THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2014 STATISTICS

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I INTRODUCTION

In 2003, we commenced what has become an ongoing project examining the way in which the High Court decides cases across a single calendar year.[1] In reporting and reflecting on the way in which the High Court as an institution and also its individual Justices decided the cases of 2014, this article is the latest instalment in that series.[2] Our purpose has remained constant throughout – to provide straightforward and accessible statistical information about the Court's decisions, with an emphasis on constitutional cases as a subset of the total. As we have previously acknowledged, these surveys are intended to complement substantive analyses of the Court's work. They tell us some things very clearly about how decisions are made, while often hinting at others such as the nature of the Court's internal dialogue, the dynamics of decision-making, and the formation and eclipse of coalitions between the Justices.

While statistical information is important in indicating, and occasionally verifying, conjecture or theories about how the Court is functioning at any point in time, it can never, obviously, tell the whole story. Interestingly, in the last two years, three serving Justices have offered detailed, and extremely distinctive, remarks on the practices of judicial deliberation and decision-making on

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1 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27 *University of New South Wales Law Journal* 88. For a full list of the published annual studies, see the Appendix to this article.

2 An earlier article, by one of the co-authors, examined a larger focus: 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.

appellate courts, if not the High Court specifically.[3] As demonstrated by our discussion in these studies of each of these contributions as they have appeared, they greatly enhance our attempts to understand the different judicial approaches and patterns which are discernible from the data alone. But conversely, a major purpose of this project is to meet the need for judicial accounts, as well as the often impressionistic assessments of those in legal practice and academia, regarding the operation of the High Court and its Justices to be considered and tested alongside empirical evidence.

The results presented in this article have been compiled using the same methodology employed in earlier years.[4] As ever, we acknowledge the inevitable limitations of an empirical study of the decisions of any final court over the space of a single calendar year. This is particularly so in respect of the constitutional cases which comprise just a portion of the High Court's annual work – and never more so than in 2014, which featured the lowest number of such matters since we began this series. However, the purpose of this annual 'snapshot' is to chart developments on the Court as they happen while also reflecting on longitudinal trends by referring back to the findings and observations of reports in preceding years.

Additionally, we caution against being too ready to attribute greater or lesser 'influence' to specific individuals on the Court simply on the basis of their relative rates of consensus, dissent and co-authorship as evidenced here. Joint judgments, frequently seen as preferable to the alternative of cases routinely decided through the delivery of a series of individual opinions, nevertheless render fairly opaque the role which individual judges have played in the decision-making process. In her recent description of the current High Court's judgment-writing practice as one which 'requires the author of a judgment to join in any judge who circulates a concurrence with the judgment', Kiefel J acknowledged that this 'results in a greater degree of anonymity of authorship than other courts'.[5] Consequently, '[a] judge whose judgments are more often than not agreed in by his or her colleagues will not necessarily achieve the recognition or reputation of other judges. This may result in a misconception about influence'.[6]

3 Justice J D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205 (based on a lecture delivered on 23, 24 and 26 January 2012); Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189 (based on a lecture delivered on 11 and 15 November 2013); Justice Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 554 (based on a lecture delivered on 13 May 2014). Justice Heydon commenced his article with the caveat that he 'must not be taken to be speaking about the actual behaviour of any particular court of which the author has been a member'.

4 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.

5 Kiefel, above n 3, 557.

6 Ibid.

II THE INSTITUTIONAL PROFILE

Table A: High Court of Australia Matters Tallied for 2014

	Unanimous	By Concurrence	Majority over Dissent	TOTAL
All Matters Tallied for Period	21 (42.86%)	16 (32.65%)	12 (24.49%)	49 (100%)
All Constitutional Matters Tallied for Period	1 (16.67%)	2 (33.33%)	3 (50.00%)	6 (100%)

A total of 49 matters were tallied for 2014.[7] Fifty-two cases appear on the Australasian Legal Information Institute High Court database for the year, but four of these (identified in the Appendix) were excluded as being matters decided by a single Justice sitting alone. Additionally, and in accordance with our previously stated criteria concerning those cases which contain a number of sufficiently distinct matters, one case was tallied as two matters.[8] Doing so ensures a more accurate depiction of the extent to which agreement and dissent feature in the work of the Court.[9]

Table A shows that, in 2014, the French Court consolidated its return to the decision-making pattern of its first two years. In 2009 and 2010, the Court had very high rates of unanimous decisions (reaching 50 per cent in 2010) and under a quarter of cases featured a dissent. By contrast, in 2011 and 2012, which coincided with Justice Heydon's decision to act on his concerns about judicial independence within the Court by not joining in any opinions with colleagues,[10] unanimous opinions plummeted (to a low of 13 per cent in 2012) and split decisions rose (to as high as 50 per cent in 2011). There are, of course, a number of variables year by year in the way in which the Court decides the matters before it – not least, of course, being the distinctive features of the matters themselves. But it is striking that since Justice Heydon's retirement in early 2013, unanimous opinions have climbed up again – 38 per cent of cases in that year and higher to 42.82 per cent in 2014. Cases decided over dissent have also been lower than in the final two years of Justice Heydon's service – halving in 2013 and 2014 to only a quarter of the Court's decisions.

