THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2008 STATISTICS

ANDREW LYNCH* AND GEORGE WILLIAMS**

I INTRODUCTION

This article presents statistical information about the High Court's decision-making for 2008 at both an institutional and individual level, with an emphasis on constitutional cases as a subset of the total. The results have been compiled using the same methodology[1] employed in previous years.[2]

The usual caveats as to the need for a sober reading of empirical data on the decision-making of the High Court over just one year apply. Both the raw figures and percentage calculations, especially in respect of the smaller set of constitutional cases, need to be appreciated with this in mind. However, each year's statistics often possess interesting features – particularly when the Court is in a period of transition with new Justices replacing those retiring. The usefulness of a yearly study is enhanced by efforts to place the results in context and we draw readers' attention to trends and patterns observed in earlier years where appropriate.

As always, we preface what follows with our familiar disclaimer that in offering these simple tabular representations of the way in which the High Court and its Justices decided the cases of 2008, we do not assert that they are any kind of substitute for more traditional legal scholarship which subjects the reasoning

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

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

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

2 See 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; 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.

contained in the cases themselves to substantive analysis. Our intention is to provide an overview of the way in which matters were resolved by the Court and its members that will stimulate and complement such research and analysis.

Additionally, we should make it clear that, in keeping with similar studies performed in respect of other final courts, this contribution to understanding the workings of the High Court is not presented as an exercise in complex jurimetrics performed by statisticians. The purpose of the article is to provide basic and accessible information about the decision-making of the Court over the specified period, in the tradition established by the *Harvard Law Review*'s annual survey of the United States Supreme Court. The tables contained in this paper are comparable to those compiled by the editors of that publication[3] while being more detailed than those generated by the Supreme Court of Canada itself.[4] However, while those statistics are generally presented without any discussion, we have aimed to assist the reader of these High Court studies by highlighting results and developments which we see as notable in light of those gathered in earlier years or by contrast with others produced in the same timeframe. Exactly the same approach is taken in different studies of the judicial decisions of South African courts.[5]

II THE INSTITUTIONAL PROFILE

Table A – High Court of Australia Matters Tallied for 2008

	Unanimous	By concurrence	Majority over dissent	TOTAL
All Matters Tallied for Period	16 (27.59%)	21 (36.21%)	21 (36.21%)	58 (100%)
All Constitutional Matters Tallied for Period	1 (14.29%)	3 (42.86%)	3 (42.86%)	7 (100%)

3 See, eg, 'The Statistics' (2005) 119 *Harvard Law Review* 415, which contains a brief note clarifying the contents and methods used in compiling the relevant tables.

4 Supreme Court of Canada, *Statistics 1998–2008* (2009) <http://www.scc-csc.gc.ca/stat/html/index-eng.asp> at 24 May 2009.

5 See especially Michael Bishop et al, 'Constitutional Court Statistics for the 2006 Term' (2007) 23 *South African Journal of Human Rights* 386; see also J M Reyneke and J J Henning, 'The Supreme Court of Appeal in Action: A Statistical Survey of the 2003 and 2004 Terms' (2007) 124 *South African Law Journal* 5.

From Table A it can be seen that a total of 58 matters were tallied for 2008.[6] Of these, only seven matters – or 12.07 per cent – involved constitutional questions. While the raw figures might appear roughly comparable to preceding years, the percentage confirms that in 2008 the steady shrinking of the Court's constitutional law caseload continued – a phenomenon we noted in last year's study. Before examining this decline more closely, it is worth repeating the definitional criteria which determines our classification of matters as 'constitutional':

> 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.[7]

The application of this criteria is not affected by the extent to which constitutional issues are central to the resolution of the matter – an approach we have explained in an earlier study.[8] Thus, the figures produced for 'constitutional matters' result from a generously applied and inclusive criteria rather than one which might narrow the field of relevant decisions based on application of some subjective additional criterion.

