THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2013 STATISTICS

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I INTRODUCTION

This article presents statistical information about the High Court's decision-making for 2013 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 studies of earlier years.[2] Likewise, we maintain our customary advice to readers about the inevitable limitations that must apply to the results of an empirical study of the decisions of any final court over the space of a single calendar year. In particular, the fact that constitutional

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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; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2010 Statistics' (2011) 34 *University of New South Wales Law Journal* 1030; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2011 Statistics' (2012) 35 *University of New South Wales Law Journal* 846; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2012 Statistics' (2013) 36 *University of New South Wales Law Journal* 514.

cases comprise just a portion of the High Court's annual work means that we strive to make observations leaning more towards circumspection than boldness. Nevertheless, taking stock of the cases handed down by the Court in the preceding year and the way in which the justices have, as individuals within the institution, decided their outcomes is illuminating. As ever, we are careful not to attribute greater or lesser 'influence' to particular individuals simply through tracking the rates of consensus, dissent and co-authorship experienced within the Court.

In last year's survey, we highlighted the significance of the departures of Gummow and Heydon JJ after 17 and 10 years respectively on the High Court bench. Justice Heydon delivered just three more opinions in early 2013 before following Gummow J into retirement. As a result, last year was the first full year of service for Gageler J, and Keane J joined the Court in March. Although the latter necessarily sat on fewer cases in 2013 than his new colleagues, he handed down opinions in enough cases for us to say that he is still well represented in the survey, though of course a caveat applies throughout that his results are not fully comparable to those of the other judges.

What does the Court now look like with its new composition? Has the institutional picture been dramatically or even discernibly altered by the exchange of two of its members? Asking these questions enables us to test the strength of the observations drawn and reflections offered in earlier studies about the part played on the Court by certain individuals and their impact upon the way in which, as a multi-member institution, it reaches its decisions. In particular, there have been two markedly consistent features of the Court's decision-making throughout this series of surveys (the results of which stretch back to 1998). Those features have been: (1) a pronounced rate of joining in opinion between a pair of judges amongst the ranks of the majority (Gummow and Hayne JJ); and (2) the presence of one member (having been first Kirby J and then Heydon J) with an especially high rate of minority opinions relative to his colleagues. In light of the personnel changes, will these steady features of the Court's institutional dynamic fade or even disappear entirely? Or will they continue as the present incumbents develop their own work practices and their role within the institution.

It has been implicit throughout this series that who the individual judges are and who they sit alongside *matters* in our attempts to fully appreciate the High Court as a public institution that decides controversies by majority vote after deliberation. This essential truth was confirmed in a remarkable speech made overseas by Justice Dyson Heydon in 2012, but only published on the eve of his retirement, in which he warned of the institutional harm able to be caused by 'excessively dominant judicial personalities'[3] in conjunction with 'judicial herd

3 J D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205, 215.

behaviour'.[4] Justice Heydon revealed a strong distaste for the use by some judges of judicial conferences as an occasion on which to forge consensus over disagreement, branding it 'polite or jovial invitations … to tell lies'.[5] In our survey of the Court's decisions in 2012, we discussed Justice Heydon's views in explaining his notable record of writing alone throughout his final year on the Court.[6] But their utility clearly transcends his specific situation even if, as Sir Anthony Mason has remarked, the risks he identified are 'not … as great as he suggests'.[7] Mason went on to confirm, less as a warning and more as a statement of the inevitable, that:

> The way in which a court works depends in large measure on the personalities of, and the relationship between, its members. The dynamics of that relationship vary considerably and can change dramatically in an enclosed community like the High Court ... However inconvenient it may be, every Justice has a responsibility to endeavour to establish a working relationship with colleagues.[8]

Both of these recent contributions highlight the intersection of institutional and individual factors in how the High Court fulfils its role. These modest annual studies aim to shed some light on these aspects through compiling information about the way the Court's members resolve the legal disputes that come before them. This enables empirical observation rather than anecdotal evidence or mere impression to feature in our understanding of how the High Court shapes the law of Australia.

II THE INSTITUTIONAL PROFILE

Table A – High Court of Australia Matters Tallied for 2013

	Unanimous	By Concurrence	Majority over Dissent	TOTAL
All Matters Tallied for Period	21 (38.18%)	20 (36.36%)	14 (25.45%)	55 (100%)
All Constitutional Matters Tallied for Period	1 (8.33%)	7 (58.33%)	4 (33.33%)	12 (100%)

A total of 55 matters were tallied for 2013.[9] An additional five matters (all identified in the Appendix) appear on the AustLII High Court database for the

4 Ibid 217.
5 Ibid 209.
6 See Lynch and Williams (2013), above n 2, 529–30.
7 Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102, 109.
8 Ibid 112.
9 The data was collected using the 60 matters listed on AustLII in its High Court database for 2013: <http://www.austlii.edu.au/>. For further information about decisions affecting the tallying of 2013 matters see the Appendix – Explanatory Notes at the conclusion of this article.

