THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2010 STATISTICS

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I INTRODUCTION

This article presents statistical information about the High Court's decision making for 2010 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]

As has become customary, we acknowledge at the outset the limitations that inhere in an empirical study of the decision making of the High Court over just one year. In particular, care must be taken not to invest too much significance in the percentage calculations given the modesty of the sample size, especially in respect of the smaller set of constitutional cases. Nevertheless, this annual exercise remains worthwhile in that it offers assistance to those watchers of the High Court who are interested in the way in which the dynamic between its

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

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; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2005 Statistics' (2006) 29 *University of New South Wales Law Journal* 182; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2006 Statistics' (2007) 30 *University of New South Wales Law Journal* 188; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2007 Statistics' (2008) 31 *University of New South Wales Law Journal* 238; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2008 Statistics' (2009) 32 *University of New South Wales Law Journal* 181; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2009 Statistics' (2010) 33 *University of New South Wales Law Journal* 267.

individual members translates to institutional outcomes, but who might otherwise be left to resort merely to impression.[3]

The results of our 2009 survey of decision making on the Court[4] provided a clear demonstration of the value of looking at the Court year by year, since the new 'French Court' displayed several new or emerging patterns of behaviour that contrasted starkly with the results of just one or two years earlier. If we recognise that a multi-member court is not a static body, then it makes sense to subject it to regular rather than sporadic scrutiny. In doing so, shifts in the way the Court's seven Justices interact over the controversies that come before them may be more discernible. As always, efforts are made to enhance the utility of this yearly study by placing the results in context and we draw readers' attention to trends and patterns observed in earlier years where appropriate.

Of course, tabular representations of the way in which the High Court and its Justices decided the cases of 2010 are only a very small part of the larger story. They are no substitute for scholarship that subjects the legal reasoning contained in the cases to substantive analysis or examines the impact of the Court's decisions upon government and the community. Additionally, we refrain from going so far as to draw specific conclusions about the particular working relationships amongst the Court's members.[5] The results here are drawn only from what may be observed from the public record of the Court's decided cases. This remains inadequate source material from which to infer, should we even desire to, the level of influence which any Justice has amongst his or her colleagues.

II THE INSTITUTIONAL PROFILE

Table A – High Court of Australia Matters Tallied for 2010

	Unanimous	By Concurrence	Majority over Dissent	TOTAL
All Matters Tallied for Period	24 (50.00%)	15 (31.25%)	9 (18.75%)	48 (100%)
All Constitutional Matters Tallied for Period	3 (33.33%)	2 (22.22%)	4 (44.44%)	9 (100%)

3 For example, see Zines' observations about the likely influence of Gummow J on the High Court, some of which are strongly consistent with the data presented in these annual studies: Leslie Zines, 'Chief Justice Gleeson and the Constitution' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009) 269, 282.

4 Lynch and Williams, 'The 2009 Statistics', above n 2.

5 Cf Zines, above n 3.

From Table A it can be seen that a total of 48 matters were tallied for 2010.[6] A remarkably high number – exactly half in fact – were decided unanimously. Last year, the rate of unanimous judgments was somewhat less at 44 per cent, but that was a huge increase on the comparable figure for the Gleeson, Brennan, Mason and Gibbs Courts. In presenting the 2009 results, we asked whether the apparent outbreak of unqualified consensus on the newly constituted French Court would hold or whether it would prove to be a spike before a return to more modest levels of unanimity. The answer, at least so far, appears to be the former. 2010 was the second full year of these seven Justices working together as a Court and they have sustained, indeed slightly lifted, the remarkably high percentage of the caseload that they decide in unison.

In doing so, the rate of matters the Court resolved through multiple concurrences was, at 31.25 per cent, steady from that of 2009, while the percentage of cases featuring dissent dropped a little to just under 19 per cent. 2010 is the first year since this series began in which that figure has been under 20 per cent. As we reminded readers when examining last year's rate of dissent, which was just over 23 per cent, for most of the Gleeson era the bench divided as to the final orders in about half of the cases decided in any given year.[7] Lest the very low incidence of formal disagreement from final orders on the French Court continue to be solely attributed to the absence of what is known in some circles as the 'Kirby effect',[8] we would draw attention to the longitudinal perspective we gave in discussing the 2009 result.[9] It is very clearly the case that the present High Court has produced far fewer split decisions in the last two years than the institution has done on average for at least the last 30 years.