This is worth bearing in mind when observing the results for the proportion of those decisions over the life of the Gleeson Court which involved consideration of constitutional issues. It is worth revisiting all these figures:[9]

1999 – 25.40%
2000 – 27.77%
2001 – 17.46%
2002 – 22.00%
2003 – 21.92%
2004 – 31.15%
2005 – 9.64%
2006 – 17.46%
2007 – 16.39%
2008 – 12.07%

---

6 The data was collected using the 59 cases available on AustLII <http://www.austlii.edu.au> at 4 May 2009 in its database for High Court decisions. Three cases were eliminated from the list of decisions for 2008 due to being decided by a single judge and one was tallied more than once on account of it containing several distinct matters. For a detailed explanation of the purpose behind multiple tallying of some cases, see Lynch (2002), above n 1, 500–2; Lynch (2005), above n 1, 494–6. For further information about the tallying of the 2008 matters, see the Appendix – Explanatory Notes at the conclusion of this paper.

7 Stephen Gageler SC, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25(1) *University of New South Wales Law Journal* 194, 195. While we also include any matters involving questions of purely State or Territory constitutional law (see Lynch and Williams (2008), above n 2, 240), there were no such matters decided by the Court last year.

8 The arguments against using a further refinement, such as use of a qualification that the constitutional issue be 'substantial', were made in Lynch and Williams (2005), above n 2, 16.

9 The percentages given here for the years 1999–2002 differ slightly from those calculable using the data in Lynch, above n 2, 42–3. That earlier study was conducted using the Australian Law Report series rather than annual listings of cases on the AustLII database. For consistency with later studies, the percentages here have been obtained using the AustLII case sets.

As ever, it is a mistake to think that the figures can simply 'speak for themselves'. It seems fair to say that the number of constitutional matters in 2004 was aberrantly high, while the lower percentage of such matters in 2005 was due, at least in part, to the unusually greater number of matters heard overall – 83 in total, and much more than in any of the other years studied. The number of constitutional cases did not rise correspondingly in that year and was, in fact, markedly low at just eight. But with just seven constitutional matters tallied for last year, 2008 presents us with the smallest group since we commenced these studies, despite its higher figure as a percentage of the matters overall than that produced for 2005.

Even so, we are wary of reading too much into these results. Perhaps the most that can be said is that 2008 was a very lean year in terms of the frequency with which the Court engaged with constitutional issues, and that it came immediately after years where the number of constitutional matters was not especially high. To give some longitudinal perspective – which may also explain our hesitancy to offer a more emphatic assessment – across the life of the Gibbs Court, about 21 per cent of matters involved constitutional issues, while for the Mason era the figure was 18 per cent, and for the Brennan Court 17 per cent.[10]

As for the manner in which the Court decided the cases of 2008, for only the third time in our annual study of the Gleeson era did the Court not split over the result in roughly half of all cases. In 2005, just 34.94 per cent of cases featured a dissent,[11] a figure comparable to last year's 36.21 per cent The low level of formal disagreement in the final year of the Gleeson Court is attributable to the very high percentage of unanimous opinions produced, which at 27.59 per cent is a significant climb back from the dip in unanimity of 2007 to a figure easily the highest of any preceding year. By contrast, the proportion of matters resolved through concurring opinions without dissent remained virtually unchanged from 2007.

Extracting much significance from the figures relating to the constitutional cases of 2008 is difficult given their scarcity. Of the seven decisions, three were decided accompanied by dissents. The single matter decided unanimously is, however, well worth noting. The decision of *Telstra Corporation Ltd v Commonwealth*[12] is the first occasion since 2003 in which all seven of the Court's members have joined to issue a single judgment in a constitutional law case.