year but these were excluded consistently with the methodology that has been employed throughout these annual studies. Four of the five were discounted simply because they were decided by a single justice or, in one case, two justices. The fifth exclusion does, however, warrant some direct comment since it is of a substantial decision and also one that would have been included in tallying for the subset of constitutional cases. That matter is *Monis v The Queen*.[10] This case is excluded due to being a 3:3 decision ultimately resolved by the procedural rule that an appeal to the Court fails if the bench is evenly divided as to whether it should be allowed or dismissed.[11] In that case, French CJ, Hayne and Heydon JJ would have allowed the appeal while Crennan, Kiefel and Bell JJ favoured dismissal. This very scenario – and the consequence of exclusion – is addressed in rule (b) of the methodology applied in compiling these statistics.[12] As one of us said in explaining the relevant approach, while 'judgments may still be compared against the final orders issued by the institution, the complete lack of a relational dimension between the justices themselves in the determination of those orders argues against tallying as dissents those opinions which are at odds with the result of the case'.[13] None of this is to deny that *Monis v The Queen* is an interesting and important 2013 decision on the constitutionally implied freedom of political communication, but for present purposes it is set aside.

As it is, the 55 matters which are tallied for the purposes of this study places 2013 as the second-busiest year experienced by the High Court since the appointment of French CJ. In 2012, 61 matters were tallied but in the years preceding that the totals were 48 (consecutively in 2011 and 2010) and 52 (in 2009) cases. In its first two years, the French Court achieved extremely high rates of unanimity in its resolution of the matters before it, ones which, we submitted, were simply unprecedented in the modern era. But the Court's newly-found capacity to reach consensus soon evaporated with the rate of unanimity plummeting from a high of 50 per cent in 2010 to 17 per cent and 13 per cent in 2011 and 2012 respectively. At least one significant factor in that trend was, as already noted in the Introduction, the resolve of Heydon J to join with no other member in the giving of reasons in his final year on the Court. This meant that unanimity was not an option whenever he sat on a case during this period, leaving only a handful of cases in which a single judgment might emerge as the expression of agreement between the other members of the Court. There may be other elements in play, but certainly it is not surprising that the departure of Heydon J has resulted in an upswing in the number of unanimous opinions written by the Court. At just over 38 per cent the rate of unanimity is not quite on par with the early years of the French era, but when we take the longer view, this is still a substantial percentage of cases in any single year and signals that the

10 (2013) 249 CLR 92.
11 *Judiciary Act 1903* (Cth) s 23(2)(a).
12 Lynch, 'Dissent', above n 1, 484.
13 Ibid 482.

current members of the Court are, as a group, more willing to grasp opportunities for unanimity than has been so in both the recent and not so recent past.

The ability of the Court in 2013 to convert agreement amongst sitting justices into unanimous opinions has produced a decline in the number of matters resolved through two or more concurring judgments and absent any dissent. In 2012, just over 54 per cent of matters were decided through concurrences. Justice Heydon's resistance to joint authorship did not, of course, necessarily reflect his disagreement from the result reached by his colleagues. Consequently, the Court, while frequently thwarted in speaking unanimously, still decided many cases with separate concurring opinions. The greater opportunity to speak with one voice in 2013 has seen a corresponding decline in the proportion of cases resolved by separate concurrences.

In about 1 in 4 cases, the Court's decision was accompanied by dissent. In 2012, the percentage of such cases was 32.79 per cent, which itself was a notable decrease from exactly half the cases of 2011 being ones containing a minority opinion. The French Court's return to higher levels of unanimity has not, then, been simply a matter of converting cases decided through concurrence into those where a single set of reasons is given. There has also been a decline in explicit disagreement over the same period.

In 2013, the High Court returned to an institutional decision-making profile which was essentially similar to that of the first two years of the French Court. Those years had started to appear as aberrant, but the 2013 results suggest that they might yet stand as representing a more typical pattern going forward than the dramatically different results seen in 2011–12. Certainly, the absence, for the time being, of a clearly identifiable 'outlier' judge on the bench[14] – something further revealed in the individual tables in Part III – would seem an important factor in maintaining the Court's return last year to a high rate of unanimity and a reduction in the number of split decisions.

In 2013, the Court confronted constitutional questions in 12 out of the 55 matters tallied – or 21.82 per cent. This was a minor decline from the result of 24.59 per cent in 2012, which was in any event a higher figure than had been seen for some years.[15] As we explained in discussing the apparent surge in matters touching upon constitutional issues in 2012,[16] our classification, while erring on the side of generous inclusion rather than selection according to some more substantial, but also subjective, criterion, has been consistently applied over the course of these studies. So, as ever, in some of the 12 matters tallied as

14 See Peter McCormick, 'Blocs, Swarms and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada' (2004) 42 *Osgoode Hall Law Journal* 99, 112.