It would be a mistake to overstate the complementary nature of these figures. Despite initial appearances, the occurrence of unanimity and dissent is not locked in a simple inverse hydraulic relationship – so that when the latter goes down, the former rises. Although there is an obvious connection between the two, it is important to appreciate that this is only one way. The existence of dissent is certainly destructive of any chance of unanimity and the fact that over the last two years the delivery of dissenting opinions has been significantly lower than in the preceding period has evidently been a factor in understanding the Court's recent capacity to speak more often with one voice. But, as we have emphasised in past studies, dissent is not the only obstacle to a single expression of the Court's view and importantly a decline in formal disagreement amongst the Justices does not automatically translate into unanimity. The far more telling set of figures is the number of matters resolved through concurring opinions relative

6 The data was collected using the 49 matters listed on AustLII <http://www.austlii.edu.au/> in its High Court database for 2010. One case was eliminated from the study. For further information about that decision and others affecting the tallying of 2010 matters, see the Appendix – Explanatory Notes at the conclusion of this paper.

7 The exceptions to this were 2005 and 2008 where cases featuring dissent dropped to around 35 per cent.

8 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, 275.

9 Lynch and Williams, 'The 2009 Statistics', above n 2, 270.

to those decided unanimously. In the absence of a dissenter to play the part of spoiler, how often do the members of the Court manage to convert consensus that might otherwise be expressed through multiple opinions into a single unanimous judgment?

The merits and drawbacks of multiple majority opinions rather than the production of just one were canvassed recently in a comprehensive report to the National Judicial College of Australia.[10] In addition to a survey of the relevant literature, the authors of that study interviewed judges, practitioners and academics to gather impressions on the relative desirability of the different methods through which consensus might be expressed by members of the High Court. The arguments, as might be expected, are fairly balanced on each side, though respondents to the study did highlight the special frustration caused by majority opinions displaying 'false difference' (that is, no substantive difference from those issued by other members of the majority, but merely difference with regard to expression or style).[11] The report not surprisingly concludes that 'different approaches have merit in different circumstances',[12] before endorsing the suggestion of the United Kingdom's Lady Justice Arden that immediately after a hearing a multi-member court should explicitly 'consider the form its judgment should take' and 'whether in that instance judicial independence requires a series of separate judgments or whether the view of either the majority or the minority can be expressed in a single set of reasons'.[13]

In light of the emerging patterns of opinion delivery from the French Court, it seems highly probable that some discussion of this sort is already the practice amongst its judges. The NJCA report examined the frequency of cases decided with multiple majority opinions (whether or not accompanied by dissent) over the period from 1989 to 2008, but the breakdown of the 2010 results is starkly at odds with the dominant pattern the report's authors discovered. They found that, excepting 1993, over the timeframe studied, annually the High Court decided well over half its cases (between 60 and 80 per cent though occasionally higher) with the majority view found across several opinions. By contrast, in 2010, only just over 40 per cent of the matters featured more than one set of reasons explaining the orders made by the Court.[14] On the strength of these very recent developments in decision making, there would no longer seem to be a pressing need to encourage the Court to adopt practices aimed at increasing the common expression of agreement.

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10 Fiona Wheeler et al, 'Multiple Opinions Project – Report', (Report to the National Judicial College of Australia, Australian National University College of Law, 30 June 2010) ('NJCA report').

11 Ibid 20–1.

12 Ibid 4. See also Michael Coper, 'Joint Judgments and Separate Judgments' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 367, 369.

13 Lady Justice Arden, 'A Matter of Style? The Form of Judgments in Common Law Jurisdictions: A Comparison' (Speech delivered at the Conference in Honour of Lord Bingham, Oxford, 20 June 2008) 10.