10 Lynch (2005), above n 1, 497–8.
11 Lynch and Williams (2005), above n 2, 183.
12 (2008) 234 CLR 210.

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	Cases sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	16 (27.59%)	Unanimous	2 (3.45%)	2						
		By concurrence	6 (10.34%)		1	1		1	1	2
		6:1	5 (8.62%)			3	1			1
		5:2	2 (3.45%)				1	1		
		4:3	1 (1.72%)							1
6	7 (12.07%)	Unanimous	3 (5.17%)	3						
		By concurrence	3 (5.17%)		2		1			
		5:1	0 (0%)							
		4:2	1 (1.72%)			1				
		3:3	0 (0%)							
5	35 (60.34%)	Unanimous	11 (18.97%)	11						
		By concurrence	12 (20.69%)		6	3	1	2		
		4:1	7 (27.59%)		5	1	1			
		3:2	5 (8.62%)			3	2			

13 All percentages given in this table are of the total number of matters (58).

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	Cases Sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	7 (100%)	Unanimous	1 (14.29%)	1						
		By concurrence	3 (42.86%)		1	1			1	
		6:1	3 (42.86%)			2				1
		5:2	0 (0%)							
		4:3	0 (0%)							

Tables B(I) and (II) aim to reveal several things about the High Court's decision-making over 2008. First, they present a breakdown of, respectively, all matters and then just the constitutional matters according to the size of the bench and how frequently it split in the various possible ways open to it. Second, the tables also record the number of opinions which were produced by the Court in making these decisions. This is indicated by the column headed 'Cases Sorted by Number of Opinions Delivered'. Immediately under that heading are the figures 1 to 7, which are the number of opinions which it is possible for the Court to deliver. Where that full range is not applicable (essentially, when a unanimous opinion is delivered), shading is used to block off the irrelevant categories. It is important to stress that the figures given in the fields of the 'Number of Opinions Delivered' column refer to the number of cases containing as many individual opinions as indicated in the heading bar.

These tables should be read from left to right. For example, Table B(I) tells us that of the seven matters heard by a six member bench, only one featured dissent, and in that case the Court split 4:2, with three judgments written. That table allows us to identify the most frequent features of all the cases in the period under examination. Based on cascading frequencies, the profile of the case most commonly decided by the High Court in 2008 was a five judge decision with no dissent and only two opinions – which was exactly the same as the most frequent case profile in the year before.

As in previous years, the number of cases resulting in as many opinions as there were judges is the exception rather than the rule. Although Table B(I) indicates six instances of this, that figure is misleading. Three of these six matters were in fact taken from the one case – *HML v The Queen; SB v The Queen; OAE v The Queen*.[15] The explanation for the separate tallying of those matters is given

14 All percentages given in this table are of the total of constitutional matters (7).

15 (2008) 235 CLR 334.

in the Appendix, but the acknowledged trade-off of insisting on such particularity is the mild inflation of some of these results. The two matters tallied as having been decided by seven individual concurrences and the additional matter tallied as resolved 4:3 with no co-authored opinions are those found in this one case. Consequently, in actual fact, there were only four separate occasions on which the number of opinions matched the number of judges. Even then, as in 2007 and 2006, in some of those matters there is only one major opinion with the other Justices issuing a simple concurrence. That occurred in *Collins v Tabart*[16] and *Fergusson v Latham*[17] with Kirby and Hayne JJ respectively authoring the leading opinion in these matters in which the Court revoked special leave to appeal. Similarly, in the more substantial case of *R v Tang* four of the seven separate opinions were bare concurrences.[18]

In the past we have used Table B(I) to dispel the myth that a lone dissenter frustrates the Court's opportunities to deliver more unanimous opinions. The rarity of this remains apparent from these results. In only five cases was a single opinion by all Justices in agreement met with a single dissent. There were, however, seven occasions in which the entire Court's concurrence on the result manifested as a joint judgment accompanied by a solo opinion. For the curious, Justice Kirby accounted for only three of those separate opinions which prevented a unanimous set of reasons.