Our assessment in 2013 was that, in the absence of an obvious 'outlier' judge, the Court had returned to 'an institutional decision-making profile which was essentially similar to that of the first two years of the French Court', and that

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7 The data was collected using the 52 matters listed on Australasian Legal Information Institute in its High Court database for 2014: <http://www.austlii.edu.au/>. For further information about decisions affecting the tallying of 2014 matters, see the Appendix to this article.

8 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640.

9 For a full explanation of the purpose behind multiple tallying in some cases, and the competing arguments, see Lynch, 'Dissent', above n 4, 500–2. For detail on this specific tallying decision, see the Appendix to this article.

10 Heydon, above n 3.

this might represent 'a more typical pattern going forward'.[11] This indeed was borne out by the comparable results for 2014.

In 2014, the Court decided just six constitutional matters out of the 49 tallied – or just 12.24 per cent. This is the lowest raw number of constitutional cases in any annual study across the life of this project to date. The percentage of constitutional matters was lower in 2005 (9.64 per cent) and 2008 (12.07 per cent), though more constitutional cases were decided then than in 2014 due to a high number of total matters. Both in number and as a proportion of matters overall, constitutional cases were less prominent in 2014 than in any preceding year of the French Court. In 2012, with almost a quarter of matters tallied as constitutional in nature, we reminded readers that our classification of such matters erred on the side of generous inclusion rather than use of some more selective, but also subjective, criterion.[12] Although, as detailed in the Appendix, some 2014 matters in which the reference to constitutional considerations was insufficient to warrant those cases receiving the relevant classification, the same methodology was applied this year as in preceding studies. Quite simply, far fewer matters in 2014 raised constitutional issues as compared to prior years.

For the record, the definitional criteria that determines our classification of matters as 'constitutional' remains that which was provided by Stephen Gageler SC, now Justice Gageler 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'.[13]

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.[14] In 2014 there were no such cases.[15]

With so few constitutional matters tallied, it is difficult to extrapolate much of significance from these results. We can note that the French Court has never split in more than 50 per cent of the constitutional cases it has decided in a single year, though this is the third time in its six years that it has divided over the

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11 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2013 Statistics' (2014) 37 *University of New South Wales Law Journal* 544, 548.

12 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2012 Statistics' (2013) 36 *University of New South Wales Law Journal* 514, 516.

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

14 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2007 Statistics' (2008) 31 *University of New South Wales Law Journal* 238, 240.

15 It is perhaps worth noting in this regard that one question in *Tajjour v New South Wales* (2014) 313 ALR 221, answered in the negative, was whether the legislative power of state parliaments was limited by the provisions of an international instrument ratified by the Commonwealth but not incorporated into domestic law by statute.

resolution of exactly one in two constitutional matters.[16] Dissent has consistently also been higher in constitutional matters than overall. Only in 2011 was the rate – at 50 per cent – the same across both the total and the constitutional cases.

The set of constitutional cases comprises matters decided by seven and six Justices sitting together. Rather unusually, no constitutional case was decided by a five-member bench. The only unanimous constitutional matter tallied was the six-judge decision in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*.[17] This is not surprising – unanimity in the total matters heard has never translated to a comparable figure for the subset of constitutional cases. As Justice Kiefel recently confirmed:

> In constitutional cases, and other cases of some complexity, there is more of a tendency for judges to write separately. This is in large part because novel questions are presented and it is necessary for a judge to work through them, and that may require writing a complete judgment.[18]

TABLE B(I): All Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[19]

Size of Bench	Number of Cases	How Resolved	Frequency	Number of Opinions						
				1	2	3	4	5	6	7
7	9 (18.37%)	Unanimous	–							
		By concurrence	5 (10.20%)		1	3	1			
		6:1	4 (8.16%)		2		1	1		
		5:2	–							
		4:3	–							
6	2 (4.08%)	Unanimous	1 (2.04%)	1						
		By concurrence	1 (2.04%)		1					
		5:1	–							
		4:2	–							
		3:3	–							
5	38 (77.55%)	Unanimous	20 (40.82%)	20						
		By concurrence	10 (20.41%)		7	3				
		4:1	5 (10.20%)		3	1		1		
		3:2	3 (6.12%)		2		1			

16 The Court divided in 50 per cent of constitutional cases in 2009 and 2011.
17 (2014) 309 ALR 29 (‘*Plaintiff S156/2013*’).
18 Kiefel, above n 3, 559.
19 All percentages given in this table are of the total number of matters tallied (49).

