of Police* [2005] HCA 42 (in which there are two distinct questions: (i) the High Court's competency to hear and determine appeals from the Supreme Court of Nauru, which is tallied as a constitutional matter; and (ii) the question of costs and joinder of the Commonwealth as a party, which is not. There are differently constituted majorities in respect of each); and
- *CSR Limited v Eddy* [2005] HCA 64 (in which there are two related matters, with some of the Justices reaching a different conclusion on issues relating to costs but concurring on the result of the other matter with respect to damages).

D Tallying decisions warranting explanation

Jarratt v Commissioner of Police for NSW [2005] HCA 506: Callinan and Heydon JJ make a more explicit order in allowing the appeal by substituting the order of the Court of Appeal. As they are essentially in agreement with the rest of the Court they are tallied as concurring.