Table B(II) provides a simple breakdown of how opinions in the seven constitutional matters for 2008 were delivered. This is the first of these studies in which all such cases were determined by a seven-member bench.

Table C – Subject Matter of Constitutional Cases

Topic	No of Cases	References to Cases[19] (Italics indicate repetition)
s 51(xxix)	1	39
s 51(xxxi)	1	7
Chapter III	2	2, 4
s 75(v)	1	28
s 76(ii)	1	*28*
s 77	1	*28*
s 92	1	11
s 109	1	*28*
Commonwealth power with respect to State Magistrates	1	14

16 (2008) 246 ALR 460.
17 (2008) 246 ALR 463.
18 (2008) 249 ALR 200.
19 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 '[2008] HCA'. Full case details are given in the Appendix.

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

III THE INDIVIDUAL PROFILE

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	34	7 (20.59%)	25 (73.53%)	2 (5.88%)
French CJ	4	1 (25.00%)	3 (75.00%)	0 (0%)
Gummow J	50	15 (30.00%)	33 (66.00%)	2 (4.00%)
Kirby J	46	10 (21.74%)	24 (52.17%)	12 (26.09%)
Hayne J	51	12 (23.53%)	37 (72.55%)	2 (3.92%)
Heydon J	49	14 (28.57%)	31 (63.27%)	4 (8.16%)
Crennan J	47	15 (31.91%)	31 (65.96%)	1 (2.13%)
Kiefel J	48	13 (27.08%)	29 (60.42%)	6 (12.50%)

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2008. As French CJ sat on only four matters for which judgments were handed down in that year, he is included merely for the sake of completeness. Caution is also required in respect of the results for Gleeson CJ, given that he sat on noticeably fewer cases prior to his retirement in August. This inhibits direct comparison between him and his colleagues throughout the tables in Part III of this article.

Excepting Kirby and Kiefel JJ, in 2008 the dissent rates for members of the Court are comparable to the results of earlier years. Dissent remains rare for the majority of serving Justices. Justice Crennan has dissented just four times in her first three years of service. Justices Gummow and Hayne continue their long pattern of rarely speaking from the minority position and Heydon J has not repeated his 15 per cent of dissenting opinions of 2006.

Justice Kiefel dissented six times which, while hardly a staggering amount, is, in this company, nevertheless notable – particularly in her first year on the Court. Even so, it hardly seems likely that she will assume the mantle of the recently-departed Kirby J as a regular outlier from the Court's opinion.

Justice Kirby actually delivered a much lower proportion of dissenting opinions than usual. In most of the years studied, Justice Kirby's minority opinions accounted for around 40 per cent of his total – hitting a high of 48 per cent in 2006. Only in 2005 did he have a percentage of dissenting opinions comparable to his 2008 figure of 26.09 per cent. Even so, at a quarter of all the opinions he authored in 2008, this remains a substantial level of formal

disagreement from his colleagues on the Court. Justice Kirby departs the institution with his reputation as its consistent outlier intact.

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	7	1 (14.29%)	6 (85.71%)	0 (0%)
French CJ	-	-	-	-
Gummow J	7	1 (14.29%)	6 (85.71%)	0 (0%)
Kirby J	7	1 (14.29%)	3 (42.86%)	3 (42.86%)
Hayne J	7	1 (14.29%)	6 (85.71%)	0 (0%)
Heydon J	7	1 (14.29%)	6 (85.71%)	0 (0%)
Crennan J	7	1 (14.29%)	6 (85.71%)	0 (0%)
Kiefel J	7	1 (14.29%)	6 (85.71%)	0 (0%)