TABLE B(II): Constitutional Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[20]

Size of Bench	Number of Cases	How Resolved	Frequency	Number of Opinions						
				1	2	3	4	5	6	7
7	4 (66.67%)	Unanimous								
		By concurrence	1 (16.67%)		1					
		6:1	3 (50.00%)		1		1	1		
		5:2								
		4:3								
6	2 (33.33%)	Unanimous	1 (16.67%)	1						
		By concurrence	1 (16.67%)		1					
		5:1								
		4:2								
		3:3								

Tables B(I) and (II) reveal several things about the High Court's decision-making over 2014. 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. Secondly, the tables record the number of opinions which were produced by the Court in making these decisions. This is indicated by the column headed 'Number of Opinions Delivered'. Immediately under that heading are the figures 1–7, 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.

These tables should be read from left to right. For example, Table B(I) tells us that of the nine matters heard by a seven-member bench, five were decided through concurring judgments and in one of those there were four opinions.

In this way, Table B(I) enables us to identify the most common features of the cases in the period under examination. In 2014 that was the delivery of a unanimous judgment by a five-member bench. This was also the most frequent form of decision in 2009, 2010 and 2013, reinforcing our earlier observation that the years 2011 and 2012 may prove to be the aberration in the decision-making pattern of the High Court under French CJ. In both those two intervening years, but also every other year since we began presenting these particular tables at the midpoint of Chief Justice Gleeson's tenure, the most common matter was a 5:0

20 All percentages given in this table are of the total number of constitutional matters tallied (6).

decision resolved through two concurring opinions. This reflected the presence of a single Justice on the Court with a distinctly individualist rather than collective approach to decision-making. Even when not in dissent, these judges only rarely joined with the other members of the Court. Indeed, given his position on the issue, in Justice Heydon's final year, this meant unanimity was in fact only possible in matters on which he did not sit.[21]

Table B(II) records the same information in respect of the subset of constitutional cases. The most common format of a constitutional case in 2014 was a seven-judge decision decided 6:1. But the three matters decided in this way each had a different number of separate opinions – two, four and, in *Tajjour v New South Wales*,[22] as many as five. What this table also reveals is that there was no constitutional matter which meets the description of what, in the United Kingdom, is known as a 'close call' – that is, a case decided over a minority of more than one Justice.[23] The only dissenting opinions were delivered by judges who found themselves isolated in their preferred resolution of the case.

TABLE C: Subject Matter of Constitutional Cases

Topic	**No of Cases**	**References to Cases (Italics indicate repetition)**
s 51(xix)	1	22
s 51(xx)	1	23
s 51(xxiiiA)	1	*23*
s 51(xxxi)	1	13
s 51(xxxix)	1	*23*
s 61	1	*23*
Chapter III, *Kable* principle	3	*13*, 30, 46
Implied freedom of political communication	1	35
Implied freedom of political association	1	*35*
Powers of state parliaments in light of international conventions	1	*35*

21 Heydon, above n 3.

22 (2014) 313 ALR 221.

23 Brice Dickson, 'Close Calls in the House of Lords' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, 2011) 283. The House of Lords most typically sat as a five-member bench which meant that two dissenters obviously amounted to a 'close call', but the expression is used, regardless of bench size, to describe cases where there is simply more than a lone dissenter: see further use in Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) 10.

Table C lists the provisions and principles of the *Constitution* that arose for consideration in the six constitutional law matters tallied for 2014. It is assembled primarily through reference to the catchwords accompanying each decision.

III THE INDIVIDUAL PROFILE

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

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	44	17 (38.64%)	26 (59.09%)	1 (2.27%)
Hayne J	34	14 (41.18%)	18 (52.94%)	2 (5.88%)
Crennan J	31	10 (32.26%)	20 (64.52%)	1 (3.23%)
Kiefel J	38	15 (39.47%)	22 (57.89%)	1 (2.63%)
Bell J	37	16 (43.24%)	21 (56.76%)	–
Gageler J	43	16 (37.21%)	19 (44.19%)	8 (18.60%)
Keane J	38	18 (47.37%)	18 (47.37%)	2 (5.26%)

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2014. The Court had a stable membership – with no retirements or new arrivals to its seven seats. Chief Justice French decided the most matters at 44, while Crennan J decided the fewest at 31.

The table reveals that the Court's overall dissent rate of 24.49 per cent owes a lot to Gageler J who, with an individual rate of 18.60 per cent, was by far the most frequent dissenter in the 2014 cases. The two judges whose disagreement from the Court's final orders was nearest to that of Gageler J were Hayne and Keane JJ – but they dissented only a quarter as often, with two minority opinions each to his eight. The Chief Justice, Crennan and Kiefel JJ each dissented just once and Bell J not at all. In 2013, Gageler J was also the judge who dissented most often (a rate of 13.95 per cent) but the gap between him and the next two most frequent dissenters was closer than in 2014. However, it would be a great exaggeration to claim that Gageler J is in any sense the successor to the mantle of Heydon J and, before him, Kirby J as the 'outlier' or 'Great Dissenter' on the court. Both those Justices reached disagreement rates over 40 per cent in successive years. Justice Gageler's dissent rate so far is not especially remarkable when compared to the individual dissent rates of Justices at earlier times in the High Court's history, notably the Court under Mason CJ.[24]

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24 See Andrew Lynch, 'Does the High Court Disagree More', above n 4, 506 (Table E(I)).