14 In addition to the 50 per cent of total matters decided unanimously, four of the nine matters containing a dissent featured only one opinion for the majority.

In 2010, there were just nine matters – or 18.75 per cent of the total – that involved discussion by the Court of constitutional questions. While that is not the lowest number (or lowest proportion of the entire caseload) recorded in these annual studies, the drop in the number of constitutional cases in recent years relative to the first half of the last decade continues to be an interesting phenomenon.[15]

The definitional criteria which continues to determine our classification of matters as 'constitutional' remains that given by Stephen Gageler SC when he gave the inaugural annual survey of the High Court's constitutional decisions. Gageler viewed 'constitutional' matters as:

> that subset of cases decided by the High Court in the application of legal principle identified by the Court as being derived from the Australian Constitution. That definition is framed deliberately to take in a wider category of cases than those simply involving matters within the constitutional description of 'a matter arising under this Constitution or involving its interpretation'.[16]

Our only amendment to this statement as a classificatory tool has been to additionally include any matters before the Court involving questions of purely state or territory constitutional law.[17] In 2010, there were two such cases: *Port of Portland Pty Ltd v Victoria*[18] in which the guarantee against executive dispensation of statute law contained in the *Bill of Rights 1688* (UK) 1 Wm & M sess 2 c 2 was a relevant consideration in a contractual dispute involving the state of Victoria; and *Cadia Holdings Pty Ltd v New South Wales*[19] concerning whether the scope of common law prerogative rights to gold and silver, as received in the colony of New South Wales, included Crown ownership of intermingled copper.

In applying the criteria as to what amounts to a 'constitutional case', the extent to which such issues are central to the resolution of the matter is generally not a consideration – an approach we have explained in an earlier study.[20] In saying that, it is as well to point out that cases where litigants raise constitutional arguments that do not receive the consideration of the Court are not included.[21] Overall, the figures produced for 'constitutional matters' result from a generously applied and inclusive criteria rather than one which might narrow the field based on some subjective additional criterion.

The Court divided in four of the nine constitutional matters it decided in 2010, which is not an unusual proportion. However, for the very first time in this annual series, the number of constitutional matters decided unanimously (three)

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

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

17 Lynch and Williams, 'The 2007 Statistics', above n 2, 240.

18 (2010) 242 CLR 348.

19 (2010) 242 CLR 195 ('*Cadia*').

20 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, 'The 2004 Statistics', above n 2, 16.

21 See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

was higher than those reached through concurrences without dissent. That is interesting, but especially when one considers the extreme rarity of unanimity in constitutional cases over the longer term – particularly when complex or controversial questions are involved.

The High Court has written a unanimous seven-judge opinion in only a handful of constitutional law cases since the start of the Gleeson era in 1998: twice in 2009 (two matters which were essentially identical challenges to the occupational health and safety legislation of two different states for section 109 inconsistency with a Commonwealth law);[22] once in 2008 (compulsory acquisition of property);[23] once in 2003 (trade and commerce power);[24] and once in 1999 (Commonwealth–state inconsistency again).[25]

It seems fair to say that all three of the unanimously decided constitutional cases of 2010 are just as, if not much more, important than these few immediate predecessors. In particular, the most significant must surely be *Plaintiff M61/2010E v Commonwealth*,[26] concerning the procedural fairness of the Commonwealth Government's offshore processing system for refugees arriving by boat. In terms of a constitutional case decided unanimously by all seven members of the Court, one needs to go back as far as *Lange v Australian Broadcasting Corporation*[27] in 1997 to find one of comparable importance.

The unanimous expression of judicial reasons in major constitutional cases is not easy to achieve. When it occurs it is never simply an accident, and certainly something that would not be expected to have occurred three times in one year without this also reflecting the broader decision making processes of the Court.

22 *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518; *John Holland Pty Ltd v Inspector Nathan Hamilton* (2009) 83 ALJR 1236.
23 *Telstra Corporation Limited v The Commonwealth* (2008) 234 CLR 210.
24 *Re Maritime Union of Australia* (2003) 214 CLR 397.
25 *Telstra v Worthing* (1999) 197 CLR 61.
26 (2010) 272 ALR 14.
27 (1997) 189 CLR 520.