Table D(II) records the actions of individual Justices in the constitutional cases of 2008. The limited number of cases prevents much comment on this table. Its obvious features are the production of a seven-Justice unanimous opinion, which has already been noted, and the concentration of constitutional dissent solely in the opinions of Kirby J. This second feature is actually a first. While dissent in constitutional matters has been exceptionally rare from Gleeson CJ and Gummow and Hayne JJ, and Crennan J has never dissented in such a matter, all other members of the Court have been represented regularly in the far right column of this table. Justices McHugh, Callinan and Heydon all filed at least one dissent in a constitutional matter in the five years preceding 2008. With the first two of those Justices now retired and Heydon J concurring with the majority in all constitutional matters last year, Kirby J alone offered an alternative resolution to any of the constitutional cases decided in his final year on the Court. His three dissents were delivered in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*,[20] *O'Donoghue v Ireland; Zentai v Republic of Hungary; Williams v United States of America*[21] and *R v Tang*.[22]

20 (2008) 234 CLR 532.
21 (2008) 234 CLR 599.
22 (2008) 249 ALR 200.

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

	Gleeson CJ	French CJ	Gu'w J	Kirby J	Hayne J	Heydon J	Crennan J	Kiefel J
Gleeson CJ	-	n/a	14 (41.18%)	7 (20.59%)	10 (29.41%)	8 (23.53%)	12 (35.29%)	12 (35.29%)
French CJ	n/a	-	2 (50.00%)	0 (0%)	2 (50.00%)	1 (25.00%)	1 (25.00%)	1 (25.00%)
Gu'w J	14 (28.00%)	2 (4.00%)	-	16 (32.00%)	32 (64.00%)	26 (52.00%)	26 (52.00%)	26 (52.00%)
Kirby J	7 (15.22%)	0 (0%)	16 (34.78%)	-	12 (26.09%)	10 (21.74%)	11 (23.91%)	12 (26.09%)
Hayne J	10 (19.61%)	2 (3.92%)	32 (62.75%)	12 (23.53%)	-	23 (45.10%)	24 (47.06%)	23 (45.10%)
Heydon J	8 (16.33%)	1 (2.04%)	26 (53.07%)	10 (20.41%)	23 (46.94%)	-	24 (48.98%)	21 (42.86%)
Cren'n J	12 (25.53%)	1 (2.13%)	26 (55.32%)	11 (23.40%)	24 (51.06%)	24 (51.06%)	-	27 (57.45%)
Kiefel J	12 (25.00%)	1 (2.08%)	26 (54.17%)	12 (25.00%)	23 (47.92%)	21 (43.75%)	27 (56.25%)	-

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

	Gleeson CJ	French CJ	Gu'w J	Kirby J	Hayne J	Heydon J	Cren'n J	Kiefel J
Gleeson CJ	-	n/a	3 (42.86%)	2 (28.57%)	3 (42.86%)	1 (14.29%)	2 (28.57%)	2 (28.57%)
French CJ	n/a	-	n/a	n/a	n/a	n/a	n/a	n/a
Gu'w J	3 (42.86%)	n/a	-	2 (28.57%)	5 (71.43%)	3 (42.86%)	3 (42.86%)	4 (57.14%)
Kirby J	2 (28.57%)	n/a	2 (28.57%)	-	2 (28.57%)	1 (14.29%)	2 (28.57%)	2 (28.57%)
Hayne J	3 (42.86%)	n/a	5 (71.43%)	2 (28.57%)	-	3 (42.86%)	3 (42.86%)	4 (57.14%)
Heydon J	1 (14.29%)	n/a	3 (42.86%)	1 (14.29%)	3 (42.86%)	-	3 (42.86%)	4 (57.14%)
Crennan J	2 (28.57%)	n/a	3 (42.86%)	2 (28.57%)	3 (42.86%)	3 (42.86%)	-	5 (71.43%)
Kiefel J	2 (28.57%	n/a	4 (57.14%)	2 (28.57%)	4 (57.14%)	4 (57.14%)	5 (71.43%)	-

)							

Tables E(I) and E(II) indicate the number of times a Justice jointly authored an opinion with his or her colleagues. It should be pointed out that the results for Gleeson CJ (and obviously also French CJ) in these tables and the rankings which follow in Tables F(I) and (II) are affected by the fewer number of cases he sat on relative to the other members of the Court. It would be a mistake to see these figures as pointing to a drop in collaboration between Gleeson CJ and the members of the Court in his final months.