What distinguishes the statistical profile of the Court – in both the French and Gleeson eras – from those earlier periods is the way much of the dissent on the Court tends these days to be a solitary experience. This is evident from the statistical profile of those Courts showing one individual with a much higher rate of dissent than his or her colleagues. But it is also underscored by looking to the cases behind these figures: in only one of his eight dissents did Gageler J have company in the minority (he and Keane J authored a joint dissent in *Taylor v The Owners – Strata Plan No 11564*).[25] Chief Justice French's sole dissent was a lone one.[26] Justice Hayne dissented twice, once alone and once alongside Crennan J.[27] Justice Keane's other dissent was a joint opinion with Kiefel J, the latter's only minority opinion.[28]

In Table A, we noted the steady climb of unanimous opinions once more in the French Court. At the individual level, rates of participation in unanimous judgments are, as is often the case, quite varied, reflecting the differently comprised courts that heard a range of matters. Justice Keane was party to more unanimous opinions as a portion of his overall decisions than anyone else – at 47.37 per cent. The other Justices were within approximately a 6 per cent range of each other for unanimity. It is interesting to compare Gageler J with French CJ and Kiefel J. The former's higher dissent rate did not translate to an especially low percentage of unanimous opinions. In fact his participation in unanimous judgments is comparable to the other two Justices, both of whom dissented just once. This might suggest that when not in disagreement with his colleagues, Gageler J was presented with, and availed himself of, opportunities to join with them in the writing of reasons. By contrast, the Chief Justice and Kiefel J either were not presented with the same degree of opportunities for unanimity in the cases on which they sat, or may have a stronger preference for writing apart even when in agreement with others as to the outcome of the matter. Justice Kiefel's recent remarks on the advantages of joint opinions, and the need to reflect on the necessity of expressing one's agreement through separate reasons, might be taken to indicate the former explanation is the better one in her case.[29] Tables E(I) and (II), appearing later in this article, shed further light on the propensity of individual Justices to write together.

We have noted before that both the distinctive nature of the matters in question and also the fact that benches of less than seven Justices will be differently constituted are inescapable variables. Accordingly, while the results reflect the opportunities for unanimity available across the year for each judge, they are, except perhaps in particularly pronounced cases, rather more difficult to use so as to gauge the willingness or otherwise of any individual judge to join

25 (2014) 306 ALR 547.

26 *Tajjour v New South Wales* (2014) 313 ALR 221.

27 See respectively *Kuczborski v Queensland* (2014) 314 ALR 528; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 314 ALR 1.

28 *Alphapharm Pty Ltd (ACN 002 359 739) v H Lundbeck A/S* (2014) 314 ALR 182.

29 Kiefel, above n 3.

with his or her colleagues. In his recent study of the United Kingdom's House of Lords and Supreme Court, Professor Alan Paterson has said that observers are:

> right to point to the importance of the composition of the panel to hear any given case. However, this is not simply because of the outlook of the individual members of the panel but because of their approach to collective decision-making, to mutual persuasion, group interaction and tactical calculations.[30]

In short, whether a bench can achieve a unanimous judgment depends not just on the way in which the individuals who are sitting would each resolve the matter, but also the efficacy of the Court's internal dialogue. As Paterson says, it turns on a range of important factors including 'leadership skills, the cordiality of relations between panel members, the propensity of panel members to vote together, and even, surprisingly, the location of the panel members' rooms'.[31] Given that, unanimous opinions can prove difficult to achieve – though, as noted, the French Court has generally had remarkable success in raising their frequency. But when unanimity proves elusive, this is hardly a reason for reproach. As Justice Kiefel reflected in her recent remarks:

> There may of course be perfectly valid reasons why a judge will wish to write separately, even if he or she agrees with others in the outcome. It is not possible to be prescriptive about such circumstances. The judge may reason differently and be unpersuaded by a colleague's reasoning. The judge may not accept the way in which the judgment is expressed. The judge may wish to say something that cannot be added to the colleague's draft.[32]

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

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	6	1 (16.66%)	4 (66.66%)	1 (16.66%)
Hayne J	6	1 (16.66%)	4 (66.66%)	1 (16.66%)
Crennan J	6	1 (16.66%)	5 (83.33%)	–
Kiefel J	6	1 (16.66%)	5 (83.33%)	–
Bell J	6	1 (16.66%)	5 (83.33%)	–
Gageler J	4	–	3 (75.00%)	1 (25.00%)
Keane J	6	1 (16.66%)	5 (83.33%)	–

Table D(II) records the actions of individual Justices in the six constitutional cases of 2014. Justice Gageler sat on only four of these cases, resulting in both *Plaintiff S156/2013*[33] and *Williams v Commonwealth [No 2]*[34] being decided by a