TABLE B (I) All Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[28]

Size of Bench	Number of Matters	How Resolved	Frequency	Cases Sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	17 (35.42%)	Unanimous	7 (14.58%)	7						
		By Concurrence	5 (10.42%)		2	3				
		6:1	3 (6.25%)		1		1		1	
		5:2	1 (2.08%)			1				
		4:3	1 (2.08%)						1	
6	3 (6.25%)	Unanimous	-							
		By Concurrence	3 (6.25%)			1	1	1		
		5:1	-							
		4:2	-							
		3:3	-							
5	27 (56.25%)	Unanimous	16 (33.33%)	16						
		By Concurrence	7 (14.58%)		7					
		4:1	1 (2.08%)		1					
		3:2	3 (6.25%)			3				
3	1 (2.08%)	Unanimous	1 (2.08%)	1						
		By Concurrence								
		2:1								

28 All percentages given in this table are of the total number of matters (48).

TABLE B (II) Constitutional Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[29]

Size of bench	Number of matters	How Resolved	Frequency	Cases Sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	8 (88.88%)	Unanimous	3 (33.33%)	3						
		By Concurrence	1 (11.11%)			1				
		6:1	3 (33.33%)		1		1		1	
		5:2								
		4:3	1 (11.11%)						1	
5	1 (11.11%)	Unanimous								
		By Concurrence	1 (11.11%)		1					
		5:1	-							
		4:2	-							
		3:3	-							

Tables B(I) and B(II) reveal several things about the High Court's decision making over 2010. First, they present a breakdown of, respectively, all matters and then just constitutional matters according to the size of the bench and how frequently it split in the various possible ways open to it. Second, the tables 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 17 matters heard by a seven member bench, only one produced a 5:2 split, and in that case three separate opinions were delivered.[30] That table allows us to identify the most common features of the cases in the period under examination. The profile of the 'typical' 2010 High Court case was, as it was in the preceding year, a five judge decision resolved with a unanimous opinion.

In keeping with the earlier comments about the apparent trend away from unnecessary individual expression through multiple opinions on the French

29 All percentages given in this table are of the total number of constitutional matters (9).

30 The case is *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539.

Court, for the first time since this table was included in our study (2005 onwards), in no case last year did the Court decide a matter by issuing as many separate opinions as there were judges. Further, in only three matters was there a joint judgment of just a pair of Justices alongside individual opinions from the remaining members of the bench. Instead, it has to be said that the norm is very much for joint judgment delivery across the Court. This is not, to be clear, a sudden change but rather the extension of an already well recognised trend in judgment delivery on the High Court since the 1980s.[31]

Table B(II) provides a similar breakdown of how opinions in the nine constitutional matters for 2010 were delivered. The constitutional case which provoked the most disagreement was *Rowe v Electoral Commissioner*[32] (in which the Court split 4:3 and produced six opinions). Also notable was *South Australia v Totani*[33] which produced only one dissent, but still six separate opinions.

TABLE C – Subject Matter of Constitutional Cases

Topic	No of Cases	References to Cases[34] (Italics indicate repetition)
s 7	1	46
s 8	1	*46*
s 9	1	*46*
s 10	1	*46*
s 24	1	*46*
s 30	1	*46*
s 31	1	*46*
s 51(xxxi)	1	3
s 51(xxxvi)	1	*46*
Chapter III Judicial Power	2	1, 39
s 71	1	*1*
s 73	1	*1*
s 75(v)	2	*1*, 41
s 80	1	17
s 98	1	*3*

31 Groves and Smyth, above n 8, 277–8.
32 (2010) 273 ALR 1.
33 (2010) 242 CLR 1.
34 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 '[2010] HCA'. Full case details are given in the Appendix.

s 100	1	3
s 109	1	30
States – Reception of English Law	1	44
States – Scope of Crown Prerogative	1	27