15 And it must not be forgotten, of course, that the figure is artificially lowered by the exclusion of *Monis v The Queen* (2013) 249 CLR 92 for reasons already given.

16 Lynch and Williams (2013), above n 2, 516.

'constitutional' for 2013, this aspect of the case may be marginal or restricted to discussion by just some members of the Court.[17]

The definitional criteria that determines our classification of matters as 'constitutional' remains that which was provided by Stephen Gageler SC, now Gageler J of the High Court, when he gave the inaugural annual survey of the High Court's constitutional decisions in 2002. He 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* ('Constitution'). That definition is framed deliberately to take in a wider category of cases than those simply involving matters falling within the constitutional description of 'a matter arising under this Constitution or involving its interpretation'.[18]

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.[19] In 2013, there were, however, no such cases.

A striking feature of the institutional results for 2012 was the Court deciding only about a quarter of constitutional cases over one or more dissenting opinions. That was a clear break from the almost invariable pattern in earlier years of about half the constitutional matters splitting the Court. In 2013, the percentage of cases in which there was a minority rose to a third, but this is still notably low. For the last two years the members of the Court have agreed with each other more often than not in cases where a constitutional issue is present. This was not the case in earlier years where disagreement was just as common as consensus, if not more so.

The set of constitutional cases comprises matters variously decided by seven, six, five and three judges sitting together. The only unanimous matter tallied is *Commonwealth v Australian Capital Territory* ('*Same-Sex Marriage Case*').[20]

17 A good example is the case of *X7 v Australian Crime Commission* (2013) 248 CLR 92, in which one of the questions reserved involved an issue under Chapter III of the *Constitution*. Only two judges directly addressed that issue with the rest finding that it did not arise.

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

19 Lynch and Williams (2008), above n 2, 240.

20 (2013) 304 ALR 204.

TABLE B(I) All Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[21]

Size of Bench	Number of Matters	How Resolved	Frequency	Cases Sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	13 (23.64%)	Unanimous	4 (7.27%)	4						
		By concurrence	5 (9.09%)		4					1
		6:1	2 (3.64%)		1	1				
		5:2	-							
		4:3	2 (3.64%)				1		1	
6	10 (18.18%)	Unanimous	2 (3.64%)	2						
		By concurrence	6 (10.91%)		3	1	1		1	
		5:1	1 (1.82%)					1		
		4:2	1 (1.82%)			1				
5	30 (54.55%)	Unanimous	13 (23.64%)	13						
		By concurrence	9 (16.36%)		5	4				
		4:1	6 (10.91%)		1	3	2			
		3:2	2 (3.64%)		1	1				
3	2 (3.28%)	Unanimous	2 (3.64%)	2						
		By concurrence	-							
		2:1	-							

21 All percentages given in this table are of the total number of matters (55).

TABLE B(II) Constitutional Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[22]

Size of Bench	Number of Matters	How Resolved	Frequency	Cases Sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	3 (25.00%)	Unanimous	-							
		By concurrence	1 (8.33%)		1					
		6:1	1 (8.33%)			1				
		5:2	-							
		4:3	1 (8.33%)				1			
6	7 (58.33%)	Unanimous	1 (8.33%)	1						
		By concurrence	5 (41.66%)		2	1	1		1	
		5:1	1 (8.33%)					1		
		4:2	-							
5	2 (16.66%)	Unanimous	-							
		By concurrence	1 (8.33%)			1				
		4:1	-							
		3:2	1 (8.33%)			1				

Tables B(I) and (II) reveal several things about the High Court's decision-making over 2013. 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, 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.

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

These tables should be read from left to right. For example, Table B(I) tells us that of the 13 matters heard by a seven-member bench, five were decided through concurring judgments but in four of those there were just two opinions while in the fifth all seven justices wrote separately. But when one looks at the case in question, *SZOQQ v Minister for Immigration and Citizenship*,[23] the appearance of disunity turns out to be a mirage. In *SZOQQ* the lead opinion was authored by Keane J, attracting bare statements of concurrence from the remaining six justices. We have previously explained that, despite the fact of unqualified consensus, cases decided in this way are still tallied as having been decided through concurrences, since the form in which the agreement across the Court is expressed is not joint but separate. In fact, the only time the Court decides a case in this fashion is in the first sitting year of a new judge, whose substantive opinion is agreed to by the set of concurrences.[24]

The only other case in 2013 in which there were as many opinions as there were justices was *Maloney v The Queen*,[25] an unsuccessful challenge to State liquor controls on Palm Island as inconsistent with the Commonwealth's *Racial Discrimination Act 1975* (Cth). The case was decided without dissent, but all six judges on the bench wrote separately.