30 Paterson, above n 23, 207.
31 Ibid 145.
32 Kiefel, above n 3, 558.
33 (2014) 309 ALR 29.
34 (2014) 252 CLR 416 ('*Williams No 2*').

six-judge bench. In 2013, Gageler J formally recused himself from sitting in the case of *Unions New South Wales v New South Wales* on the basis that he had, in his former capacity as Commonwealth Solicitor-General, provided legal advice to the Commonwealth Government (intervening in the case) that touched on the validity of the challenged law.[35] No formal recusal was made by him in relation to his not sitting on the two 2014 constitutional cases, but it may be assumed that a similar consideration is the explanation.[36]

Plaintiff S156/2013 is the single case that was decided unanimously. Dissents were filed in half the constitutional cases for the year but in each case they were, as already noted in connection to Table B(II), lone minority opinions: French CJ dissented in *Tajjour v New South Wales*,[37] Hayne J in *Kuczborski v Queensland*,[38] and Gageler J in *Attorney-General (NT) v Emmerson*.[39]

Justices Crennan, Kiefel and Bell did not deliver a minority opinion. Even allowing for the low number of constitutional matters in 2014 as providing fewer opportunities for constitutional disagreement, it can hardly be said that these three members of the Court regularly deliver even a single minority judgment in such cases in any given year. Justices Crennan and Bell have each dissented just twice in a constitutional matter since being appointed to the Court. In the case of Crennan J, who retired after 10 years' service in early March 2015, that is a notable record – especially since, in respect of one of the two occasions on which she was tallied in dissent, the constitutional issue was, as we said at the time, peripheral to the case.[40] It should also be noted that both of Justice Bell's dissents were accrued in the relatively unusual circumstance of the bench fragmenting so that there are actually more opinions dissenting from the Court's final orders than concur in them. This phenomenon, which typifies what Justice Gageler and Brendan Lim have recently referred to as the occasional 'collective irrationality' of group decision-making,[41] occurred in *Momcilovic v The Queen*[42] and *Plaintiff M47/2012 v Director-General of Security*[43] and it was in those constitutional cases that Bell J was tallied as being in dissent.

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35 (2013) 304 ALR 266.

36 In 2013, Gageler J also did not sit on *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441. While no formal reason for recusal was given on that occasion either, an earlier legal advice he had co-authored for the ACT was publicly available: David Jackson and Stephen Gageler, *Re Civil Partnerships Bill 2006; Ex parte Australian Capital Territory* (Joint Opinion, 5 May 2008).

37 (2014) 313 ALR 221.

38 (2014) 314 ALR 528.

39 (2014) 307 ALR 174.

40 This was Justice Crennan's joint dissent with French CJ in *X7 v Australian Crime Commission* (2013) 248 CLR 92. Her other constitutional dissent (co-authored with Hayne J) was in a case squarely concerned with such issues: *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

41 Justice Stephen Gageler and Brendan Lim, 'Collective Irrationality and the Doctrine of Precedent' (2014) 38 *Melbourne University Law Review* 525, 528–32.

42 (2011) 245 CLR 1. For a detailed explanation of its tallying, see Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2011 Statistics' (2012) 35 *University of New South Wales Law Journal* 846, 852–4.

43 (2012) 251 CLR 1. For a detailed explanation of its tallying, see Lynch and Williams, '2012 Statistics', above n 12, 519–20.

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

	French CJ	Hayne J	Crennan J	Kiefel J	Bell J	Gageler J	Keane J
French CJ	–	22 (50.00%)	16 (36.36%)	25 (56.82%)	23 (52.27%)	13 (29.55%)	27 (61.36%)
Hayne J	22 (64.71%)	–	12 (35.29%)	22 (64.71%)	18 (52.94%)	10 (29.41%)	19 (55.88%)
Crennan J	16 (51.61%)	12 (38.71%)	–	21 (67.74%)	21 (67.74%)	11 (35.48%)	16 (51.61%)
Kiefel J	25 (65.79%)	22 (57.89%)	21 (55.26%)	–	20 (52.63%)	11 (28.95%)	22 (57.89%)
Bell J	23 (62.16%)	18 (48.65%)	21 (56.76%)	20 (54.05%)	–	15 (40.54%)	24 (64.86%)
Gageler J	13 (30.23%)	10 (23.26%)	11 (25.58%)	11 (25.58%)	15 (34.88%)	–	17 (39.53%)
Keane J	27 (71.05%)	19 (50.00%)	16 (42.11%)	22 (57.89%)	24 (63.16%)	17 (44.74%)	–