As ever, it must be stressed that a high incidence of joint judgment delivery for one Justice across the other members of the Court cannot be simply equated with influence. Without knowing more about the internal dynamic of the Court's members, these figures do not enable us to distinguish between the driving intellectual force and the 'joiners' who might come together in a coalition of Justices. That said, former Justice Michael McHugh has made some revealing comments which help illuminate these results – or rather confirm long-held suspicions.

When describing Gummow J as 'a great judicial politician' on account of the fact that 'he always had three votes',[23] McHugh J made clear his opinion that the latter's high number of co-authored opinions every year is attributable to his dominance on the Court rather than to any tendency to be a 'follower'. While the strength of the judicial partnership between Gummow and Hayne JJ remained unmatched in 2008 when the two wrote together in 64 per cent of all cases on which Gummow J sat, both are also frequently joined by other members of the Court. Justice Gummow was joined in his reasons by Heydon, Crennan and Kiefel JJ in just over half of the matters determined in 2008. It is important to note that, although the rate of co-authorship with each of these three Justices is identical, the cases in which they wrote with each other were not all the same. In fact, Gummow J only issued four solo opinions throughout 2008. In all other cases, he wrote with one or more of his colleagues. He was the most frequent co-author for all members of the Court, except for Crennan and Kiefel JJ who wrote with each other on just one more occasion than either did with Gummow J. This high level of collaboration between Crennan and Kiefel JJ also carried over to just the subset of constitutional matters, where they joined together just as often as Gummow and Hayne JJ did. However, such is the frequency with which all of these members of the Court write together that it is difficult at this point to view the two newer Justices as having forged a co-authorship relationship in the same vein as Gummow and Hayne JJ. Suffice to say that, even as the personnel of the Court has changed in recent years its members have continued to increase the frequency with which joint opinions are produced.

The exception in the way the Court functions has been Kirby J, who retired in February 2009. Of Justice Kirby's frequent place in dissent with his colleagues and generally much lower incidence of joint opinion delivery, McHugh offered this assessment: 'He never did any alliance building…[h]is work methods

23 David Marr, 'Now History will be the Judge', *Sydney Morning Herald* (Sydney), 31 January 2009.

excluded it'.[24] Quite what McHugh is referring to is difficult to guess, though the same news story contains an anecdote, apparently true, telling of a telephone call by Brennan CJ to Justice Kirby's chambers on Christmas Day morning. Justice Kirby took the call. Without going into the issue too much,[25] the suggestion seems to be that Justice Kirby's experience on the Court was the result of differences of habit and work practices, as much as intellectual outlook, from his colleagues.

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

	Glee'n	Fr'ch	Gu'w	Kirby	Hayne	Hey'n	Cren'n	Kief'l
Glee'n	-	n/a	1	5	3	4	2	2
Fr'ch	n/a	-	1	-	1	2	2	2
Gu'w	4	5	-	3	1	2	2	2
Kirby	5	-	1	-	2	4	3	2
Hayne	5	6	1	4	-	3	2	3
Hey'n	6	7	1	5	3	-	2	4
Cren'n	4	6	2	5	3	3	-	1
Kief'l	5	6	2	5	3	4	1	-

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

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

24 Ibid.

25 For an earlier attempt at speculation on Justice Kirby's propensity to dissent from one of the authors, see Andrew Lynch, 'Taking Delight in Being Contrary, Frightened of Being a Loner or Simply Indifferent – How Do Judges *Really* Feel About Dissent?: Cass Sunstein's *Why Societies Need Dissent*' (2004) 32 *Federal Law Review* 311, 322–4.