Table B(I) enables us to identify the most common features of the cases in the period under examination. In 2013 these were the delivery of a unanimous judgment by a five-member bench. This was also the most frequent form of decision in 2009 and 2010, when unanimity was at record levels. In every other year since we began presenting these particular tables, the most common pattern has been of a 5:0 decision resolved through two concurring opinions.

Table B(II) records the same information in respect of the subset of constitutional cases. Given its subject matter, *Maloney* also features in this table as the only constitutional case in which all judges wrote individually. The most common format of constitutional case in 2013 was a six-judge decision made without dissent and through just two sets of reasons. The constitutional matter in which the bench was most tightly divided was *X7 v Australian Crime Commission*[26] (a 3:2 result), but as already noted that is a case in which constitutional questions were far from decisive.

23 (2013) 296 ALR 409 ('*SZOQQ*').

24 We have noted this practice in respect of each new justice since the arrival of Heydon J: Lynch and Williams (2008), above n 2, 243; Lynch and Williams (2010), above n 2, 274; Lynch and Williams (2013), above n 2, 519.

25 (2013) 298 ALR 308 ('*Maloney*').

26 (2013) 248 CLR 92.

TABLE C – Subject Matter of Constitutional Cases

Topic	**No of Cases**	**References to Cases (Italics indicate repetition)**
s 7	2	3, 58
s 24	2	*3, 58*
s 51(ii)	1	34
s 51(xxi)	1	55
s 51(xxii)	1	*55*
s 64	1	*58*
Chapter III Judicial Power	5	5, 7, 29, 40, 53
s 75(v)	1	18
s 76	1	26
s 77	1	*26*
s 91	1	*34*
s 99	1	*34*
s 109	1	28
s 128	2	*3, 58*
Melbourne Corporation principle	1	*34*
Implied Freedom of Political Communication	2	*3, 58*

Table C lists the provisions and aspects of the *Constitution* that arose for consideration in the 12 constitutional law matters tallied for 2013. It is assembled primarily through reference to constitutional provisions in the catchwords accompanying each decision.

Once again, we note the exclusion of *Monis* throughout this data set – it was a third High Court case from last year, which raised the implied freedom of political communication, alongside the two tallied in Table C – which are *Attorney-General (SA) v Corporation of the City of Adelaide*[27] and *Unions NSW v New South Wales*.[28]

27 (2013) 249 CLR 1.
28 (2013) 304 ALR 266.

III THE INDIVIDUAL PROFILE

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

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	48	17 (35.42%)	30 (62.50%)	1 (2.08%)
Hayne J	40	10 (25.00%)	26 (65.00%)	4 (10.00%)
Heydon J	3	0 (0%)	2 (66.67%)	1 (33.33%)
Crennan J	47	16 (34.04%)	30 (63.83%)	1 (2.13%)
Kiefel J	49	20 (40.82%)	27 (55.10%)	2 (4.08%)
Bell J	46	17 (36.96%)	25 (54.35%)	4 (8.70%)
Gageler J	43	15 (34.88%)	22 (51.16%)	6 (13.95%)
Keane J	31	16 (51.61%)	13 (41.94%)	2 (6.45%)

Table D(I) presents, in respect of each justice, the delivery of unanimous, concurring and dissenting opinions in 2013. Justice Heydon, who sat on only three of the matters tallied, is included in this and all subsequent tables in this Part for the sake of completeness. It is not suggested any comparative analysis between him and the other members of the Court last year is possible. Justice Heydon was succeeded by Keane J, whose overall caseload is, given his slightly delayed start to the Court's sitting year, rather lower than those of his colleagues. A gap of between 9 and 18 decided cases lies between Keane J and his new colleagues at the Court. Consequently, it is difficult to engage in direct comparison in respect of the way Keane J and the other justices decided the cases of 2013.

As a sign that things have changed on the Court, 2013 is one of the few years since we began these annual studies in which there is no obvious 'outlier' justice – an individual whose opinions were routinely in the minority. Justice Gageler dissented most often at 13.95 per cent but this is trifling when compared to the rate of disagreement of Heydon J and Kirby J in earlier years (both of whom nudged 50 per cent in, respectively, 2011 and 2006). The dissent rate of Heydon J, it must be noted, only soared towards the end of his time on the Court and had previously either been close to the very low rates which typified the High Court under Gleeson CJ or risen occasionally to around 15 per cent.

Just two extra dissents separate Gageler J from both Hayne and Bell JJ and every member of the Court filed at least one minority opinion. Only Hayne, Heydon, Bell and Gageler JJ had the experience of being in lone dissent, and of

the three who served the full year, only Gageler J was in the minority by himself more often than with at least one other justice.