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

	French CJ	Hayne J	Crennan J	Kiefel J	Bell J	Gageler J	Keane J
French CJ	–	4 (66.67%)	3 (50.00%)	4 (66.67%)	4 (66.67%)	0 (0%)	4 (66.67%)
Hayne J	4 (66.67%)	–	3 (50.00%)	4 (66.67%)	4 (66.67%)	0 (0%)	4 (66.67%)
Crennan J	3 (50.00%)	3 (50.00%)	–	5 (83.33%)	4 (66.67%)	1 (16.67%)	4 (66.67%)
Kiefel J	4 (66.67%)	4 (66.67%)	5 (83.33%)	–	5 (83.33%)	1 (16.67%)	5 (83.33%)
Bell J	4 (66.67%)	4 (66.67%)	4 (66.67%)	5 (83.33%)	–	0 (0%)	4 (66.67%)
Gageler J	0 (0%)	0 (0%)	1 (25.00%)	1 (25.00%)	0 (0%)	–	1 (25.00%)
Keane J	4 (66.67%)	4 (66.67%)	4 (66.67%)	5 (83.33%)	4 (66.67%)	1 (25.00%)	–

Tables E(I) and (II) indicate the number of times a Justice jointly authored an opinion with his or her colleagues. It should be remembered 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 most particularly applies to Crennan J given the fewer cases she heard in 2014.

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). It should be acknowledged that the gap between how frequently one judge wrote with various colleagues is often not large, maybe just one or two decisions, so the ranking of different judges as co-authors for any particular member of the Court – made explicit in Tables F(I) and (II) – should not be over-emphasised.

It will be recalled from Table D(I) that the Chief Justice and Gageler J decided the most cases in 2014 – at 44 and 43 respectively. Yet, despite being almost equally well placed to be the most frequent co-author of opinions for the other members of the Court, they are opposite ends of the spectrum in Table E(I). With the exception of Gageler J, all Chief Justice French's colleagues wrote with him in at least half the cases they sat on last year. While this was also true for Kiefel, Bell and Keane JJ, overall, the rates of joining with the Chief Justice were higher. Justices Hayne, Kiefel and Bell joined with the French CJ in upwards of 62 per cent of their decisions, while Keane J topped that with just over 70 per cent of his opinions being with the Chief Justice (as well as, of course, other colleagues on many of those occasions). This is the highest figure in the table, and although reciprocally Keane J was the most frequent co-author for the Chief Justice, this was so as a lower percentile of the latter's overall judgments, reflecting the greater number of cases French CJ sat on, some presumably without Keane J in attendance.

While the Chief Justice was the most frequent co-author for Hayne, Kiefel and Keane JJ, Hayne J joined just as often with Kiefel J. Justice Keane was the most frequent co-author for not only the Chief Justice but also Bell and Gageler JJ. Justice Crennan joined most – and equally – with Kiefel and Bell JJ.

The position of Gageler J in Table E(I) is striking. Despite sitting on the second highest number of cases in 2014, he was the member of the Court least frequently joined with by all colleagues, with the exception of Keane J who (only just) wrote less often with Crennan J. The fact that Crennan J – who sat on the *least* amount of cases in 2014 – wrote more often with the other five judges than Gageler J did is telling in respect of the latter's propensity to write alone. We identified this propensity in our survey of the 2013 statistics, and it is a matter upon which Gageler J has since spoken as part of a broader reflection on the judicial role on a multi-member court.[44] While it is clear that he is not attracted to the strategy ultimately adopted by Heydon J of simply not countenancing the joining in judgment with any of his colleagues, Gageler J obviously values the ability to give individual expression to his reasons even when in agreement with colleagues as to the result of a case, but more importantly has made plain that he sees the individual's production of those reasons as necessary to 'maximise the probability that the court as an institution will give the best of possible

44 Gageler, above n 3.

judgments'.[45] Justice Gageler emphasises an approach to collective decision-making which is less immediately collaborative than some other accounts, including those captured by Paterson in his interviews with senior members of the United Kingdom judiciary.[46] Instead, Justice Gageler has put the collective–individual judicial dynamic in final courts as follows:

> A court of final appeal cannot ensure that the answers given by a majority of its members will be the best answers the court can give, except by ensuring that its members consider, and have sufficient time each to consider, those questions each to the best of his or her individual ability. If, having reasoned independently to the same conclusion, they 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 ordinarily to outweigh the costs of doing so.[47]

Turning to Table E(II), which reveals joint judgments in constitutional matters, it must be remembered that Gageler J sat on just four of the six constitutional cases heard in 2014. In one of those, *Attorney-General (NT) v Emmerson*,[48] Gageler J was in lone dissent. Of the remaining three opportunities for joining that he had, he did so only in *Kuczborski v Queensland*[49] where he wrote with Crennan, Kiefel and Keane JJ.

By contrast, Kiefel J was the most frequent co-author for all judges in constitutional cases – though for French CJ, Hayne and Gageler JJ she was tied in this spot by a number of other judges whom they joined as often. Justice Kiefel was the only member of the Court not to write separately at least once in a constitutional matter.