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

III THE INDIVIDUAL PROFILE

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

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	45	23 (51.11%)	22 (48.89%)	0 (0%)
Gummow J	41	20 (48.78%)	20 (48.78%)	1 (2.44%)
Hayne J	38	19 (50.00%)	17 (44.74%)	2 (5.26%)
Heydon J	41	18 (43.90%)	17 (41.46%)	6 (14.63%)
Crennan J	36	16 (44.44%)	19 (52.78%)	1 (2.78%)
Kiefel J	40	21 (52.5%)	15 (37.50%)	4 (10.00%)
Bell J	35	15 (42.86%)	19 (54.29%)	1 (2.86%)

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2010. Refreshingly, for the first time in several years, no caveats are particularly necessary. The composition of the Court was entirely stable over the year and only a difference of 10 matters separates the busiest member of the Court (French CJ) from the Justice who sat on the fewest matters (Bell J). That difference is worth bearing in mind when considering the tables in Part III of this paper, but is less than in many earlier years.

Once again, Heydon J was the Court's most frequent dissenter, the role that has fallen to him ever since the departure of Kirby J. The variation is in the Court overall more than with Heydon J himself. He had a comparable rate of dissent to the figure in Table D(I) in both 2006 and 2009. His result here is arguably a little inflated since, as will be discussed below, in one of the constitutional cases in which he dissented, he was nevertheless substantially in agreement with the majority. Although he outstrips his present colleagues, we reiterate that his level of formal disagreement remains much lower than that regularly reached by McHugh and Callinan JJ as members of the Gleeson Court. Additionally, it is worth noting that only on three occasions did Heydon J form a minority of one –

and indeed these were the only cases to feature lone dissent across the entire year. When any of the other Justices were in dissent they had company.

Dissent generally remains low – reflecting, of course, the results in Table A above. Although Bell J has now issued her first dissent (as a joint judgment with Crennan J in *Travelex Ltd v Commissioner of Taxation*),[35] French CJ is still yet to find himself in the minority.

The individual rates of participation in the delivery of unanimous opinions reflect the very high level of unanimity in Table A for the institution as a whole. Chief Justice French and Kiefel J joined more often in unanimous opinions than they authored other joint or individual opinions, while Hayne J matched the institutional level of unanimity with exactly half the cases on which he sat being resolved through unanimous opinion.

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

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	9	3 (33.33%)	6 (66.66%)	0 (0%)
Gummow J	9	3 (33.33%)	6 (66.66%)	0 (0%)
Hayne J	9	3 (33.33%)	5 (55.55%)	1 (11.11%)
Heydon J	9	3 (33.33%)	2 (22.22%)	4 (44.44%)
Crennan J	9	3 (33.33%)	6 (66.66%)	0 (0%)
Kiefel J	8	3 (37.50%)	4 (50.00%)	1 (12.50%)
Bell J	8	3 (37.50%)	5 (62.50%)	0 (0%)

Table D(II) records the actions of individual justices in the constitutional cases of 2010. As can be seen, French CJ and Gummow, Crennan and Bell JJ dissented in no constitutional matters. Justices Hayne, Heydon and Kiefel all dissented in *Rowe v Electoral Commissioner*[36] and Heydon J had three additional dissents on his own in the cases of *Kirk v Industrial Relations Commission*;[37] *Arnold v Minister Administering the Water Management Act 2000*;[38] and *South Australia v Totani*.[39] It should be acknowledged, however, that Justice Heydon's opinion in *Kirk* is very largely in agreement with the substance of the joint majority opinion and his dissent rests on the slightly different orders he proposed to give in the resolution of the matter.

35 (2010) 241 CLR 510.
36 (2010) 273 ALR 1.
37 (2010) 239 CLR 531 ('*Kirk*').
38 (2010) 240 CLR 242.
39 (2010) 242 CLR 1.