Chief Justice French and Crennan J co-authored their only dissent in *X7 v Australian Crime Commission*.[29] Only two other dissenting opinions were co-authored: by Kiefel and Keane JJ in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*[30] and Bell and Gageler JJ in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*.[31]

The rates of participation in unanimous judgments are, once again, highly varied across the table, reflecting the differently comprised courts that heard a range of matters. So, Hayne J found himself a party to a unanimous opinion in only a quarter of the cases on which he sat, while Keane J exceeded the former's number of unanimous opinions and achieved a unanimity rate of 50 per cent of the cases he heard. Of course, the distinctive nature of the matters in question and how benches of just five justices are comprised are inescapable variables. The results cannot by themselves reveal much more than the opportunities for unanimity available across the year for each judge. Unless they are especially marked or accompanied by a clear public statement like that offered by Heydon J in 2012, different results in respect of unanimity cannot reliably inform us about the willingness or otherwise of any individual judge to join with his or her colleagues.

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

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	12	1 (8.33%)	10 (83.33%)	1 (8.33%)
Hayne J	12	1 (8.33%)	10 (83.33%)	1 (8.33%)
Heydon J	1	0 (0%)	0 (0%)	1 (100%)
Crennan J	11	1 (9.09%)	9 (81.82%)	1 (9.09%)
Kiefel J	12	1 (8.33%)	10 (83.33%)	1 (8.33%)
Bell J	12	1 (8.33%)	11 (91.66%)	0 (0%)
Gageler J	7	0 (0%)	6 (85.71%)	1 (14.29%)
Keane J	6	1 (16.66%)	4 (66.66%)	1 (16.66%)

Table D(II) records the actions of individual justices in the constitutional cases of 2013. It should be noted that Gageler J, as well as newcomer Keane J, sat on a fewer number of these cases.

29 (2013) 248 CLR 92.
30 (2013) 304 ALR 135.
31 (2013) 247 CLR 613.

Only Bell J recorded no dissent in a constitutional matter. But that said, it is worth illuminating the nature of the cases in which minority opinions are tallied for the remainder of the Court, since this puts the significance of the disagreement into clearer perspective. Only the dissents of Heydon and Gageler JJ can be said to have been delivered in cases in which the constitutional issues were central to the resolution of the matter. Those opinions were given in, respectively, *Attorney-General (SA) v Corporation of the City of Adelaide*[32] and *Magaming v The Queen*.[33]

By contrast, the joint dissent of French CJ and Crennan J in *X7 v Australian Crime Commission*[34] and by Hayne, Kiefel and Keane JJ in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*[35] were in cases where the constitutional issue was, respectively, peripheral[36] or substantial, but ultimately not determinative.[37] In particular, the dissents tallied in the latter case arise from the affirmation which those justices give of the correctness of the Court's decision in *Al-Kateb v Godwin*,[38] a matter that the other four members of the Court deemed unnecessary to determine in light of the facts before them. That division is a significant one – but not, it must be said, one that affected the plaintiff since all seven members of the Court agreed that her detention was presently authorised under relevant provisions of the *Migration Act 1958* (Cth).

The single unanimous constitutional matter was, as noted above, the successful challenge to the *Marriage Equality (Same Sex) Act 2013* (ACT) in the *Same-Sex Marriage Case*.[39]

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 on which each member of the Court actually sat. That justices do not necessarily sit with each other on an equal number of occasions should also be noted as a factor that limits opportunities for some pairings to collaborate more often. This particularly applies to Keane J given the significantly fewer cases he heard in 2013. Justice Heydon sat on just three of the matters tallied for the year and, consistent with his decisions in 2012, he did not join with any other justice on those occasions.

32 (2013) 249 CLR 1.
33 (2013) 302 ALR 461.
34 (2013) 248 CLR 92.
35 (2013) 304 ALR 135.
36 *X7 v Australian Crime Commission* (2013) 248 CLR 92.
37 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 304 ALR 135.
38 (2004) 219 CLR 562.
39 (2013) 304 ALR 204.

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

	French CJ	Hayne J	Heydon J	Crennan J	Kiefel J	Bell J	Gageler J	Keane J
French CJ	-	20 (41.66%)	0 (0%)	29 (60.42%)	29 (60.42%)	24 (50.00%)	14 (29.17%)	19 (39.58%)
Hayne J	20 (50.00%)	-	0 (0%)	23 (57.50%)	28 (70.00%)	23 (57.50%)	6 (15.00%)	13 (32.50%)
Heydon J	0 (0%)	0 (0%)	-	0 (0%)	0 (0%)	0 (0%)	0 (0%)	-
Crennan J	29 (61.70%)	23 (48.94%)	0 (0%)	-	34 (72.34%)	30 (63.83%)	15 (31.91%)	19 (40.43%)
Kiefel J	29 (59.18%)	28 (57.14%)	0 (0%)	34 (69.39%)	-	29 (59.18%)	15 (30.61%)	20 (40.82%)
Bell J	24 (52.17%)	23 (50.00%)	0 (0%)	30 (65.22%)	29 (63.04%)	-	15 (32.61%)	20 (43.48%)
Gageler J	14 (32.56%)	6 (13.95%)	0 (0%)	15 (34.88%)	15 (34.88%)	15 (34.88%)	-	15 (34.88%)
Keane J	19 (61.29%)	13 (41.94%)	-	19 (61.29%)	20 (64.52%)	20 (64.52%)	15 (48.39%)	-