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

	French CJ	Hayne J	Crennan J	Kiefel J	Bell J	Gageler J	Keane J
French CJ	–	4	5	2	3	6	1
Hayne J	1	–	4	1	3	5	2
Crennan J	2	3	–	1	1	4	2
Kiefel J	1	2	3	–	4	5	2
Bell J	2	5	3	4	–	6	1
Gageler J	3	5	4	4	2	–	1
Keane J	1	4	6	3	2	5	–

45 Ibid 203.
46 Paterson, above n 23.
47 Gageler, above n 3, 201.
48 (2014) 307 ALR 174.
49 (2014) 314 ALR 528.

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

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

IV CONCLUSION

The High Court under French CJ has experienced a number of years in which important, in some cases landmark, constitutional cases have been decided. Examples of such cases readily come to mind, including *Williams v Commonwealth*,[50] *Kirk v Industrial Court of New South Wales*[51] and *Wainohu v New South Wales*.[52] The year 2014 was not such a year.

In 2014, the High Court handed down very few matters on constitutional questions. Only six matters were tallied as dealing with constitutional law, the lowest number since we began these surveys more than a decade ago. Moreover, none of those six decisions represents a significant turning point or development in our understanding of the *Constitution*. Some are, of course, of great importance in other respects, such as the Court's decision in *Williams No 2* in again striking down the National School Chaplaincy Program. However, that decision did so by reaffirming the Court's existing dicta on the subject of federal executive power, rather than striking out in a significant new direction.

The year 2014 may have been a quiet year in the development of Australia's constitutional system, but it is nonetheless significant in furthering our understanding of the dynamics and interactions on Australia's highest court. The 2014 cases once again demonstrate why the French Court, with the exception of two years at the end of Justice Heydon's tenure, is on track to be remembered as achieving a surprising degree of agreement and unanimity among its members, running at a combined rate of about 75 per cent of all matters. The level of unanimity in particular exceeds that achieved by other Courts in the modern era, including its predecessor, that was led by Gleeson CJ.

50 (2012) 248 CLR 156 ('*Williams No 1*').
51 (2010) 239 CLR 531.
52 (2011) 243 CLR 181.

What is also striking about the French Court era is that where dissent does occur, it very often does so on a solitary basis. The Court sees surprisingly few 'close calls' – 4:3 or 3:2 decisions in which one vote would have changed the result. In fact, in 2014, no case was decided by 4:3 or even 5:2, and among the 38 matters decided by a five-member bench, only three were decided by 3:2. What this demonstrates is that not only does the French Court achieve remarkably high levels of agreement but that, where there is disagreement, it rarely comes close to changing the result in the case.

The judge who most challenges the vision of a united French Court is Gageler J. Where there was dissent in 2014, much of it can be attributed to him. His rate of dissent of 18.60 per cent makes him by far the most frequent dissenter last year. The next most frequent dissenter was Hayne J with a rate of 5.88 per cent. Justice Gageler was also the most frequent dissenter in 2013, his first full year on the Court. What has changed is that his rate of dissent has significantly increased, as has the gap between him and the next most frequent dissenter. Justice Gageler provides a counterpoint, but his rate of disagreement should not be overstated. His dissents stand out in particular because of the unusually high levels of agreement among the other members of the Court. Indeed, Gageler J comes nowhere close to the rate of dissent of the great dissenters of other periods, such as Kirby J and Heydon J, both of whom achieved rates of dissent of over 40 per cent.

The distinctiveness of Justice Gageler's position is also, perhaps even more, evident in his rates of joint authorship. By contrast, in particular to the Chief Justice, who proved in 2014 to be the most frequent co-author with other members of the bench, Gageler J was the judge least likely to join in reasons with his colleagues. This again demonstrates Justice Gageler's distinctive approach to decision-making, and his greater willingness to express his view separately to other members of the Court, whether in dissent or agreement. It will be interesting to see whether, over time, other members of the Court, particularly new appointees, come to take a similar position as Gageler J to legal issues, increasing the incidence of 'close call' divisions on the bench, and perhaps also reducing his rate of dissent and sole authorship.

In seeing a change of his relative position on the Court, Gageler J has time on his side. By contrast, one of the High Court's newest appointees, Nettle J, formerly of the Victorian Court of Appeal, will not have anything like the same opportunity to make his mark. The Abbott Government's first High Court appointee, a replacement for the retiring Crennan J, was both expected and unexpected. The appointment of Nettle J was expected in the sense that the retirement of both of the High Court's Victorian judges in 2015, Crennan J and Hayne J, meant the appointment of at least one Victorian in 2015 was almost certain. Indeed, without such an appointment, the High Court would have lacked a Victorian member for the first time since 1906, surely an unthinkable proposition given the strength of that state's legal profession. As an acknowledged leader of the Victorian profession and judiciary, the appointment of Nettle J was in this sense no surprise.

What was unexpected was that Nettle J was appointed in spite of his age. He took up his seat on the High Court on 3 February 2015 at the age of 64 years and two months. The next oldest appointee in the history of the High Court was Owen J in 1961 at age 61 years and 10 months. Justice Nettle exceeds Justice Owens' age by over two years, which is in more surprising given that Owen J was appointed at a time when High Court judges were not required to retire at age 70. That bar on continuing service means, by contrast, that Nettle J must retire five years and 10 months after his appointment, in December 2020. Indeed, despite being the most recent appointee, he is third in line for retirement after Hayne J in 2015 and French CJ in 2017.