Cren'n	3	n/a	2	3	2	2	-	1
Kief'l	3	n/a	2	3	2	2	1	-

IV CONCLUSION

The 2008 statistics confirm some important trends revealed by our earlier surveys, including the leadership role played by Gummow J, the high rate of dissent of Kirby J and a decline in the number of constitutional cases decided by the High Court. The last confirms a change apparent to anyone who has watched or appeared in the High Court over recent years. In its final years, the Gleeson Court has decided markedly fewer constitutional cases.

The issue is not simply a matter of numbers. The Gleeson Court has also been characterised by the fact that over a decade it has issued fewer decisions, relative to the Brennan, Mason and Gibbs Courts before it, having a major impact on the development of Australian constitutional law. There are of course some notable exceptions, especially in the area of the separation of judicial power, but overall the Gleeson era did not have an impact in this area comparable to that of earlier Courts. Even where the Gleeson Court has delivered decisions of great political importance, such as that in *New South Wales v Commonwealth (Work Choices Case)*,[26] the decisions have often confirmed or simply recast existing lines of authority rather than substantially deepening our understanding of that area of constitutional law, let alone striking out in bold new directions.

Its often cautious approach to constitutional doctrine is the reason why the time of the Gleeson Court is unlikely to be remembered as a leading era in the development of Australian constitutional jurisprudence. Major opportunities have often not been fully grasped, such as the opening to develop judicial review principles in *Plaintiff S157 /2002 v Commonwealth*[27] or clarify crucial issues concerning the implied freedom of political communication or the operation of Chapter III as a safeguard of individual liberty, with the Court preferring to avoid or just to downplay constitutional issues in a way that has inhibited the meaningful development of doctrine. There are of course major exceptions when it comes to the willingness to develop legal principles, the most notable being many of the dissents of Kirby J. Whether or not those dissents provide fertile ground for future development by the French Court or its successors must wait to be seen. While, on past evidence, the likelihood of reversals by the High Court in favour of earlier dissents appears very limited,[28] we note that two pairs of authors who examine the legacy of Justice Kirby's constitutional opinions in a collection

26 (2006) 229 CLR 1 ('*Work Choices Case*').

27 (2003) 211 CLR 476.

28 Andrew Lynch, 'The Intelligence of a Future Day: The Vindication of Constitutional Dissent in the High Court Australia – 1981–2003' (2007) 29 *Sydney Law Review* 195.

of essays published to mark his retirement argue that several of his opinions will ultimately be vindicated.[29]

One consequence of the Gleeson Court's reticence on constitutional issues has been the decline in the number of such cases brought before it. Constitutional law often involves unexplored aspects of doctrine or the application of longstanding principles to new contemporary problems in a way that raises questions about the correctness of those principles. The relative unwillingness of many of the judges of the Gleeson Court to embark on constitutional development has naturally acted as a dampener upon the eagerness of parties to bring such cases before the Court. Cases that might have been litigated on the basis that they may have opened up new avenues of thinking or new principles, and in so doing won the case for a plaintiff, have, we suspect, more often not been argued.

Most clearly, cases have been less likely to be brought by States challenging Commonwealth action. The *Work Choices Case* in 2006 was less a turning point in Commonwealth/State relations than a final recognition that there is rarely scope for the States to effectively challenge the exercise of Commonwealth legislative or executive power. Given this, why should the States now choose to litigate federalism disputes, if that litigation is only likely to confirm a favourable outcome for the Commonwealth? It may be better to leave the question unanswered and instead seek compromise through political means from a position of arguable strength, rather than certain weakness.

Whether the decline in the volume of constitutional litigation is a good or bad thing is open to debate. Less litigation can be an indication of stability and predictability in constitutional law, which can be a boon to economic development and Australia's other arms of government. On the other hand, too static a system of constitutional law also has its problems. Public law does need to develop with the times, and the greatest public law judges such as Sir Owen Dixon have been well aware of the need for constitutional law doctrine to facilitate national development.[30] There certainly remain any number of unresolved issues of importance in and around Australia's constitutional structure and it can only be hoped that in future years the High Court is more willing to tackle these questions.