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

	French CJ	Hayne J	Heydon J	Crennan J	Kiefel J	Bell J	Gageler J	Keane J
French CJ	-	4 (33.33%)	0 (0%)	5 (41.66%)	4 (33.33%)	4 (33.33%)	1 (8.33%)	2 (16.66%)
Hayne J	4 (33.33%)	-	0 (0%)	6 (50.00%)	7 (58.33%)	9 (75.00%)	0 (0%)	3 (25.00%)
Heydon J	0 (0%)	0 (0%)	-	0 (0%)	0 (0%)	0 (0%)	0 (0%)	-
Crennan J	5 (45.45%)	6 (54.55%)	0 (0%)	-	7 (63.64%)	7 (63.64%)	1 (9.09%)	2 (18.18%)
Kiefel J	4 (33.33%)	7 (58.33%)	0 (0%)	7 (58.33%)	-	7 (58.33%)	0 (0%)	3 (25.00%)
Bell J	4 (33.33%)	9 (75.00%)	0 (0%)	7 (58.33%)	7 (58.33%)	-	1 (8.33%)	3 (25.00%)
Gageler J	1 (14.29%)	0 (0%)	0 (0%)	1 (14.29%)	0 (0%)	1 (14.29%)	-	0 (0%)
Keane J	2 (33.33%)	3 (50.00%)	-	2 (33.33%)	3 (50.00%)	3 (50.00%)	0 (0%)	-

In a Court with a strong rate of unanimous opinions, it is not surprising to see fairly high levels of joining across the bench in Table E(I). Consequently, it should be acknowledged that the gap between how frequently one judge wrote with various colleagues is often minimal, just one or two decisions, so the ranking of different judges as co-authors for any particular member of the Court (made clearer in Tables F(I) and (II)) should not be over-emphasised. Justice Kiefel decided more cases than anyone else last year and so she was well-placed to be the most frequent co-author of opinions for every other member of the Court. This was indeed the case, except for Bell J who wrote with Crennan J on just one extra occasion. Justices Crennan, Kiefel and Bell were all more regular co-authors for each other and the other members of the Court than anyone else. This is not solely a result of the fact that they heard more cases than the others – French CJ decided just one less case than Kiefel J and his rate of joining with colleagues was not as consistently high. The most regular co-authoring relationship was that between Crennan and Kiefel JJ which reached the same level – around 70 per cent of the opinions authored by each – attained by Gummow and Hayne JJ in earlier studies in this series. However, while Crennan and Kiefel JJ have written together frequently while on the Court together, each has written just as if not more often with other members of the Court in previous years. There is no reason to suspect they will continue to be each other's most frequent co-author in 2014 and beyond. But their rate of joining with each other last year is notable – even if it does not endure.

The other interesting feature in Table E(I) is the contrast presented by the Court's two newest justices. Just as a matter of raw numbers, and despite his significantly lower number of decided cases, Keane J showed himself to be a more regular co-author with colleagues than Gageler J, who sat on the Court for the full year. The contrast of the percentages is particularly striking. Justice Gageler wrote with others on no more than approximately a third of cases on which he sat (and significantly less often with Hayne J than the rest of the bench). Justice Keane, on the other hand, decided over 60 per cent of the cases he heard by writing with French CJ, Crennan, Kiefel and Bell JJ. Only time will tell whether those early signs of propensity to write separately or jointly continue, or whether they are simply reflective of the issues in the particular cases of 2013 and the composition of the benches which decided them. However, Justice Gageler's high rate of individual authorship may be more than coincidental. In the Sir Frank Kitto Lecture he delivered at the University of New England on 11 November 2013, Gageler J gave a strong indication that, like Dyson Heydon before him, he is alert to the importance of maintaining the individual 'decisional independence necessary to ensure the quality of collective decision-making'.[40] Justice Gageler acknowledged 'the constant risk of deliberation to the quality of group decision-making is the risk of loss of independence of individual