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

	French CJ	Gummow J	Hayne J	Heydon J	Crennan J	Kiefel J	Bell J
French CJ	-	32 (71.11%)	25 (60.98%)	18 (40.00%)	21 (46.67%)	26 (57.78%)	22 (48.89%)
Gummow J	32 (78.05%)	-	26 (63.41%)	19 (46.34%)	23 (56.10%)	26 (63.41%)	23 (56.10%)
Hayne J	25 (65.79%)	26 (68.42%)	-	18 (47.37%)	21 (55.26%)	29 (76.32%)	21 (55.26%)
Heydon J	18 (43.90%)	19 (46.34%)	18 (43.90%)	-	16 (39.02%)	18 (43.90%)	13 (31.71%)
Crennan J	21 (58.33%)	23 (63.89%)	21 (58.33%)	16 (44.44%)	-	21 (58.33%)	26 (72.22%)
Kiefel J	26 (65.00%)	26 (65.00%)	29 (72.50%)	18 (45.00%)	21 (52.50%)	-	22 (55.00%)
Bell J	22 (62.86%)	23 (65.71%)	21 (60.00%)	13 (37.14%)	26 (74.29%)	22 (62.86%)	-

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

	French CJ	Gummow J	Hayne J	Heydon J	Crennan J	Kiefel J	Bell J
French CJ	-	4 (44.44%)	4 (44.44%)	3 (33.33%)	4 (44.44%)	4 (44.44%)	4 (44.44%)
Gummow J	4 (44.44%)	-	6 (66.66%)	4 (44.44%)	7 (77.77%)	5 (55.55%)	6 (66.66%)
Hayne J	4 (44.44%)	6 (66.66%)	-	4 (44.44%)	6 (66.66%)	6 (66.66%)	6 (66.66%)
Heydon J	3 (33.33%)	4 (44.44%)	4 (44.44%)	-	4 (44.44%)	3 (33.33%)	3 (33.33%)
Crennan J	4 (44.44%)	7 (77.77%)	6 (66.66%)	4 (44.44%)	-	5 (55.55%)	6 (66.66%)
Kiefel J	4 (50.00%)	5 (62.50%)	6 (75.00%)	3 (37.50%)	5 (62.50%)	-	6 (75.00%)
Bell J	4 (50.00%)	6 (75.00%)	6 (75.00%)	3 (37.50%)	6 (75.00%)	6 (75.00%)	-

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 borne in mind that the judges do not hear the same number of cases in a year. For this reason, the tables should be read horizontally as the percentage results vary depending on the number of cases each member of the Court actually sat on. That Justices do not necessarily sit with each other on an equal number of occasions should also be considered as a factor that limits opportunities for some pairings to collaborate more often.

Last year, the changed composition of the Court resulted in a rather more complex picture in these tables than we were accustomed to seeing over much of the era of the Gleeson Court. While co-authorship by Gummow and Hayne JJ remained more frequent than any other pairing, the degree to which their colleagues joined with them displayed greater differentiation than in the past.[40] In 2010, the Gummow–Hayne partnership was supplanted for the first time ever in the total set of cases decided in a year. Chief Justice French and Gummow J enjoyed a higher incidence of joint authorship with each other than they did with their other colleagues. But this coalition did not dominate above all others. To a comparable degree, Hayne and Kiefel JJ wrote most often with each other last year. And although it should be remembered that they sat in slightly fewer cases than the others, Crennan and Bell JJ were each other's most frequent collaborator over other colleagues. All three of these joint judgment partnerships (that is, between French–Gummow, Hayne–Kiefel and Crennan–Bell) accounted for over 70 per cent of the opinions that each pair authored.

In 2010, Gummow J was the member of the Court whom everyone joined with second most frequently, apart from French CJ and Heydon J who wrote with him more than any other. But the margins between rankings are not great and it should be emphasised that, as earlier results in this study have confirmed, there are strong collaborative relationships interweaved across the Court. The Justice who joined with his colleagues less than any other as a proportion of the cases on which he sat was Heydon J. Not only was he every other judge's least frequent co-author of an opinion, but the rate of his own joining with each of his colleagues was uniformly much lower than the figures produced by the collaborative relationships of other Justices.