Indeed, even if Nettle J serves until his mandatory retirement, he will have one of the shortest tenures in the history of the Court, and will serve the shortest period of time since Justice Aickin's period of service ended after five years and nine months in 1982 due to his death from a car accident. There is no doubting the capacity of Nettle J to be a fine jurist on the High Court, but his opportunities to contribute to the development of the law are inevitably more limited than most. Indeed, at his swearing in, Nettle J acknowledged this by joking that perhaps he had been considered a 'wild card' but that 'any damage I might do … is bound to be relatively limited'.[53] As our statistical surveys have demonstrated, it can take a number of years for a new Justice to make his or her mark on the Court, perhaps because their views may only become fully apparent or developed after deciding a succession of cases in an area, or because that judge may not attract the support of his or her colleagues until he or she has been on the bench for a sustained period. Time will tell.

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'.[54]

A Matters Identified as Constitutional

- *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174; [2014] HCA 13.
- *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 29; [2014] HCA 22.
- *Williams v Commonwealth [No 2]* (2014) 252 CLR 416; [2014] HCA 23.

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53 Transcript of Proceedings, *Ceremonial Sitting To Mark the Occasion of the Swearing-In of the Honourable Geoffrey Arthur Akeroyd Nettle as a Justice of the High Court of Australia* [2015] HCATrans 005 (3 February 2015) 18 (Nettle J).

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

- *Pollentine v Bleijie* (2014) 311 ALR 332; [2014] HCA 30.
- *Tajjour v New South Wales* (2014) 313 ALR 221; [2014] HCA 35.
- *Kuczborski v Queensland* (2014) 314 ALR 528; [2014] HCA 46.

B Matters Not Tallied

- *Ludlam v Johnston* (2014) 305 ALR 319; [2014] HCA 1.
- *Australian Electoral Commission v Johnston* (2014) 251 CLR 463; [2014] HCA 5.
- *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 311 ALR 154; [2014] HCA 27.
- *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 3]* (2014) 88 ALJR 964; [2014] HCA 39.

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:

- *Barbaro v The Queen* (2014) 305 ALR 323; [2014] HCA 2.
- *Lee v The Queen* (2014) 308 ALR 252; [2014] HCA 20.
- *Tajjour v New South Wales* (2014) 313 ALR 221; [2014] HCA 35.
- *Hunter and New England Local Health District v McKenna* (2014) 314 ALR 505; [2014] HCA 44.
- *Commissioner of State Revenue v Lend Lease Development Pty Ltd* (2014) 315 ALR 170; [2014] HCA 51.

D Cases Tallied as a Multiple Number of Matters[55]

- *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7.

Although the parties in these matters were the same, the substantive issue in each was different and this was further reflected in the respective orders also being different. Justice Gageler was tallied as concurring in the first matter but dissenting in the second.

E Tallying Decisions Warranting Explanation

- *Western Australia v Brown* (2014) 306 ALR 168; [2014] HCA 8 – brief mention is made of section 109 of the *Constitution*, but this was not at issue in the case nor is it mentioned in the head note of the case report. The matter has not been tallied as a 'constitutional' matter.

55 The purpose behind multiple tallying in some cases – and the competing arguments – are considered in Lynch, 'Dissent', above n 4, 500–2.

- *Taylor v The Owners – Strata Plan No 11564* (2014) 306 ALR 547; [2014] HCA 9 – brief mention is made of the separation of powers in the *Constitution* in relation to statutory construction. The matter has not been tallied as a 'constitutional' matter.
- *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 209; [2014] HCA 24 – brief mention is made to the original jurisdiction of the High Court under section 75(v) of the *Constitution*. The matter has not been tallied as a 'constitutional' matter.
- *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 – brief mention is made to section 75(v) of the *Constitution*. The matter has not been tallied as a 'constitutional' matter.
- *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 312 ALR 537; [2014] HCA 34 – brief mention is made to Chapter III of the *Constitution*, and also to constitutional writs. The matter has not been tallied as a 'constitutional' matter.
- *Kuczborski v Queensland* (2014) 314 ALR 528; [2014] HCA 46 – Hayne J concurred with the Court's orders on the issues of standing and the validity of sections 173EB–173ED of the *Liquor Act 1992* (Qld) but dissented with respect to the validity of sections 60A–60C of the *Criminal Code Act 1899* (Qld) schedule 1 ('*Criminal Code*'). Justice Hayne's judgment has been tallied as a dissent.
- *Argos Pty Ltd (ACN 008 524 418) v Minister for Environment and Sustainable Development* (2014) 315 ALR 44; [2014] HCA 50 – Gageler J concurred in allowing the appeal of the second and third appellants but dissented from the Court's orders in allowing the appeal of the first appellant. His judgment has been tallied as a dissent.

F Complete List of Earlier Annual Studies

- 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;
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2013 Statistics' (2014) 37 *University of New South Wales Law Journal* 544.