40 See Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189, 199.

judgments within the group'.[41] However, he stated that this 'risk is one to be managed'[42] – it does not, contrary to Heydon's insistence, necessitate the unwavering delivery of sole-authored opinions. For as Gageler J conceded, '[i]f, having reasoned independently to the same conclusion, they [judges] are able to put immaterial differences aside and agree on a common form of expression of those reasons, then the systemic benefits can be expected to outweigh the costs of doing so.'[43]

Table E(II) reveals joint judgments in constitutional matters. In this context the picture changes slightly – Hayne J emerges as a more frequent co-author with his colleagues than he was generally. Indeed, he and Bell J, in a continuation of their form from the preceding year, wrote together in 75 per cent of cases with a constitutional flavour. This was more often than any other judges wrote with each other. At the same time, Hayne J was tied with others as the most regular co-author in constitutional cases for both Kiefel and Keane JJ. He was the second most regular co-author (separated from the top spot by just one judgment) for both French CJ and Crennan J.

Overall, Bell J was the judge with whom all colleagues wrote most often in constitutional cases, though for each of them she was often tied as most regular co-author with other members of the Court. Only the Chief Justice joined with someone else more frequently – and that was Crennan J in just one more case.

Justice Gageler's low rate of joining in Table E(I) translates to the results in respect of constitutional cases. He did not write at all with Hayne, Kiefel or Keane JJ and just once with French CJ[44] and then, on another occasion, with Crennan and Bell JJ.[45] Although it must be noted that Gageler J sat on fewer constitutional matters than other members of the Court, Keane J sat on one less yet still joined with others more.

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

41 Ibid 197.
42 Ibid.
43 Ibid 201.
44 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 295 ALR 596.
45 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 304 ALR 135.

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

	French CJ	Hayne J	Heydon J	Crennan J	Kiefel J	Bell J	Gageler J	Keane J
French CJ	-	3	N/A	1	1	2	5	4
Hayne J	3	-	N/A	2	1	2	5	4
Heydon J	N/A	N/A	-	N/A	N/A	N/A	N/A	-
Crennan J	3	4	N/A	-	1	2	6	5
Kiefel J	2	3	N/A	1	-	2	5	4
Bell J	3	4	N/A	1	2	-	6	5
Gageler J	2	3	N/A	1	1	1	-	1
Keane J	2	4	-	2	1	1	3	-

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

	French CJ	Hayne J	Heydon J	Crennan J	Kiefel J	Bell J	Gageler J	Keane J
French CJ	-	2	N/A	1	2	2	4	3
Hayne J	4	-	N/A	3	2	1	N/A	5
Heydon J	N/A	N/A	-	N/A	N/A	N/A	N/A	-
Crennan J	3	2	N/A	-	1	1	5	4
Kiefel J	2	1	N/A	1	-	1	N/A	3
Bell J	3	1	N/A	2	2	-	5	4
Gageler J	1	N/A	N/A	1	N/A	1	-	N/A
Keane J	2	1	-	2	1	1	N/A	-

IV CONCLUSION

At the outset, we asked what picture might now be drawn of the High Court given its new composition. Has the pattern of decision-making on the Court been dramatically or even discernibly altered by the exchange of two of its members? The answer is clearly that recent departures and appointments have made a difference. However, this has not resulted in the Court embarking on a major new direction, but seen it return to the patterns established in the first years of the French Court.

Those initial two years of the Court under French CJ (2009 and 2010) saw an unusually high level of agreement and unanimity amongst members of the bench. This clarity of consenus broke down in 2011 and 2012, due especially to the

idiosyncratic approach of Heydon J, who ended his career on the Court rivalling the most prominent dissenters in the institution's history. Justice Heydon adopted an unqualified insistence upon expressing his views on a case through a sole-authored opinion, irrespective of the approach of other members of the Court. His unwillingness even to settle with others as to how their mutual agreement on the outcome of a case might be jointly articulated, made unanimity impossible.

The retirement of Heydon J removed the sole source of persistent dissent from the Court. The highest rate of dissent in 2013 across all matters was by Gageler J, who dissented in 13.95 per cent of matters, but this bears no comparison to the highest rates of dissent reached by both Heydon and Kirby JJ. Significant differences certainly remain between members of the current Court, both as to their views on the law and their judicial method, but in 2013 this did not frequently manifest as differences over the result ordered in the matters decided. Hence, last year saw a high level of unanimity, along with a low rate of dissent by all members of the Court across decisions as a whole, and constitutional law cases in particular.

Other aspects of the Court's decision-making remain in a state of development. In particular, unlike the prior, pronounced rate of joining in opinion writing by Gummow and Hayne JJ, the current Court in 2013 saw a high level of agreement across the board, without the emergence of any notable associations between judges. The most regular co-authoring relationship was that between Crennan and Kiefel JJ in regard to all matters, and Hayne and Bell JJ in regard to constitutional matters. Even if these collaborations represent important alignments within the Court, they will not have the opportunity to develop over a significant period of time. This is because both Hayne and Crennan JJ must retire from the Court at age 70 in 2015.