Table E(II) reveals joint judgments in constitutional matters. With three of the nine cases decided unanimously, the baseline for joint authorship is, of course, much higher than in the past. Apart from those three matters, French CJ and Heydon J joined with others only on one occasion each. For the former that was in *Kirk*[41] where the entire bench, barring Heydon J who dissented, delivered a single majority opinion; while Heydon J wrote a joint judgment with Gummow, Hayne and Crennan JJ in *Cadia*[42] while French CJ wrote alone. The remaining five Justices worked with each other in various combinations. Justice Bell was

40 As an example, the Chief Justice wrote most often with Gummow J but least often with Hayne J than any of the other judges he joined with.

41 (2010) 239 CLR 531.

42 (2010) 242 CLR 195.

the only member of the Court who did not deliver at least one sole authored opinion in constitutional law last year.

For the sake of clarity, the 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

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

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

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

IV CONCLUSION

Last year we found that in the first full year of the French Court 'unanimity broke out contrary to all of the statistical evidence of recent decades'.[43] Prior experience suggested that this could not last and was likely to be an aberration. Agreement across the Court has proved more often than not to be elusive, and in constitutional matters almost unobtainable.

43 Lynch and Williams, 'The 2009 Statistics', above n 2, 282.

The level of agreement amongst members of the High Court in 2009 might have been explained as a 'honeymoon' effect on the arrival of the new Chief Justice, or perhaps the result of an unusual combination of less contentious cases. Neither explanation seemed likely, and we were left to wonder whether the consensus of 2009 could be repeated in 2010.

2010 shows that the French Court has indeed turned the tables. To an even greater extent in 2010, the High Court has been able to achieve a level of agreement across the whole body of its workload that is unprecedented for the modern High Court. It may be that watchers of the Court would have to turn back to the very first High Court of the early 1900s to find a similar level of agreement. And of course the High Court then was for its first decade composed initially only of three, and then five, judges.

What has proved particularly striking about the French Court is how, more so than any of the Gleeson, Brennan, Mason and Gibbs Courts before it, it has been able to speak with one voice. Surprisingly, this has occurred in some of the most contentious constitutional law decisions. Unanimity in such cases is very rare. Over the decade of the Gleeson Court from 1998, the High Court delivered a unanimous seven-judge opinion in just three constitutional matters. By contrast, the French Court has in just over two years delivered unanimous seven-judge opinions in five matters. Moreover, none of these unanimous opinions delivered by the Gleeson Court could be regarded as having taken place in a major case, whereas the French Court has been able to achieve unanimity even in an important and controversial case such as *Plaintiff M61/2010E v Commonwealth*.[44]

The last two years have marked a shift that goes beyond simply a change in the personnel of the Court, even though that does include a new Chief Justice and the retirement of the Court's greatest ever dissenter. Some of the success in achieving agreement, as evidenced both by the high proportion of unanimous opinions and also the elimination in 2010 of the old bugbear of cases in which the Court decides a matter not by way of one or more joint judgments but by issuing as many separate opinions as there are judges, must presumably be attributed to the leadership and management style of the new Chief Justice. Certainly, it is hard to see that the answer lies in the nature of the cases that have come before the Court. Particularly in the field of constitutional law, the questions before the Court in areas such as water rights, jurisdictional error, the application of the *Kable* doctrine and inconsistency between federal and state laws remain as difficult and as contested as ever.

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

44 (2010) 272 ALR 14.

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'.[45]

A Matters Identified as Constitutional

- *Kirk v Industrial Relations Commission*; *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)*[46]
- *Arnold v Minister Administering the Water Management Act 2000*[47]
- *R v LK; R v RK*[48]
- *Cadia Holdings Pty Ltd v New South Wales*[49]
- *Dickson v The Queen*[50]
- *South Australia v Totani*[51]
- *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth of*[52]
- *Port of Portland Pty Ltd v Victoria*[53]
- *Rowe v Electoral Commissioner*.[54]

Not tallied as constitutional cases, but perhaps meriting some brief explanation, were *Dupas v The Queen* (2010) 241 CLR 237 (in which a brief discussion of abuse of process included some constitutional references) and *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 (in which the appellant made some constitutional arguments, but the Court did not see these as necessary to answer in determination of the matter).