---

29 Heather Roberts and John Williams, 'Constitutional Law' in Ian Freckleton and Hugh Selby (eds) *Appealing to the Future – Michael Kirby and His Legacy* (2009) 179–216; Gavan Griffith and Graeme Hill, 'Constitutional Law: Dissents and Posterity' in Ian Freckleton and Hugh Selby (eds) *Appealing to the Future – Michael Kirby and His Legacy* (2009) 217–38.

30 For example, as Dixon J suggested in regard to s 90 of the *Constitution* in an oft-quoted statement in *Parton v Milk Board (Vic)* (1949) 80 CLR 229, 260: 'In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy is adopted should not be hampered or defeated by State action'.

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 [sic] the accuracy and value of the information conveyed'.[31]

A Matters Identified As Constitutional

- *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1;
- *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 242 ALR 191;
- *Telstra Corporation Ltd v Commonwealth* (2008) 243 ALR 1;
- *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418;
- *O'Donoghue v Ireland; Zentai v Republic of Hungary; Williams v United States of America* (2008) 234 CLR 599;
- *MZXOT v Minister for Immigration and Citizenship* (2008) 247 CLR 58;
- *R v Tang* (2008) 249 ALR 200.

B Matters Not Tallied

Three matters on the AustLII database for 2008 were excluded from tallying as they were decided by a single justice alone:

- *Siminton v Australian Prudential Regulation Authority* (2008) 249 ALR 413;
- *Tilley v The Queen* (2008) 251 ALR 367;
- *Priestley v Godwin* (2008) 251 ALR 612.

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 questions:

- *O'Donoghue v Ireland; Zentai v Republic of Hungary; Williams v United States of America* (2008) 234 CLR 599;
- *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 248 ALR 693;
- *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 249 ALR 398;

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

- *BHP Billiton Iron Ore Pty Ltd v National Competition Council; BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 249 ALR 418;
- *Cesan v The Queen; Mas Rivadavia v The Queen* [2008] HCA 52;
- *Kennon v Spry; Spry v Kennon* (2008) 251 ALR 257.

One case was tallied as a multiple number of matters in this study.[32] The case of *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334 contains three matters and the decision to tally these separately was due to the following factors: no matter had any factual connection to each other; all judgments discuss the three matters distinctly; and although the first two matters are resolved through concurrences, the bench split 4:3 on the result in *OAE v The Queen*.

D Tallying Decisions Warranting Explanation

- *Adams v The Queen* [2008] HCA 15 – Heydon J is tallied as dissenting as he ordered that special leave should be revoked while the majority dismissed the appeal;
- *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334 – In the third matter, Heydon J indicated he would have preferred to revoke special leave (which would have been tallied as a dissent similar to [2008] HCA 15) but as the other six Justices disagreed but were evenly divided on the appeal, his Honour granted special leave and dismissed the appeal;
- *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 – Gleeson CJ made an additional order that the respondents should pay the costs of the appellants of the appeal to the High Court. His Honour's judgment is still tallied as concurring;
- *MZXOT v Minister for Immigration and Citizenship* (2008) 247 CLR 58 – Heydon, Crennan and Kiefel JJ answered one of the questions (3B) for the Court with a negative, while the other members of the bench considered it 'unnecessary to answer'. Their Honours' judgment is still tallied as concurring;
- *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 248 ALR 195 – Heydon and Kiefel JJ would have allowed the appeal completely while the majority allowed it only in part. Their Honours are tallied as dissenting;

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

- *Kennon v Spry; Spry v Kennon* (2008) 251 ALR 257 – Kiefel J concurred with the order dismissing the appeals but allowed special leave to cross-appeal and those cross-appeals themselves. Her Honour is tallied as dissenting.