It is too early to discern any noticeable trends when it comes to the decision-making of the High Court's two newest justices, Gageler and Keane JJ. What can be said about their judgments in 2013 is that there was a contrast between them, with Gageler J showing a greater preference for writing alone, sometimes in dissent, as opposed to Justice Keane's willingness to join with the judgments of his colleagues. It is not yet possible to see whether this represents a longer term approach on either of their parts. How judges initially begin their time on the High Court is often not indicative of the reputation they will build over the years ahead. There is a legion of examples of members of the Court – some from the very recent past, others from much earlier – changing their decision-making style over the course of their tenure on the Court. Sometimes this occurs dramatically, sometimes very gradually over a number of years. Sometimes it is accompanied by extra-curial proclamation or reflection, while in other instances it occurs subtly in response to some change in the institution's membership.[46] The purpose of regular annual studies such as this is to monitor the dynamics of the Court and

46 Consider the example offered by Sir Anthony Mason of the replacement of Menzies J with Murphy J: Mason, above n 7, 112.

identify the emergence of new patterns in the interaction of its seven members as they go about their common institutional endeavour.

APPENDIX – EXPLANATORY NOTES

The notes identify when and how discretion has been exercised in compiling the statistical tables in this article. As the *Harvard Law Review* editors once stated in explaining their own methodology, 'the nature of the errors likely to be committed in constructing the tables should be indicated so that the reader might assess for himself the accuracy and value of the information conveyed'.[47]

A Matters Identified as Constitutional

- *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3.
- *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5.
- *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7.
- *Minister for Immigration and Citizenship v Li* [2013] HCA 18.
- *New South Wales v Kable* [2013] HCA 26.
- *Maloney v The Queen* [2013] HCA 28.
- *X7 v Australian Crime Commission* [2013] HCA 29.
- *Fortescue Metals Group Ltd v Commonwealth* [2013] HCA 34.
- *Magaming v The Queen* [2013] HCA 40.
- *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53.
- *Commonwealth v Australian Capital Territory* [2013] HCA 55.
- *Unions NSW v New South Wales* [2013] HCA 58.

B Matters Not Tallied

- *Monis v The Queen* [2013] HCA 4 – a six-member bench resulting in a 3:3 split, resolved by application of section 23(2)(a) of the *Judiciary Act 1903* (Cth).
- *Michaelides v The Queen* [2013] HCA 9 – French CJ and Crennan J sitting.
- *Gajjar v Minister for Immigration and Citizenship* [2013] HCA 13 – Kiefel J sitting alone.

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

- *Plaintiff S3/2013 v Minister for Immigration and Citizenship* [2013] HCA 22 – Gageler J sitting alone.
- *Rutledge v Victoria* [2013] HCA 60 – Hayne J sitting alone.

C Cases Involving a Number of Matters – How Tallied

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

- *Huynh v The Queen* [2013] HCA 6.
- *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd; Aristocrat Technologies Australia Pty Ltd v Allam* [2013] HCA 21.
- *Elias v The Queen; Issa v The Queen* [2013] HCA 31.
- *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50.

No case was tallied as a multiple number of matters in this study.[48]

D Tallying Decisions Warranting Explanation

- *Weinstock v Beck* [2013] HCA 14 and *Beck v Weinstock* [2013] HCA 15 – the parties are the same but reversed as appellant and respondent in the two matters and although the factual background is the same, the issues in each matter are different and the cases are reported – and thus tallied – separately.
- *X7 v Australian Crime Commission* [2013] HCA 29 – although the catchwords do not refer to any constitutional issue, one of the questions reserved by the parties involved a Chapter III issue which was directly addressed by two members of the Court (French CJ and Crennan J), the other judges finding that the issue did not arise. This case was thus classified as 'constitutional'.
- *Kline v Official Secretary to the Governor-General* [2013] HCA 52 – the catchwords do not list any constitutional matter but the judgments given by the Court offer some brief observations about the nature of the Governor-General's office and his/her powers under section 61. This case was not classified as 'constitutional'.
- *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53 – although the catchwords do not refer to any constitutional issues, one of the questions reserved by the parties involved a Chapter III issue, namely the validity of provisions authorising detention as determined by the Court's earlier decision in *Al-Kateb v Godwin* (2004) 219 CLR 562. This question was directly addressed by several judges, and indeed was a point of division. Justices

48 The purpose behind multiple tallying in some cases – and the competing arguments – are considered in Lynch, 'Dissent', above n 1, 500–02.

Hayne, Kiefel and Keane are tallied as dissenting due to differences between their orders and those of the other judges, particularly as regards the constitutional validity of section 198 of the *Migration Act 1958* (Cth). This case was thus classified as 'constitutional'.