B Matters Not Tallied

Only one matter on the AustLII database for 2010 was excluded from tallying: *Aktas v Westpac Banking Corporation Limited (No 2)*[55] in which the respondent sought variation of an earlier order for costs made by the Court in the matter of *Aktas v Westpac Banking Corporation Limited*.[56] The application was dismissed by the three Justices who had formed the majority in the earlier matter (French CJ, Gummow and Hayne JJ), but the dissenters on that occasion (Heydon and Kiefel JJ) each declined from either concurring with or dissenting

45 Louis Henkin, 'The Supreme Court, 1967 Term' (1968) 82 *Harvard Law Review* 63, 301.
46 (2010) 239 CLR 531.
47 (2010) 240 CLR 242.
48 (2010) 241 CLR 177.
49 (2010) 269 ALR 204.
50 (2010) 270 ALR 1.
51 (2010) 242 CLR 1.
52 (2010) 272 ALR 14.
53 (2010) 272 ALR 449.
54 (2010) 273 ALR 1.
55 (2010) 241 CLR 570.
56 (2010) 241 CLR 79.

from this result – Heydon J because neither course would make a difference to the outcome; and Kiefel J because the respondent was seeking a variation of orders she had not joined in. Under the circumstances, inclusion of this matter in this study would have been problematic.

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:

- *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)*[57]
- *Arnold v Minister Administering the Water Management Act 2000*[58]
- *Amaca Pty Ltd v Ellis; South Australia v Ellis; Millennium Inorganic Chemicals Ltd v Ellis*[59]
- *Wallaby Grip Ltd v QBE Insurance (Australia) Ltd; Stewart v QBE Insurance (Australia) Limited*[60]
- *Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation*[61]
- *Lehman Brothers Holdings Inc v City of Swan & Ors; Lehman Brothers Asia Holdings Limited (In Liquidation) v City of Swan & Ors*[62]
- *Health World Ltd v Shin-Sun Australia Pty Ltd*[63]
- *R v LK; R v RK*[64]
- *Ansari v The Queen; Ansari v The Queen*[65]
- *John Alexander's Clubs Pty Limited v White City Tennis Club Limited; Walker Corporation Pty Limited v White City Tennis Club Limited*[66]
- *Wicks v State Rail Authority of New South Wales; Sheehan v State Rail Authority of New South Wales*[67]
- *Dickson v The Queen*[68]

57 (2010) 239 CLR 531.
58 (2010) 240 CLR 242.
59 (2010) 240 CLR 111.
60 (2010) 240 CLR 444.
61 (2010) 240 CLR 481.
62 (2010) 240 CLR 509.
63 (2010) 240 CLR 590.
64 (2010) 241 CLR 177.
65 (2010) 241 CLR 299.
66 (2010) 241 CLR 1.
67 (2010) 241 CLR 60.
68 (2010) 270 CLR 1.

- *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth*[69]
- *Hili v The Queen; Jones v The Queen*.[70]

No case was tallied as a multiple number of matters in this study.[71]

D Tallying Decisions Warranting Explanation

- *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)*[72] – although substantially concurring in the majority's joint judgment, Heydon J is tallied as dissenting due to the different stance on the orders that should be made, particularly as to the future of any Industrial Court proceedings;
- *Lehman Brothers Holdings Inc v City of Swan*[73] – Heydon J concurs with the orders except as to costs; his opinion has been tallied as a concurrence; and
- *Osland v Secretary to the Department of Justice*[74] – Heydon J concurs with the orders except as to costs; his opinion has been tallied as a concurrence.

69 (2010) 272 ALR 14.
70 (2010) 272 ALR 465.
71 The purpose behind multiple tallying in some cases – and the competing arguments – are considered in Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement', above n 1, 500–2.
72 (2010) 239 CLR 531.
73 (2010) 240 CLR 509.
74 (2010) 241 CLR 320.